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Police Privacy

Rachel Moran

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Police Privacy

Rachel Moran*

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INTRODUCTION

Police officer misconduct records¹ are protected from public disclosure in the vast majority of states.² Many states also make these records very difficult for criminal defendants to obtain, even when the officers who are the subject of these records are key witnesses in a prosecution against those defendants.³ Misconduct records may contain information ranging from claims of excessive force to planting evidence to arriving late or intoxicated to work. The common justification for denying access to these records is that police officers have a privacy interest in the content of the records.⁴ When in 2018 the New York Police Department—which has for the past several years refused to disclose even anonymized police misconduct records⁵—floated a proposal to release redacted information about its disciplinary process, the city’s largest police union immediately sued to halt the

1. I use the term “misconduct records” to denote information regarding allegations or findings of police misconduct that is within the possession of a police department or governmental agency responsible for assessing police misconduct. These records may include, *inter alia*, complaints lodged by civilians against police officers, internal affairs reports, disciplinary findings against officers, performance evaluations, and, in some jurisdictions, body camera footage or other technology recording possible instances of misconduct by officers. 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, 745 (2015); Kate Levine, *Discipline and Policing*, 68 DUKE L.J. 839, 859–60 (2019) (describing the impossibility of providing a precise definition for police disciplinary records because jurisdictions do not take a uniform approach to such records); Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Disciplinary Records from the Public*, 22 CUNY L. REV. 148, 152 (2019) (providing similar definition of police misconduct “information”). Although Abel and Levine have written about “personnel” records and “disciplinary” records, I avoid those terms because they are at once broader and narrower than misconduct records. Personnel records tend to contain far more information than that specifically pertaining to police misconduct, and disciplinary records are limited to those in which discipline was actually imposed.

2. For a helpful breakdown of each state’s laws regarding disclosure of police personnel records, see Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), <https://www.wnyc.org/story/police-misconduct-records/> [https://perma.cc/ZSK4-YXHP]. A few states, most notably California, have amended their disclosure laws in the years since this compilation was published. These amendments are discussed where relevant below.

3. See Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1368–76; Jeffrey F. Ghent, Annotation, *Accused’s Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case*, 86 A.L.R. Fed. 3d 1170, §2(a) (Supp. 2017). Examples of statutes denying or imposing obstacles to defendants’ access to these records include N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2014) and 20 VT. STAT. ANN. tit. 20, § 1923(d) (2018).

4. *Infra* Part I.

5. N.Y. CIV. RIGHTS LAW § 50-a; Robert Lewis, *When a Cop’s Right to Privacy Undermines Our Right to a Fair Trial*, WNYC (Oct. 14, 2015), <https://www.wnyc.org/story/when-a-cops-right-to-privacy-undermines-our-right-to-a-fair-trial/> [https://perma.cc/RQ3AHXSQ]; Rick Rojas, *Suit Challenges Secrecy on New York Police Disciplinary Records*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/nyregion/nypd-disciplinary-records.html> [https://perma.cc/WF9A-SELH].

release on grounds that disclosure of these records would constitute a breach of the officers' privacy.⁶

Similar scenarios are playing out all over the country. In California, a controversial state statute has for decades prevented disclosure of law enforcement misconduct records to the public on the basis that disclosing this information would constitute an “unwarranted invasion of [law enforcement officers’] personal privacy.”⁷ Although the legislature amended the statute in late 2018 to permit disclosure of some records,⁸ as the law previously stood, not even prosecutors relying on these officers as witnesses had access to the records.⁹ In early 2019, a Kentucky lawmaker proposed a bill to restrict public access to police misconduct records, arguing that the bill was necessary to protect the officers’ privacy and prevent retaliatory action.¹⁰ When a Honolulu newspaper sought access to the misconduct records of several local police officers, the police department refused.¹¹ After the newspaper sued for access, the case wound its way up to the Hawaii Supreme Court, where the court concluded that police officers have a “significant privacy interest” in their misconduct records, and the records could be disclosed only after a showing that the public interest in access outweighs this privacy right.¹² In many other states, police misconduct records are withheld from the public under a privacy exemption to the state open records act.¹³

6. Verified Petition, *Patrolmen’s Benevolent Ass’n of N.Y. v. de Blasio*, 171 A.D.3d 636 (N.Y. 2019) (No. 1), <https://www.courthousenews.com/wp-content/uploads/2018/04/Patrolman-v-DeBlasio.pdf> [<https://perma.cc/YSE8-PHAR>]; Mike Hayes & Kendall Taggart, *The NYPD Announces An Independent Panel Will Review Its Disciplinary Program*, BUZZFEED NEWS (June 21, 2018), https://www.buzzfeed.com/mikehayes/nypd-disciplinary-review-board-created?utm_term=.nsZdPDQ5R#oyQx9dLkv [<https://perma.cc/S9LV-98GC>].

7. Cal. Penal Code §§ 832.7, .8 (2018); see also Liam Dillon & Maya Lau, *Gov. Jerry Brown Signs Landmark Laws That Unwind Decades of Secrecy Surrounding Police Misconduct, Use of Force*, L.A. TIMES (Sep. 30, 2018), https://www.latimes.com/politics/la-pol-ca-police-misconduct-rules-changed-2018-0930-story.html?utm_source=dlvr.it&utm_medium=twitter# [<https://perma.cc/4QS4-GFQH>].

8. See S.B. 1421 (Cal. 2019). Senate Bill 1421, which took effect in January 2019, modified California’s statute to permit public access to investigations into officer shootings and other major uses of force, as well as confirmed incidents of officers lying on duty or committing sexual assault. The new law has met immediate legal challenges. See *Walnut Creek Police Officers Ass’n v. City of Walnut Creek*, 33 Cal. App. 5th 940 (2019), https://www.aclunc.org/docs/SB_1421_Order_2.8.2019.pdf [<https://perma.cc/4YUX-MJF3>]; Liam Dillon, *California Attorney General Sued Over Release of Records of Police Shootings and Misconduct Probes*, L.A. TIMES (Feb. 14, 2019), <https://www.latimes.com/politics/la-pol-ca-becerra-police-records-suit-20190214-story.html> [<https://perma.cc/Y7YX-2UCA>].

9. *Ass’n for L.A. Deputy Sheriffs v. Superior Court*, 13 Cal. App. 5th 413, 436–39 (2017), *judgment reversed and remanded*, *Ass’n for L.A. Deputy Sheriffs v. Superior Court*, 251 Cal.Rptr.3d 320 (Cal. 2019)).

10. Deborah Yetter, *Major Effort to Restrict Access to Kentucky Open Records Proposed*, L.A. COURIER J. (Jan. 7, 2019), <https://www.courier-journal.com/story/news/2019/01/07/kentucky-bill-limits-open-records-access-law/2503148002> [<https://perma.cc/C2AR-8TYE>].

11. *Peer News LLC v. City of Honolulu*, 138 Haw. 53, 55 (2016).

12. *Id.*

13. *E.g.*, DEL. CODE ANN. TIT. 11, CH. 92, §9200(d) (2018); D.C. CODE §2-534 (2018); MD. CODE ANN., GENERAL PROVISIONS §§ 4-301, -311 (2018) (declaring personnel records “confidential”); see also Lewis et al., *supra* note 2 (summarizing each state’s approach to disclosure of

The notion of police officers' right to privacy is frequently invoked and rarely examined. Many scholars have identified controversies surrounding a variety of other legal protections for police officers that may insulate the officers from public accountability.¹⁴ Some have called for increased transparency and public access to policing policies,¹⁵ while others have suggested that the protections police officers receive should be afforded to ordinary civilians as well.¹⁶ But there is a notable dearth of legal scholarship analyzing what police officers' purported right to privacy actually means, particularly in the context of misconduct records. When police departments, government agencies, and courts refuse to disclose police misconduct records on grounds that disclosure would violate officers' right to privacy, this justification is too often taken at face value.

This Article provides a unique contribution to the scholarly literature by examining the commonly proffered privacy justification for refusing to disclose police misconduct records through the lens of privacy theory. The Article scrutinizes what advocates on both sides of the spectrum, arguing for privacy or transparency in police misconduct records, do not: whether and to what extent privacy law supports the non-disclosure of police misconduct records.

The Article begins by placing this issue in its real-world context: an increasingly heated dispute over a once rarely questioned assumption, that police misconduct records are a private matter and should not be subject to public scrutiny. Part I sets out the present-day disagreements between police accountability advocates seeking to lift the veil on opaque disciplinary decisions and police privacy proponents who vehemently resist efforts to increase transparency.

Part II transitions into a historical discussion of privacy law from both judicial and scholarly perspectives and particularly examines developing understandings of informational privacy: that is, privacy in recorded information about oneself. Rather than immediately zeroing in on police records, Part II provides the reader a primer regarding privacy rights more generally: the kinds of acts and information courts and scholars deem private and the philosophical bases for recognizing rights to privacy in these varied contexts. It then segues into an analysis of limitations on the

police misconduct records); Levine, *supra* note 1, 868–69 (collecting various state approaches to privacy of police disciplinary records).

14. See, e.g., Devon Carbado, *Blue-On-Black Violence*, 104 GEO. L.J. 1479, 1505–08 (2016); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 717 (2017) (“Perhaps no issue has been more controversial in the discussion of police union responses to allegations of excessive force than statutory and contractual protections for officers accused of misconduct”); 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, 186 (2005); Kate Levine & Stephen Rushin, *Interrogation Parity*, 2018 U. ILL. L. REV. 1685, 1686–88 (2018); Stephen Rushin & Atticus DeProspero, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. 646 (2019); Lindsey Webb, *Legal Consciousness as Race Consciousness*, 48 SETON HALL L. REV. 403, 410–20 (2018).

15. Fisk & Richardson, *supra* note 14 (labeling transparency in police misconduct records as “clearly desirable”); Keenan & Walker, *supra* note 14 (arguing that the public’s need for truth and accountability trumps officers’ desire for “special protections”).

16. Levine & Rushin, *supra* note 14.

right to informational privacy and discusses the limited categories of information traditionally protected by the right to privacy.

Part III applies the discussion of privacy law to the current controversy over police misconduct records. Part III.A. begins by analyzing whether police officers have a legally cognizable right to privacy in their misconduct records, which requires comparing misconduct records to the types of information courts and scholars consistently recognize as private. This Part also assesses whether police officers' status as public actors affects the kinds of information that are and should be deemed private.

After considering whether officers have a cognizable right to privacy, Part III.B. then pivots to how courts and government agencies should balance privacy rights against the interests of other parties seeking access to misconduct records. In particular, Part III.B. considers five interests that should factor into this balancing test: (1) the governmental interest in ensuring accountability of employees in positions of trust; (2) the right of the public to protect itself from abusive officers; (3) the interest in protecting privacy rights of civilians; (4) the governmental interest in effective decision-making regarding public employees; and (5) in the context of criminal litigation specifically, the right of defendants to access exculpatory information.

Lastly, Part IV recognizes the outcome-oriented concerns voiced by those who oppose granting access to police misconduct records. Although this article is primarily concerned with analyzing the validity of police privacy claims from a legal theory standpoint, fears about the practical effect of disclosure on both police officers and policing reform efforts cannot be ignored, and thus the article closes by addressing those issues.

I. DISPUTES REGARDING DISCLOSURE OF POLICE MISCONDUCT RECORDS

Laws preventing disclosure of police misconduct records are typically traceable to police unions, which have for decades served as powerful lobbying organizations and friends of politicians seeking to present themselves as “tough on crime.”¹⁷ In the 1970s, the California legislature, at the urging of police unions angered that complaints of officer misconduct were serving as fodder for impeachment of the officers in criminal cases, passed what was widely considered

17. *E.g.*, Conti-Cook, *supra* note 1 (“Police union rhetoric supporting secrecy of misconduct records heavily cites to privacy and safety concerns of officers . . .”); Cynthia Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 SETON HALL L. REV. 1063, 1070 (2016); Liam Dillon (@dillonliam), TWITTER (Aug. 31, 2018), <https://twitter.com/dillonliam/status/1035617567174344704?s=11> [<https://perma.cc/PBN5-ECCF>]; Nick Grube, *In the Name of the Law: Hawaii Police Union ‘Outguns’ Students*, HONOLULU CIV. BEAT (Feb. 20, 2013), <http://www.civilbeat.org/2013/02/in-the-name-of-the-law-hawaii-police-union-outguns-students/> [<https://perma.cc/M46C-PEWX>]; Kendall Taggart & Mike Hayes, *Secret NYPD Files: Officers Who Lie and Brutally Beat People Can Keep Their Jobs*, BUZZFEED NEWS (Mar. 5, 2018), https://www.buzzfeed.com/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious?utm_term=.qumQJgADK#.fjrOLAKaz [<https://perma.cc/RQ4S-ZDSG>].

the most extreme law enforcement records law in the country.¹⁸ The statute prevented disclosure of police misconduct records not just to the public but also to prosecutors.¹⁹

New York's Civil Rights Law Section 50-a, also enacted in the 1970s, provides that law enforcement performance records shall be "considered confidential and not subject to inspection or review" except by express consent of the police officer whose records are at issue.²⁰ Much like the California legislature, the New York legislature passed this law "as a safeguard against potential harassment of officers."²¹ The New York Court of Appeals interprets Section 50-a as preventing police departments from disclosing even redacted misconduct records that contain no identifying information about the officers involved.²²

While states take varied approaches to disclosure of police misconduct records, thirty-eight of the fifty states have enacted statutes protecting some or all of these records from disclosure to the public.²³ Delaware singles out law enforcement records for special protective status, broadly excluding police personnel records or internal investigation files into police misconduct from public disclosure outside the litigation context.²⁴ Idaho exempts from public disclosure the personnel records of all public officials or employees.²⁵ Maryland similarly protects personnel records from public disclosure and precludes release of internal affairs records regarding police misconduct.²⁶

18. See Katherine Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 126–28 (2017); Liam Dillon, *Here's How California Became the Most Secretive State on Police Misconduct*, L.A. TIMES (Aug. 15, 2018), [http://www.latimes.com/politics/la-me-california-police-discipline-secret-20180815-story.html# \[https://perma.cc/5GDS-8MJ2\]](http://www.latimes.com/politics/la-me-california-police-discipline-secret-20180815-story.html# [https://perma.cc/5GDS-8MJ2]). This law was amended, effective January 1, 2019, to permit disclosure of certain police misconduct records. See S.B. 1421 (Cal. 2019).

19. Ass'n for L.A. Deputy Sheriffs v. Superior Court, 13 Cal. App. 5th 413, 436–39 (2017), cert. granted, 403 P.3d 144 (Cal. Sup. Ct. 2017). The statute was amended in 2018 to permit disclosure of certain records but otherwise remains in full effect. See Cal. Penal Code §§ 832.7, .8; S.B. 1421 (Cal. 2019).

20. N.Y. CIV. RIGHTS LAW § 50-a(1) (adopted in 1976).

21. Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145, 154 (1999); Prisoners' Legal Servs. v. N.Y. State Dept. of Correctional Servs., 73 N.Y.2d 26, 31–32 (1988); Bies, *supra* note 18, at 131–34.

22. *In re* N.Y. Civ. Liberties Union v N.Y. City Police Dep't, No. 08423 (N.Y. Ct. App. Dec. 11, 2018), [https://www.nycourts.gov/ctapps/Decisions/2018/Dec18/133opn18-Decision.pdf \[https://perma.cc/H7W2-9SWM\]](https://www.nycourts.gov/ctapps/Decisions/2018/Dec18/133opn18-Decision.pdf [https://perma.cc/H7W2-9SWM]); Hon. Mary Jo White et al., *The Report of the Independent Panel on the Disciplinary System of the New York City Police Department* (Jan. 25, 2019), [https://www.independentpanelreportnypd.net/assets/report.pdf \[https://perma.cc/5DZE-PV6F\]](https://www.independentpanelreportnypd.net/assets/report.pdf [https://perma.cc/5DZE-PV6F]).

23. See Lewis et al., *supra* note 2 (indicating that thirty-eight of the fifty states either entirely or partially protect police misconduct records from disclosure to the public). Although a few states have modified their records disclosure laws since this summary was published in 2015, it is still the most accurate published fifty-state summary available. Each of the statutes cited below have been independently reviewed for accuracy.

24. DEL. CODE ANN. TIT. 11, CH. 92, §9200(d) (2018).

25. IDAHO CODE § 74-106(1) (2018).

26. MD. CODE ANN., GENERAL PROVISIONS §§ 4-301, -311 (2018); Md. Dep't of State Police v. Dashiell, 443 Md. 435, 439, 448, 458–59 (2015); see also MISS. CODE ANN. § 25-1-100 (2015)

Other states permit disclosure of some police misconduct records but only in limited circumstances. Vermont's statutory scheme provides for public disclosure of the names of police officers who were charged and disciplined for misconduct but precludes access to records of complaints that were not sustained or internal affairs investigations into those complaints.²⁷ Several states allow limited disclosure of disciplinary records only when a public employee has been discharged or demoted as a result of disciplinary action.²⁸

"Privacy" is nearly always invoked as the justification for non-disclosure laws. Some courts rely on officer privacy as the basis for prohibiting public disclosure of misconduct records.²⁹ Other jurisdictions explicitly incorporate privacy language into the calculus of what types of records may be disclosed.³⁰ Although these statutes typically exempt records when disclosure would "constitute an unwarranted invasion of personal privacy," the statutes do not define or otherwise resolve the question of what constitutes an unwarranted invasion of personal privacy.³¹

Non-disclosure advocates also rely on privacy as a basis to push for or maintain strict disclosure laws. In 2017, after the NYPD released body-worn camera footage of officers involved in on-duty fatal shootings of civilians, the Patrolmen's Benevolent Association sued to prevent disclosure of camera footage, arguing that disclosure violated "very serious" privacy interests of police officers.³² When the Chicago Tribune attempted to obtain information about complaints civilians had filed against Chicago police officers, the Fraternal Order of Police argued that the

(exempting personnel records from public access); OR. REV. STAT. § 192.345(12) (2018) (exempting from disclosure "personnel discipline action" or any records pertaining to such action); 38 R.I. GEN. LAWS § 38-2-2(4)(A)(I)(b) (exempting personnel records); VA. Code Ann. § 2.2-3705.1(1) (2017) (exempting personnel records); WYO. STAT. ANN. § 16-4-203 (2018) (exempting personnel records).

27. VT. STAT. ANN. tit. 20, §§ 1923(d), 2409 (2018).

28. *See, e.g.*, IOWA CODE § 22.7(11)(a)(5) (2018) (permitting disclosure of disciplinary records resulting in discharge or demotion); N.C. GEN. STAT. § 153A-98(a)-(b) (2018) (protecting personnel files and disciplinary records from disclosure, but permitting disclosure of limited information pertaining to dismissal, suspensions, or demotions); OKLA. STAT. tit. 51, § 24A.7 (making personnel and disciplinary records confidential except to the extent they pertain to "final disciplinary action resulting in loss of pay, suspension, demotion of position, or termination"); 65 PA. STAT. AND CONS. STAT. ANN. § 67.708(b)(7) (2009) (exempting information pertaining to criticism, demotion, discipline, or discharge, except for the "final action of an agency that results in demotion or discharge").

29. *See Dasbiell*, 443 Md. at 461, 465 n.17.

30. *E.g.*, CONN. GEN. STAT. § 1-210(b)(2) (2013); D.C. CODE § 2-534(a)(3) (2018); MICH. COMP. LAWS ANN. § 15.243(1)(a), (b) (2018); N.H. REV. STAT. ANN. § 91-A:5(IV) (2018).

31. § 1-210(b)(2) (2013) (exempting personnel records from disclosure to the public if such disclosure would constitute an "invasion of personal privacy"); § 2-534(a)(3) (2018) (exempting records of investigations conducted by the Office of Police Complaints, to the extent disclosure of such records would "[c]onstitute an unwarranted invasion of personal privacy"); § 15.243(1)(a), (b) (2018) (precluding disclosure of personal information or law enforcement investigative records that would "constitute a clearly unwarranted invasion of . . . privacy"); § 91-A:5(IV) (2018) (exempting personnel records "and other files whose disclosure would constitute invasion of privacy").

32. *See Verified Petition/Complaint ¶¶ 1, 4, 6-7* *Patrolmen's Benevolent Ass'n of N.Y. v. de Blasio*, 171 A.D.3d 636 (N.Y. 2019), <https://www.politico.com/states/f/?id=00000160-db85-dcd4-a96b-ffad8b6e0000> [<https://perma.cc/2QPL-UEEU>].

officers' "privacy rights" precluded release of the records.³³ Law enforcement officers in Baltimore have echoed the same concern, complaining that release of police disciplinary records would "invade the privacy of officers and their families."³⁴

As the California legislature and executive branch over the past several years debated whether to permit disclosure of law enforcement personnel records, police unions repeatedly invoked officer privacy as a reason to bar disclosure.³⁵ The Ventura County District Attorney argued that a proposed bill granting public access to investigative files into officer misconduct would "give peace officers lesser privacy rights in investigation files than those afforded murderers, pedophiles, and other criminals."³⁶ South Dakota's attorney general recently refused to identify the name of an officer who shot a civilian, reasoning that because the officer may have been acting in self-defense, he qualified as a crime victim and thus disclosure of his name would violate his right to privacy.³⁷ Police privacy proponents argue that disclosure of misconduct records would embarrass officers, expose them to unwarranted misconduct allegations, and cause the public to unfairly judge them without all relevant facts.³⁸

33. Fraternal Order of Police, Lodge No. 7 v. City of Chicago, 2016 IL App (1st) 143884, ¶ 29 (2016).

34. See Justin Fenton, *Baltimore Police Disciplinary Records Remain Shielded Despite Revelations of Misconduct*, BALTIMORE SUN (Feb. 17, 2018), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-police-records-transparency-20180214-story.html> [<https://perma.cc/6475-SWY8>].

35. S.B. 1286, Proposed Senate Bill, SB-1286, Peace officers: records of misconduct (Cal. 2016), http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1286 [<https://perma.cc/GJ76-LD7L>]; S. COMM. PUB. SAFETY, B. ANALYSIS, S.B. 1286 (Cal. 2016), https://spsf.senate.ca.gov/sites/spsf.senate.ca.gov/files/sb_1286_analysis.pdf [<https://perma.cc/XVJ6-2AX4>] (listing California law enforcement unions opposing proposed reforms to records disclosure law); Dillon, *supra* note 18; Patrick McGreevy, *Lawmaker Proposes Giving Public Access to Police Shooting and Misconduct Cases*, L.A. TIMES (Feb. 19, 2016), <http://www.latimes.com/politics/la-pol-ca-cop-records-story.html> [<https://perma.cc/9U29-JJN7>]; James Queally, *California Police Uphold Few Complaints of Officer Misconduct and Investigations Stay Secret*, L.A. TIMES (Sep. 23, 2018), <http://www.latimes.com/local/lanow/la-me-police-misconduct-complaints-20180923-story.html#> [<https://perma.cc/78V3-NE3Y>].

36. S. COMM. PUB. SAFETY, S.B. 1286, at 15 (Cal. 2016).

37. Arielle Zions, *Citing Marsy's Law, State Won't Release Name of Trooper Who Shot Man*, RAPID CITY J. (Oct. 19, 2018), https://rapidcityjournal.com/news/local/crime-and-courts/citing-marsy-s-law-state-won-t-release-name-of/article_910cf64-28f6-5328-bae7-554d67e1e999.html [<https://perma.cc/PA5K-UDA9>].

38. Darrel W. Stephens, *Police Discipline: A Case for Change*, NEW PERS. POLICING 1, 8–9 (2011); Dartunorro Clark, *State Law Keeps Police Files Shrouded in Secrecy*, TIMES UNION (Mar. 15, 2015), <http://www.timesunion.com/tuplus-local/article/State-law-keeps-police-files-shrouded-in-secrecy-6134788.php> [<https://perma.cc/V7C4-FUSQ>]; Fenton, *supra* note 34; Melody Gutierrez, *Stephon Clark Killing Prompts Bid to Open Police Disciplinary Records*, S.F. CHRON. (Apr. 9, 2018), <https://www.sfchronicle.com/politics/article/Stephon-Clark-killing-prompts-bid-to-open-police-12816652.php?psid=mdkXi> [<https://perma.cc/PBJ2-MDEL>]; Kasia Hall, *Police Discipline Still Hidden Behind Closed Doors*, ORANGE CTY. REG. (Aug. 14, 2012), <https://www.oregister.com/2012/08/14/police-discipline-still-hidden-behind-closed-doors/> [<https://perma.cc/8DXV-9J3V>].

Police unions almost universally oppose measures to increase transparency and public oversight of officers,³⁹ and many lawmakers, reluctant to ruffle the feathers of a powerful and unified voting bloc, concede to the unions' demands.⁴⁰ Nonetheless, a growing movement has formed in recent years against laws precluding disclosure of police misconduct records.⁴¹ Although California had long been the epicenter of these disputes even before its 2018 amendment permitting disclosure of certain records,⁴² two recent events in particular brought the issue to the forefront of activists' and lawmakers' agendas. The first involved an exposé of the Riverside Police Department, after leaked internal affairs documents revealed that numerous officers had cheated on a promotion exam, but none were demoted or fired.⁴³ Two months after that revelation, Stephon Clark's shooting death at the hands of Sacramento police officers—which garnered national attention in part because Clark was unarmed in his grandmother's backyard when the officers

39. E.g., Dillon, *supra* note 18; Liam Dillon (@dillonliam), TWITTER (Aug. 31, 2018, 12:57 PM), <https://twitter.com/dillonliam/status/1035617567174344704?s=11> [<https://perma.cc/RCY6-GSFE>] (showing amount of money L.A. police union donated to California state legislators in advance of vote on proposed bill to amend statute preventing disclosure of police disciplinary records); John Sullivan et al., *In Fatal Shootings by Police, 1 in 5 Officers' Names Go Undisclosed*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-ca10-11e5-b0fd-073d5930a7b7_story.html [<https://perma.cc/3YZ3-SR5S>] (discussing the “powerful voice” of police unions opposing disclosure of the names of officers who shot and killed civilians). The case has been made that police unions' invocation of a right to privacy is not sincere, and instead is simply an excuse for maintaining power and opposing reform. See Cynthia Conti-Cook, *Open Data Policing*, 104 GEO. L.J. ONLINE 14 (2017), <https://georgetownlawjournal.org/articles/243/open-data-policing/pdf> [<https://perma.cc/RRW5-5AQH>] (arguing that the real reasons police unions and departments oppose transparency in policing data “include liability, protecting its members from discipline, and retaining power over the narrative of policing”). Although there is certainly room for debate on this topic, it is not the subject of this paper. Instead, I focus this paper on analyzing the privacy concern's legal viability.

40. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1215–16 (2017) (“Police unions are . . . a powerful political constituency.”); Seth Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2206–17 (2014) (discussing the collective bargaining powers of various police unions across the country); Dillon, *supra* note 18; Grube, *supra* note 17; Gutierrez, *supra* note 38; Theodore Kupfer, *Law-Enforcement Unions Have Too Much Power*, NAT. REV. (Feb. 2, 2018), <https://www.nationalreview.com/2018/02/law-enforcement-unions-powerful-obstacle-criminal-justice-reform-fiscal-responsibility/> [<https://perma.cc/B6YL-WVZW>]; Ashley Southall, *4 Years After Eric Garner's Death, Secrecy Law on Police Discipline Remains Unchanged*, N.Y. TIMES (Jun. 3, 2018), <https://nytimes.com/2018/06/03/nyregion/police-discipline-records-garner.html?smtyp=cur&smid=tw-nytimes> [<https://perma.cc/6TJK-9FSH>].

41. E.g., Ass'n for L.A. Deputy Sheriffs v. Superior Court, 403 P.3d 144, *cert. granted*, (Cal. 2017); Ass'n for L.A. Deputy Sheriffs v. Superior Court, 13 Cal. App. 5th 413, 436–39 (2017); *In re N.Y. Civ. Liberties Union v. N.Y. City Police Dept.*, 50 N.Y.S.3d 365 (2017); *Fraternal Order of Police, Lodge No. 7 v. City of Chicago*, 2016 IL App (1st) 143884, ¶ 29; Fenton, *supra* note 34; see also Fisk & Richardson, *supra* note 14, at 750–51 (2017) (discussing recent legislative attempts to address controversies surrounding non-disclosure of police records).

42. S. COMM. PUB. SAFETY, S.B. 1286 (Cal. 2016).; Dillon, *supra* note 18.

43. Bret Kelman, *Twenty-Five Cops Were Caught Cheating on a Promotional Exam. Nobody Got Fired. Some Still Got Promoted*, DESERT SUN (Feb. 8, 2018), https://www.usatoday.com/story/news/crime_courts/2018/02/08/twenty-five-cops-were-caught-cheating-promotional-exam-nobody-got-fired-some-still-got-promoted/318222002/ [<https://perma.cc/4RPN-QVY4>].

misidentified him as a burglary suspect—sparked renewed calls by Democratic legislators for amendments to the statute shielding misconduct records from release.⁴⁴

No data exists at a national level that can prove a causal connection between increasing public access to misconduct records and decreasing police misconduct.⁴⁵ But the intensifying demands for transparency in states that protect misconduct records from disclosure cannot be divorced from the recurring tragedy of police officers with hidden histories of violence killing people of color,⁴⁶ nor from most police departments' abysmal track records of holding officers accountable for wrongdoing.⁴⁷ Chicago police officer Jason Van Dyke, who in 2018 was convicted of second-degree murder and sixteen counts of aggravated battery with a firearm for shooting and killing seventeen-year-old Laquan McDonald,⁴⁸ had been accused

44. Gutierrez, *supra* note 38; Sam Levin, *Hundreds Dead, No One Charged: The Uphill Battle Against Los Angeles Police Killings*, GUARDIAN (Aug. 24, 2018), <https://www.theguardian.com/us-news/2018/aug/24/los-angeles-police-violence-shootings-african-american> [<https://perma.cc/W3KG-M44B>] (arguing that California's strict confidentiality laws concerning police disciplinary records fostered a culture of excessive force).

45. Anecdotal evidence suggests that public access to misconduct records can and does motivate improved responses to police misconduct. One example is the case of Chicago police officer Jason Van Dyke, who murdered Laquan McDonald. *See infra* note 49. Before a reporter sued for access to the body camera footage of Van Dyke shooting and killing McDonald, the City of Chicago had not so much as suspended Van Dyke; on the day of the video's release, McDonald was charged with first-degree murder. *See Laquan McDonald: A Timeline of the Shooting, Fallout, and Officer Van Dyke's Trial*, CBS NEWS (Sep. 4, 2018), <https://chicago.cbslocal.com/2018/09/04/laquan-mcdonald-shooting-timeline-cpd-officer-jason-van-dyke-trial/> [<https://perma.cc/368G-38VJ>]; *see also* Tanya Eiserer, *2 Dallas Deputy Police Chiefs Disciplined Over Handling of Actions Involving Fired Officers*, DALL. NEWS (Mar. 2013), <https://www.dallasnews.com/news/news/2013/03/09/2-dallas-deputy-police-chiefs-disciplined-over-handling-of-actions-involving-fired-officers> [<https://perma.cc/DH6T-517Q>] (article detailing belated firing of Dallas police officers after expose by Dallas Morning News into their misconduct).

46. *See* Thomas Barrabi, *Who Is Daniel Pantaleo? NYPD Officer Who Killed Eric Garner Was Accused of Misconduct Before Chokehold Death*, INT'L BUS. TIMES (Dec. 3, 2014), <http://www.ibtimes.com/who-daniel-pantaleo-nypd-officer-who-killed-eric-garner-was-accused-misconduct-1733094> [<https://perma.cc/LNE2-VHGH>] (noting that Officer Pantaleo, who killed Eric Garner, had been sued at least twice before on allegations of racially motivated misconduct); Donna Jackel, *He Was Shot in the Back by a Cop... Then Spent 18 Months in Jail*, NARRATIVELY (July 2, 2018), <http://narrative.ly/he-was-shot-in-the-back-by-a-copthen-spent-18-months-in-jail/> [<https://perma.cc/J5AF-LJGP>]; Ray Sanchez, *Officer Michael Thomas Slager of South Carolina: What We Know About Him*, CNN (Apr. 9, 2015), <https://www.cnn.com/2015/04/08/us/south-carolina-michael-slager/index.html> [<https://perma.cc/T58U-YB2B>]; Jon Seidel, *Police Review Authority Boss Ousted*, CHI. SUN TIMES (Dec. 6, 2015), <https://chicago.suntimes.com/2015/12/6/18420946/police-review-authority-boss-ousted> [<https://perma.cc/B3C3-BL68>]; Mitch Smith, *Mayor of Chicago Announces Measures to Curb Use of Deadly Force by the Police*, N.Y. TIMES (Dec. 30, 2015), <https://www.nytimes.com/2015/12/31/us/mayor-rahm-emanuel-announces-measures-to-curb-use-of-deadly-force-by-chicago-police.html> [<https://perma.cc/A5WT-L3YJ>]; Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?smid=twnytimes&smtyp=cur&_r=0 [<https://perma.cc/Y9G5-63D7>].

47. *See* Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 854–56 (2016).

48. Mark Guarino & Mark Berman, *Chicago Police Officer Jason Van Dyke Convicted of Second-Degree Murder for Killing Laquan McDonald*, WASH. POST (Oct. 5, 2018), <https://www.washingtonpost.com>

of misconduct in at least eighteen prior incidents, ranging from excessive force to use of racial slurs.⁴⁹ Chicago police officer Patrick Kelly had been the subject of more than twenty-four investigations into inappropriate conduct both on- and off-duty before he shot and severely injured a man in a drunken off-duty altercation.⁵⁰ Although an Illinois court ruled in 2014 that records of complaints filed against police officers were not protected from public disclosure, the records had in practice been exempt from disclosure for most of Van Dyke's and Kelly's careers.⁵¹

New Jersey, which exempts police misconduct records from public disclosure,⁵² has also experienced serious misconduct-related scandals. Phillip Seidle, an officer in the Neptune Police Department in New Jersey was convicted of murdering his wife in 2015.⁵³ Before the murder, Seidle had been the subject of twenty-six previous internal affairs investigations, and the police department had twice confiscated his service revolver due to concerns about inappropriate violence.⁵⁴ In Bloomfield, New Jersey, a police officer who was sentenced to prison for battery of a civilian during a traffic stop had been the subject of at least thirty-seven previous reports regarding his use of force against civilians.⁵⁵

In Maryland—another state that prohibits public access to police misconduct records⁵⁶—eight members of Baltimore's elite Gun Trace Task Force were recently convicted on a variety of federal charges stemming from incidents in which they stole money from civilians, tampered with evidence, committed warrantless raids, and perjured themselves.⁵⁷ Leaked documents revealed that many of the officers

st.com/news/post-nation/wp/2018/10/05/chicago-police-officer-jason-van-dyke-convicted-of-second-degree-murder-for-killing-laquan-mcdonald/?noredirect=on&utm_term=.d44afb519b78 [https://perma.cc/A46F-D7UR].

49. See Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. TIMES (Nov. 18, 2015), <http://www.nytimes.com/2015/11/19/us/few-complaints-against-chicago-police-result-in-discipline-data-shows.html?smid=tw-nytimes&smtyp=cur&r=0> [https://perma.cc/9V5B-YKX7].

50. Jeff Coen & Stacy St. Clair, *Judge Upholds Record \$44.7 Million Jury Award in Michael LaPorta Case*, CHI. TRIB. (Aug. 30, 2018), <http://www.chicagotribune.com/news/local/breaking/ct-met-jury-award-upheld-kelly-20180830-story.html> [https://perma.cc/F5ZR-99YN].

51. See Fraternal Order of Police, Lodge No. 7 v. City of Chicago, 2016 IL App (1st) 143884, ¶¶ 1, 36, 40; Kalven v. City of Chicago, 2014 IL App (1st) 12184, ¶¶ 22–31, *overruled in unrelated part by Perry v. Dep't of Financial and Professional Regulation*, 2018 IL 122349.

52. N.J. STAT. ANN. § 47:1A-10 (2001).

53. See MaryAnn Spoto, *Former Neptune Cop Sentenced to 30 years in Prison for Fatal Shooting of Ex-Wife*, N.J.COM (Sept. 30, 2016), https://www.nj.com/monmouth/index.ssf/2016/09/hold_hold-suspended_neptune_cop_sentenced_to.html [https://perma.cc/7GKW-W7QP].

54. Andrew Ford, *The Shield (Part 2)*, ASBURY PARK PRESS (Jan. 22, 2018), <https://www.app.com/story/news/investigations/watchdog/shield/2018/01/22/philip-seidle-exclusive-interview/109503924/> [https://perma.cc/D4SA-5Y6L].

55. Kala Kachmar & Andrew Ford, *The Shield (Part 8)*, ASBURY PARK PRESS (Jan. 22, 2018), <https://www.app.com/story/news/investigations/watchdog/shield/2018/01/22/how-bad-cops-made/1035150001/> [https://perma.cc/5BC5-K5HT].

56. MD. CODE ANN., GENERAL PROVISIONS § 4-301, -311 (2018); Md. Dep't of State Police v. Dashiell, 443 Md. 435, 439, 448, 458–59 (2015).

57. Fenton, *supra* note 34.

had lengthy disciplinary histories to which the public was not privy.⁵⁸ In response, Maryland's Attorney General promised a "fresh look" at issues regarding "disclosure and transparency" of police misconduct records.⁵⁹

The NYPD has also experienced a crisis of confidence in recent years, in part due to revelations about officers committing misconduct with seeming impunity. In 2018, *BuzzFeed News* broke a series of stories regarding leaked internal affairs reports describing widespread and serious misconduct by officers who remained on the force.⁶⁰ According to the reporters, investigative files showed that between 2001 to 2015, "at least 319 New York Police Department employees who committed offenses serious enough to merit firing were allowed to keep their jobs."⁶¹ The offenses included lying on official reports, lying under oath, lying during internal affairs investigations, cheating, stealing, assaulting civilians, using excessive force, fighting, threatening to kill someone, engaging in sexually inappropriate behavior with both minors and adults, running a prostitution ring, and firing a gun without cause.⁶² Manhattan's District Attorney is now requesting that the police department provide the District Attorney with electronic access to police disciplinary files,⁶³ and NYPD Police Commissioner James O'Neill has admitted that his police department had lost the trust of the community and needed to become more transparent in its disciplinary process.⁶⁴

Even in states that ostensibly grant public access to police misconduct records, police departments continue to cite privacy as a justification for not disclosing certain records. In Alabama—a state that does not formally exempt police misconduct records from public disclosure—the Huntsville police department has refused to disclose body camera footage showing an officer killing a civilian, citing "matters of privacy" as the basis for non-disclosure.⁶⁵ In Colorado, where public

58. *Id.*

59. *Id.*

60. See Mike Hayes, *Two NYPD Officers Busted for Gambling and Prostitution Have a History of Misconduct, Records Show*, BUZZFEED NEWS (Sept. 12, 2018), <https://www.buzzfeednews.com/article/mikehayes/nypd-officers-gambling-prostitution-misconduct-records> [<https://perma.cc/PFE7-KRBP>]; Hayes & Taggart, *supra* note 6; Taggart & Hayes, *supra* note 17.

61. Taggart & Hayes, *supra* note 17.

62. *Id.*; Hayes, *supra* note 60.

63. See James C. McKinley, Jr., *Manhattan District Attorney Demands Access to Police Records*, N.Y. TIMES (July 8, 2018), <https://mobile.nytimes.com/2018/07/08/nyregion/manhattan-district-attorney-police-records.html> [<https://perma.cc/7UBE-L34Z>].

64. Taggart & Hayes, *supra* note 17; see also Kenneth Lovett, *Relatives of Those Who Died at Hands of Police Push for Repeal of NYS Law Shielding Release of Cop Disciplinary Records*, N.Y. DAILY NEWS (Dec. 24, 2018), https://www.nydailynews.com/news/politics/ny-pol-50a-police-discipline-diallo-bell-garner-carr-20181223-story.html?outputType=amp&__twitter_impression=true [<https://perma.cc/5RQL-KLGV>].

65. Lauren Gill, *A Grand Jury Indicted an Alabama Police Officer for Murder. Then a Mayor Came to His Defense*, APPEAL (Sept. 10, 2018), <https://theappeal.org/a-grand-jury-indicted-an-alabama-police-officer-for-murder-then-a-mayor-came-to-his-defense> [<https://perma.cc/9CLS-44NJ>]; see also ALA. CODE § 36-12-40 (providing public access to records in the possession of the state and no specific exemption for police misconduct records).

access to criminal justice records and investigatory files is left to the discretion of the custodian of those records,⁶⁶ police departments routinely deny such records requests.⁶⁷

The landscape surrounding access to police misconduct records is widely varied, shifting, and subject to extensive and increasing criticism. What remains consistent is the justification at the center of nearly every dispute: privacy.

II. PRIVACY: WHAT IT IS AND WHAT IT PROTECTS

A. History and expansion of the right to privacy

Privacy is a “highly contested concept” among legal scholars.⁶⁸ The United States Constitution contains no explicit mention of a right to privacy. Most privacy theorists date the scholarly origins of the right to Samuel Warren and Louis Brandeis’s 1890, aptly titled article, *The Right to Privacy*.⁶⁹ Privacy, according to Warren and Brandeis, was best described as the right to “enjoy life,” which fundamentally involved “the right to be let alone.”⁷⁰ They envisioned a world in which privacy intrusions were committed primarily by journalists and photographers seeking to invade the “sacred precincts of private and domestic life.”⁷¹ For Warren and Brandeis, privacy rights were confined mostly (or perhaps entirely) to the home and were violated by those breaching the sacrosanct space of the home.

66. COLO. REV. STAT. §§ 24-72-302, -304-05 (2018).

67. See Margaret Kwoka et al., *Access Denied: Colorado Law Enforcement Refuses Public Access to Records of Police Misconduct*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3136011 [<https://perma.cc/LX8B-FL8M>]. A new bill mandating that police misconduct records be made available for public inspection is now under consideration in the Colorado legislature. See H.B. 19-1119 (Colo. 2019).

68. Mary Ann Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 426 n.4 (2017); see also Edward J. Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 962 (1964) (“Remarkably enough, there remains to this day considerable confusion concerning the nature of the interest which the right to privacy is designed to protect.”); Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1911 (2013) (quoting JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 149 (2012)); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 35 (1967) (describing privacy law as “infected with pernicious ambiguities”); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1946 (2013); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CAL. L. REV. 1069, 1113 (2014); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1088 (2002).

69. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977) (citing article as foundation of United States privacy law); Irwin P. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 704–08 (1990) (describing lack of coherent legal approach to privacy violations before Warren and Brandeis’s article); Richard Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 176 (1979); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 400–01 (2008); Solove, *supra* note 68, at 1099–1100.

70. Warren & Brandeis, *supra* note 69, at 193.

71. *Id.*

Courts were slow to recognize privacy as a cognizable right.⁷² Although a few state courts after Warren and Brandeis's article addressed the prospect of a right to privacy with mixed results,⁷³ the United States Supreme Court remained mostly silent on the issue for many years.⁷⁴ In 1928, Louis Brandeis himself, by then a justice on the Supreme Court, drafted a dissenting opinion in *Olmstead v. United States* that complained of the majority's unwillingness to recognize that government agents' wiretappings of citizens' phones constituted an "intrusion . . . on the privacy of the individual."⁷⁵ In 1952, Justice Douglas, also in dissent, suggested that a constitutional right to privacy should prevent public railway cars from broadcasting radio programs over their loudspeakers.⁷⁶ But it was not until 1965 that the Court first explicitly recognized such a right in *Griswold v. Connecticut*.⁷⁷

The defendants in *Griswold* were convicted under a Connecticut law that criminalized using (or helping others use) contraceptive devices and challenged the law as unconstitutional.⁷⁸ The Court, while noting that the Constitution does not expressly reference a right to privacy, reasoned that the First Amendment provides "a penumbra where privacy is protected from governmental intrusion," specifically within the right to freedom of association.⁷⁹ Additionally, the right to privacy could be unearthed in "emanations from" the Third Amendment's prohibition against forced quartering of soldiers in civilians' homes, the Fourth and Fifth Amendments' protections against governmental intrusion into the sanctity of home and life, and the Ninth Amendment's protection of "rights retained by the people."⁸⁰ The Court ultimately concluded that the right of privacy in the marriage relationship was "a legitimate one."⁸¹ While a 7-2 majority of the court reversed the convictions in *Griswold*, five of the seven majority justices wrote or joined in separate concurring opinions expressing widespread disagreement over the origins and existence of a constitutional right to privacy.⁸² This gallimaufry of approaches to privacy rights led

72. See, e.g., Posner, *supra* note 69, at 177 (describing various torts such as "right of publicity" and "false light" that developed after publication of Warren and Brandeis's article).

73. See *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905) (recognizing a right to privacy); *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902) (rejecting claim based on a right to privacy); *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285 (Mich. 1899) (criticizing notion of a right to privacy); *Corliss v. E.W. Walker Co.*, 64 F. 280 (Mass. Cir. Ct. 1894) (holding that a public figure cannot prevent publication of his portrait); see also RESTATEMENT OF TORTS § 867 (1939); Wilbur Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693, 694 (1912); William Prosser, *Privacy*, 48 CAL. L. REV. 383, 386-87 (1960) (citing numerous cases for proposition that the majority of American courts had begun to recognize a right to privacy by the 1930s).

74. Posner, *supra* note 69, at 177.

75. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

76. *Pub. Util. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting).

77. *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also Posner, *supra* note 69, at 177 (positing that *Griswold* ushered in a new era of privacy law by recognizing a right to privacy "divorced from the specific privacy-oriented guarantees of the Bill of Rights").

78. 381 U.S. at 480-81.

79. *Id.* at 483 (citing *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)).

80. *Id.* at 484-85.

81. *Id.* at 485.

82. *Id.* at 486-507.

one scholar to bemoan *Griswold* as “thrown up in great haste, from a miscellany of legal rock and stone.”⁸³

Divided as the *Griswold* decision was, it is generally recognized as the foundation of a series of Supreme Court cases recognizing the “autonomy” strand of privacy theory.⁸⁴ This controversial subsection of privacy theory involves the ability to maintain control over personal choices, specifically in “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.”⁸⁵

A separate strand of privacy law, now recognized as the “confidentiality” strand,⁸⁶ received its first meaningful analysis in the Supreme Court’s 1977 decision *Whalen v. Roe*.⁸⁷ In *Whalen*, the Court was asked to decide whether a New York law, authorizing the state to maintain a database containing the names and addresses of everyone purchasing certain prescription drugs, posed an unconstitutional threat to the privacy of drug purchasers.⁸⁸ In examining this issue the Court took its first step toward differentiating the autonomy and confidentiality branches of privacy theory, reasoning that the Court’s earlier decisions had “in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”⁸⁹ While the autonomy branch of privacy theory stems from the latter interest, the confidentiality strain, in contrast, is grounded in Warren and Brandeis’s “right to be let alone” and “protected from governmental intrusion.”⁹⁰

The *Whalen* Court then decided that New York’s law did not unconstitutionally threaten either interest.⁹¹ Although the “accumulation of vast amounts of personal information” in electronic or paper databases necessarily created a threat to privacy that “arguably has its roots in the Constitution,” states can collect and use such data as needed for public purposes, as long as the statutory

83. Gerety, *supra* note 69, at 233.

84. *Roe v. Wade*, 410 U.S. 113 (1973) (expanding privacy rights to include the right to an abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the right of privacy in contraceptive choices extended to “the individual, married or single”).

85. *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976)); *see also* Gerety, *supra* note 69, at 236 (defining privacy as “autonomy or control over the intimacies of personal identity”).

86. *See Whalen v. Roe*, 429 U.S. 589 (1977); *Barry*, 712 F.2d at 1558; *Plante v. Gonzalez*, 575 F.2d 1119, 1128 (5th Cir. 1978).

87. *Whalen*, 429 U.S. 589. The Court also hinted at the confidentiality strand of privacy ten years earlier in *Katz v. United States*, 389 U.S. 347 (1967), a decision that rejected a defendant’s claim of a “general constitutional right to privacy.” *Id.* at 348–51. While *Katz* did reason that privacy rights were properly understood as a “right to be let alone,” it made no attempt to flesh out the contours of those rights. *Id.*

88. 429 U.S. at 591–96. The data at issue in *Whalen* was accessible to the state but not private actors. *Id.* at 594, 601–02.

89. *Id.* at 598–600.

90. *See id.* at 599 n.25 (citing numerous authorities to explicate this point).

91. *Id.* at 600.

scheme regulating such collection properly takes into account the individual interest in privacy.”⁹² Justice Brennan, concurring in the judgment, wrote separately to make clear he did not believe the Constitution provided “a general interest in freedom from disclosure of private information.”⁹³

B. Development of a right to informational privacy

Around the same time the Supreme Court was engaged in nascent efforts to mold a coherent privacy doctrine, legal scholars also began to weigh in more earnestly on the definition of privacy. In his 1960 work *Privacy*, William Prosser theorized that the right to privacy encompassed four distinct torts, one of which was “public disclosure of private facts.”⁹⁴ By the late 1960s and the dawn of the computer age, scholars and government officials were acutely and increasingly attuned to ways in which the government’s expanded capacity for data collection could affect traditional notions of privacy.⁹⁵ When Hyman Gross published *Concept of Privacy* in 1967, he argued that the right to privacy included protections against disclosure of “the intimate facts of one’s life,” as well as “protection of confidential information—income tax information, census information, financial affairs, and the like.”⁹⁶ In 1968, Charles Fried warned that “the burgeoning claims of public and private agencies to personal information, have created a new sense of urgency in defense of privacy.”⁹⁷ In Fried’s eyes, privacy involved “not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves.”⁹⁸ By 1973, the U.S. Department of Health, Education, and Welfare had issued a lengthy report examining concerns related to computerized information, acknowledging that such concerns centered around “implications for personal privacy, and understandably so if privacy is considered to entail control by an individual over the uses made of information about him.”⁹⁹

This was the backdrop of the Supreme Court’s 1977 decision in *Whalen*, which represented the Court’s first tentative embrace of a constitutional right to informational privacy. While *Whalen* never used the phrase “informational privacy,” it nonetheless acknowledged that governmental collection of data that is “personal in character and potentially embarrassing or harmful if disclosed” could threaten

92. *Id.*

93. *Id.* at 606–09 (Brennan, J., concurring).

94. Prosser, *supra* note 73, at 389.

95. *See, e.g.*, U.S. DEP’T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS: REPORT OF THE SECRETARY’S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS ix (1973), available at <https://www.justice.gov/opcl/docs/rec-com-rights.pdf> [<https://perma.cc/AG3H-FD4Z>] (193-page report prepared by the U.S. Department of Health regarding the “changes in American society which may result from using computers to keep records about people”).

96. Gross, *supra* note 68, at 34.

97. Charles Fried, *Privacy*, 77 YALE L.J. 475, 475 (1968).

98. *Id.* at 482; *see also id.* at 483 (“Privacy . . . is control over knowledge about oneself.”).

99. U.S. DEP’T OF HEALTH, EDUC. & WELFARE, *supra* note 95, at xx.

the privacy of the subject of that data.¹⁰⁰ However, the *Whalen* majority was careful not to reach any definitive conclusions as to the existence of a right to informational privacy, instead noting only that any privacy interest in personal data “arguably has its roots in the Constitution.”¹⁰¹

In *Nixon v. Administrator of General Services*, decided the same term as *Whalen*, the Court agreed to hear another question about privacy of information.¹⁰² The *Nixon* Court considered whether the Presidential Recordings and Materials Preservation Act, permitting the government to publicly disseminate President Nixon’s papers and recordings, violated the president’s right to privacy.¹⁰³ The Court began its privacy analysis by accepting Nixon’s concession that people who enter public life “voluntarily surrender[] the privacy secured by law for those who elect not to place themselves in the public spotlight.”¹⁰⁴ The Court then said it “may agree” with Nixon’s argument that even public officials “are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity.”¹⁰⁵ The Court contrasted such information regarding “matters of personal life” with recordings that related to the work of the presidency, for which Nixon lacked any expectation of privacy and which the public had a legitimate interest in reviewing.¹⁰⁶ Without explicitly embracing the existence of a constitutional right to informational privacy, the Court concluded that the Presidential Recordings Act did not violate any such right.¹⁰⁷

C. Limitations on the right to informational privacy

In the forty years since *Whalen* and *Nixon* both alluded to a right to privacy in personal information but rejected the privacy claims at issue, the Supreme Court has continued to narrowly construe such a right.¹⁰⁸ In the 2011 case *NASA v. Nelson*, the Court addressed a challenge brought by federal employees arguing that NASA’s policy of requiring employees to report drug treatment and counseling violated their privacy interest in “avoiding disclosure of personal matters.”¹⁰⁹ The Court “assume[d], without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*,” but held that NASA’s reporting policies did not violate that right.¹¹⁰ In so doing, the Court relied on the

100. *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

101. *Id.*

102. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977).

103. *Id.*

104. *Id.* at 455 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

105. *Id.* at 457.

106. *Id.* at 459, 462, 465.

107. *Id.* at 457.

108. *See, e.g.*, Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 161 (2015) (bemoaning the lack of definitive resolution regarding the extent of a constitutional interest in “informational privacy”).

109. *See NASA v. Nelson*, 562 U.S. 134, 138 (2011).

110. *Id.* at 147.

government's "strong interest" in employing a reasonable and competent workforce, as well as the importance of the jobs NASA employees performed.¹¹¹ In separate concurrences, Justices Thomas and Scalia expressed their belief that the Constitution does not bestow a right to informational privacy.¹¹²

In summary, the Supreme Court has never definitively recognized a constitutional right to privacy of information but has hinted at such a right in the three cases discussed above.¹¹³ To the extent this right may exist, the Court has found it in only a limited class of cases involving records of drug use,¹¹⁴ drug treatment,¹¹⁵ and counseling.¹¹⁶ Even in these narrow contexts, the Court found no impermissible violation of a right to informational privacy, instead ruling that governmental interests in ensuring a strong workforce and competent employees, or tracking possible illicit drug use, trumped the right to privacy.¹¹⁷ The Court also rejected application of the right to information regarding public actors about which the populace has a legitimate concern.¹¹⁸

Although most scholars recognize *Whalen*, *Nixon*, and *Nelson* as the Supreme Court's three most prominent informational privacy decisions, the Court has also twice addressed informational privacy claims arising under the federal Freedom of Information Act (FOIA).¹¹⁹ In *Department of Air Force v. Rose*, the Court was asked to interpret FOIA's provision exempting from public access "personnel . . . files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹²⁰ The Court concluded that the statute did not protect all personnel files from public disclosure but only those files the release of which would threaten an individual's privacy for "clearly unwarranted" reasons.¹²¹ The Court also noted that the "clearly unwarranted" provision should be construed as a "limited exception" to the general rule mandating disclosure of personnel files.¹²²

The Court's other major FOIA decision, *United States Department of Justice v. Reporters Committee for Freedom of Press*, addressed whether the FBI's disclosure of private civilians' criminal history records could "reasonably be expected to constitute" an "unwarranted invasion of personal privacy" under a separate subsection of FOIA dealing with records compiled for law enforcement

111. *Id.* at 150–53.

112. *Id.* at 159–69 (2011) (Scalia & Thomas, JJ., concurring).

113. *Nelson*, 562 U.S. 134; *Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

114. *Whalen*, 429 U.S. at 605.

115. *Nelson*, 562 U.S. at 150–53.

116. *Id.*

117. *Id.*; *Whalen*, 429 U.S. at 598.

118. *Nixon*, 433 U.S. at 457.

119. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *Dep't of Air Force v. Rose*, 425 U.S. 352 (1976).

120. *Rose*, 425 U.S. at 370.

121. *Id.* at 371–72 (interpreting 5 U.S.C. § 552(b)(6)).

122. *Id.*

purposes.¹²³ The records at issue included convictions, sentences, arrests, and charges that did not result in conviction.¹²⁴ The Court construed this exemption more broadly than the personnel records provision, concluding that disclosure of rap sheets to private parties could reasonably be construed as implicating the interest in “avoiding disclosure of personal matters”¹²⁵ because “both the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person.”¹²⁶

While the *Reporters Committee* Court recognized a privacy interest in avoiding disclosure of personal information—and concluded that criminal history records constituted personal information for purposes of FOIA—it made no effort to ground its privacy discussion in any constitutional rights, instead relying on the text of FOIA and common practice surrounding non-disclosure of criminal history records.¹²⁷ The Court also had no opportunity to analyze privacy interests in records of public employees, instead limiting its holding to the idea that “disclosure of records containing personal details about private citizens can infringe significant privacy interests.”¹²⁸

The federal circuit courts of appeal have also treated informational privacy claims with circumspection.¹²⁹ Some have declined to recognize the right at all. The D.C. Circuit Court of Appeals, in the context of a policy requiring certain federal government employees to disclose information about finances, mental health, and illegal drug use, expressed “grave doubts” that a constitutional right to “nondisclosure of private information” exists but refused to decide the question because the policy would satisfy constitutional scrutiny even if such a right did exist.¹³⁰ The First Circuit has also declined to decide whether a right to informational privacy exists, reasoning that, though the Supreme Court appears to have espoused a right to privacy in some forms of information, that right may extend only to matters affecting “the autonomy branch of the right of privacy”—that is, marital and family relationships, procreation, and child-rearing.¹³¹

Other circuits have recognized a constitutional right to informational privacy but limited the right to specific types of highly personal information, mostly involving medical, sexual, or financial records. The Second, Third, Fourth, and Fifth Circuits have identified a right to privacy in “intimate and personal” records but

123. *Id.* at 751 (citing 5 U.S.C. § 552(b)(7)(C) (1982)).

124. *Id.* at 752.

125. *Id.* at 762 (quoting *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977)).

126. *Id.* at 762–63.

127. *Id.* at 763–70.

128. *Id.* at 766.

129. *E.g.*, *Am. Fed’n of Gov’t Emps. v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786 (D.C. Cir. 1997); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577–78 (3d Cir. 1980); *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978).

130. *Am. Fed’n of Gov’t Emps.*, 118 F.3d at 788, 791.

131. *Borucki v. Ryan*, 827 F.2d 836, 839–49 (1st Cir. 1987).

limited this category to medical and financial records and held that even these records can be disclosed if the public interest justifies an intrusion into the privacy right.¹³² The Second and Fifth Circuits have also concluded that release of information that is not “highly personal” does not violate the right to privacy.¹³³ The Sixth Circuit Court of Appeals has construed the right to informational privacy to encompass “only two instances: (1) where the release of personal information could lead to bodily harm, and (2) where the information released was of a sexual, personal, and humiliating nature.”¹³⁴ The Seventh Circuit has more vaguely identified a privacy right to confidentiality in “certain types of information” but declined to apply that right to the context of a school psychologist arguing that his employment should not be conditioned on willingness to disclose information regarding student sexual abuse.¹³⁵ The Eighth Circuit has recognized a right to informational privacy but held that the information disclosed must involve “either a shocking degradation or an egregious humiliation” to implicate a constitutional violation.¹³⁶ The Ninth and Tenth Circuits have acknowledged a constitutional right

132. *Hancock v. Cty. of Rensselaer*, 882 F.3d 58, 65 (2d Cir. 2018); *Walls v. City of Petersburg*, 895 F.2d 188, 189–90, 192–94 (4th Cir. 1990) (holding that a background check questionnaire for city police department employees, which contained questions about criminal and financial history, passed constitutional muster because the city had a compelling interest in guarding against police corruption and few people had access to the information); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 112–14 (3d Cir. 1987) (agreeing that medical and financial information is intimate and should not be subjected to public scrutiny, but, nonetheless, permitting police departments to require officers to disclose this information when applying for certain positions); *Barry*, 712 F.2d at 1558–62 (acknowledging a right to privacy in the context of laws requiring disclosure of financial information for city employees and political candidates, but holding that such right is outweighed by the government’s interest in deterring corruption); *Westinghouse Elec. Corp.*, 638 F.2d at 577–80; *Plante*, 575 F.2d at 1132–36 (acknowledging a right to privacy in the context of laws requiring disclosure of financial information for city employees and political candidates, but holding that such right is outweighed by the government’s interest in deterring corruption); *see also Doe v. Borough of Barrington*, 729 F. Supp. 376, 382–84 (D.N.J. 1990) (police officers violated constitutional right against “disclosure of personal matters” when they disclosed that the plaintiff had AIDS). *But see Paul P. v. Verniero*, 170 F.3d 396, 401–04 (3d Cir. 1998) (requirement that people convicted of certain sex offenses provide name, address, social security number, and other identifying information to law enforcement, which then disseminates information to the public, may have implicated “some nontrivial [privacy] interest,” but was justified by public interest in knowing where sex offenders live); *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 207 (3d Cir. 1991) (finding no right to privacy for information in police reports).

133. *Barry*, 712 F.2d at 1558–62; *Plante*, 575 F.2d at 1132–36.

134. *Lee v. City of Columbus*, 636 F.3d 245, 248, 260 (6th Cir. 2011) (internal citations omitted) (holding that sick leave policy requiring employees to tell supervisors about the nature of their illness did not implicate a right to informational privacy); *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008); *see also Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (denying existence of right to privacy in medical records).

135. *Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 795–98 (7th Cir. 1987); *see also Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988) (noting circuit courts’ confusion over the existence and extent of a constitutional right to privacy of personal information, but concluding that privacy of information within medical records is “information of the most personal kind,” and therefore protected).

136. *Cooksey v. Boyer*, 289 F.3d 513, 516 (8th Cir. 2002) (disclosure of fact that high-ranking police officer was receiving psychological treatment for stress did not violate officer’s right to privacy).

to privacy in some types of medical information, reasoning that medical records contain “intimate facts of a personal nature.”¹³⁷

Scholars also have endorsed mostly narrow understandings of informational privacy. Shortly after *Whalen*, Richard Posner imagined informational privacy rights as “invaded whenever private information is obtained against the wishes of the person to whom the information pertains”¹³⁸ but specifically denoted information regarding “health or employment or credit or arrests.”¹³⁹ Another early privacy scholar, Tom Gerety, reasoned that informational privacy rights must be interpreted narrowly to encompass only “such information as is necessary to the intimacies of our personal identities.”¹⁴⁰

Some scholars dispute that informational privacy should be recognized as a constitutional right. Mary Fan, criticizing its development as an assumed right, has referred to informational privacy as “affectively influenced intuition,” based primarily on a gut instinct that the law should provide a remedy against disclosure of certain information.¹⁴¹ Daniel Solove has also cautioned against reading too broadly into the right of privacy and noted that privacy violations generally are limited to intrusions upon body, family, and home.¹⁴²

Solove and Fan are far from the only privacy theorists to express concern over those too quick to label publication of information a violation of informational privacy rights. Scott Skinner-Thompson proposes that questions of informational privacy be assessed through the lens of two “more narrow and concrete values”: (1) creating space for political thought, and (2) preventing “intimate, personal information”—specifically sexual, medical, and mental health information—from serving as a basis to discriminate against the subject of the information.¹⁴³ Helen Nissenbaum categorizes informational privacy as an effort to restrict “access to sensitive, personal, or private information.”¹⁴⁴ According to Nissenbaum, the right to informational privacy extends to information which “meets societal standards of intimacy, sensitivity, or confidentiality.”¹⁴⁵ Jeffrey Skopek summarizes informational privacy as encompassing “a type of information that others should not try to discover,” generally involving matters pertaining to intimacy or autonomy.¹⁴⁶

137. *See* *Seaton v. Mayberg*, 610 F.3d 530, 536–40 (9th Cir. 2010); *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir. 1994).

138. Richard A. Posner, *THE ECONOMICS OF JUSTICE* 272–73 (1981); *see also id.* at 231 (“[P]rivacy means the withholding of information, particularly personal information . . .”).

139. Posner, *supra* note 69, at 174–75.

140. Gerety, *supra* note 69, at 282.

141. Mary D. Fan, *Constitutionalizing Informational Privacy by Assumption*, 14 U. PA. J. CONST. L. 953, 979 (2012).

142. Solove, *supra* note 68, at 1129–30, 1135.

143. Skinner-Thompson, *supra* note 108, at 162, 205.

144. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 125 (2004).

145. *Id.*

146. Jeffrey Skopek, *Reasonable Expectations of Anonymity*, 101 VA. L. REV. 691, 700 (2015).

In yet another attempt to mark the boundaries of informational privacy, Seth Kreimer has posited that recognition of a privacy right should hinge on whether dissemination of information would intrude upon an explicit provision of the Bill of Rights.¹⁴⁷ According to Kreimer, the right to privacy must be “rooted in the constitutional framework itself.”¹⁴⁸ If disclosure of information would interfere with, for example, free exercise of religion or freedom of association, then such disclosure could be deemed unconstitutional.¹⁴⁹ Disclosures of information that do not implicate an explicit provision of the Bill of Rights, in contrast,¹⁵⁰ may not rise to the level of a constitutional violation.

III. POLICE OFFICERS AND PRIVACY RIGHTS

Having discussed the boundaries of informational privacy law in Part II, the question now becomes where police misconduct records fit within these categories of information the law deems private. Answering this question requires two distinct analyses. First, does the law recognize a privacy right in the kinds of information typically contained within police misconduct records? Second, if it does, how should that privacy right be balanced against the interests of other actors? Part III addresses both of these questions in turn.

A. Assessing whether police misconduct records fit within the boundaries of privacy rights

As discussed in Part II, the question of whether the Constitution protects a right to informational privacy is not entirely settled.¹⁵¹ However, given that most scholars and lower courts acknowledge a constitutional right to privacy of at least some information¹⁵²—and the Supreme Court has repeatedly alluded to its existence, though never affirmed it explicitly¹⁵³—the remainder of this article proceeds under the assumption that informational privacy is a cognizable right in certain contexts. The crux of the analysis becomes whether this right is appropriately applied to the specific context of police misconduct records.

i. Subject matter of the records

Police misconduct records contain information pertaining to both allegations and sustained findings of police misconduct.¹⁵⁴ This information will frequently

147. Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 132–34 (1991).

148. *Id.* at 132.

149. *Id.* at 132–34.

150. *Id.* at 143–46.

151. *See supra* Part II.C. I take no position on whether informational privacy should be recognized as a right inherent in the Constitution; the purpose of this article is not to persuade the reader of whether informational privacy is a constitutional right, but rather to apply privacy rights as they are historically and currently understood to the debate surrounding police misconduct records.

152. *Supra* notes 132–40.

153. *Supra* notes 100–113.

154. *See supra* note 1.

include records of complaints against police officers (lodged by both civilians and fellow officers), internal affairs reports, disciplinary findings against officers, performance evaluations, and, in some jurisdictions, body camera footage or other technology recording instances of possible misconduct by officers.¹⁵⁵

Two examples may help illuminate the dramatically divergent approaches that different jurisdictions take to disclosure of misconduct records. The first is that of Mohamed Noor, a Minneapolis police officer convicted in 2019 of murder for shooting and killing Justine Damond, an Australian woman who had called the police moments earlier to report a possible assault happening outside her home.¹⁵⁶ Minnesota is one of the twelve states that treat most police misconduct reports as matters of public record.¹⁵⁷ Investigators from Minnesota's Bureau of Criminal Apprehension obtained information documenting that, approximately two months before he shot and killed Damond, Noor put a gun to the head of a motorist pulled over for a minor traffic stop.¹⁵⁸ An initial police incident report written shortly after the incident indicated that Noor and his partner stopped the driver after seeing him give the middle finger to a bicyclist and pass a vehicle without signaling.¹⁵⁹ In the incident report, neither Noor nor his partner documented Noor's use of the gun or provided any justification for it.¹⁶⁰

Due in part to Minnesota's open records laws, Noor's past history of allegedly inappropriate gun use was available to the prosecutor and the public. The government, unsurprisingly, sought to use this information against Noor in his criminal case.¹⁶¹ Contrast Noor's case with a cases in a state like New York, which protects police misconduct records from disclosure and where the prosecutor's

155. See Abel, *supra* note 1, at 745; Levine, *supra* note 1, at 859–60; Moran, *supra* note 3.

156. Mitch Smith, *Minneapolis Police Officer Convicted of Murder in Shooting of Australian Woman*, N.Y. TIMES (Apr. 30, 2019), <https://www.nytimes.com/2019/04/30/us/minneapolis-police-noor-verdict.html> [https://perma.cc/NA8M-8Y8S].

157. See MINN. STAT. § 13.43(2) (2018). The following information is public: “. . . (4) the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action; (5) the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body.” *Id.*

158. Libor Jany, *Filing: Mohamed Noor Raised Red Flags Among Psychiatrists, Training Officers*, STAR TRIB. (Sept. 6, 2018), <http://www.startribune.com/judge-rejects-motion-to-seal-medical-records-in-trial-for-officer-who-killed-justine-ruszczuk-damond/492518991/> [https://perma.cc/C68A-CU6H]; see also State's Response to Court's Order to Submit Supplemental Materials for Review Regarding Defendant's Motion to Dismiss for Lack of Probable Cause, State v. Noor, MNCIS No: 27-CR-18-6859 (D. Minn. 2018), <http://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-18-6859/Memo091918.pdf> [https://perma.cc/LE9T-Y6VK].

159. Jany, *supra* note 158.

160. *Id.*

161. State's Response to Defendant's Motions to Dismiss for Lack of Probable Cause, State v. Noor, No: 27-CR-18-6859 (D. Minn. 2018), <http://mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-18-6859/ResponseToMotionToDismiss090518.pdf> [https://perma.cc/4X24-3C6W]. The State argued that the records should be sealed pursuant to an exception for criminal investigative data, MINN. STAT. § 13.82, subd. 7 (2017), but did not prevail on that point. *Id.*

office may not have immediate access to such records.¹⁶² After NYPD officer Daniel Pantaleo choked Eric Garner to death in 2014, a grand jury declined to indict Pantaleo for his role in Garner's death.¹⁶³ It is impossible to say what information the grand jury received, because the Staten Island District Attorney's office has refused to release records of the proceedings.¹⁶⁴ But the public did not learn until 2017 that Pantaleo had incurred fourteen prior complaints of misconduct before killing Garner, including multiple allegations of excessive force and abusive behavior.¹⁶⁵ (The information was disclosed only after an employee of the Civilian Complaint Review Board leaked it to the press; that employee was later fired for the leak.¹⁶⁶) Pantaleo is far from the only NYPD officer with a lengthy history of misconduct to remain on the force. Internal affairs reports leaked to *BuzzFeed News* in 2018 indicate that officers have retained their positions after misconduct including perjury, assault, excessive force, and improper use of a gun.¹⁶⁷ Absent unauthorized leaks, the public would have no knowledge of or access to this information.

These examples illustrate not only the different approaches that states take to the privacy of police misconduct records but also how these varied approaches may contribute to disparate treatment of officers accused of misconduct. While Minnesota and New York represent two extremes, many other states fall somewhere in the middle, exempting disclosure when it would constitute an "unwarranted invasion of personal privacy" but providing no statutory guidance as to what an unwarranted invasion of personal privacy is.¹⁶⁸ Given the troubling

162. N.Y. CIV. RIGHTS LAW § 50-a(1) (McKinney 2014); *People v. Garrett*, 18 N.E.3d 722, 732 (N.Y. 2014); McKinley, Jr., *supra* note 63.

163. Lauren Gambino, *Eric Garner: Grand Jury Declines to Indict NYPD Officer Over Chokehold Death*, *GUARDIAN* (Dec. 3, 2014), <https://www.theguardian.com/us-news/2014/dec/03/eric-garner-grand-jury-declines-indict-nypd-chokehold-death> [<https://perma.cc/SYH6-CV25>].

164. J. David Goodman, *Appeals Court Rules for Transcripts in Eric Garner Case to Remain Sealed*, *N.Y. TIMES* (Nov. 23, 2015), <https://www.nytimes.com/2015/11/24/nyregion/appeals-court-rules-for-transcripts-in-eric-garner-case-to-remain-sealed.html> [<https://perma.cc/KB8X-RC3F>].

165. *Officer History*, *SCRIBD*, https://www.scribd.com/document/342591738/D-Pantaleo-Alleged-CCRB-File#fullscreen&from_embed [<https://perma.cc/4VA8-D4P5>] (last visited Sept. 10, 2018); *see also* Carimah Townes & Jack Jenkins, *EXCLUSIVE DOCUMENTS: The Disturbing Secret History of the NYPD Officer Who Killed Eric Garner*, *THINK PROGRESS* (Mar. 21, 2017), <https://thinkprogress.org/daniel-pantaleo-records-75833e6168f3/> [<https://perma.cc/79U5-5FY7>].

166. Denis Slattery, *Garner Chokehold Cop's Sealed Disciplinary Records Shouldn't Affect Broader Request in Separate Case, Lawyers Argue*, *N.Y. DAILY NEWS* (Apr. 8, 2017), <http://www.nydailynews.com/new-york/pantaleo-decision-shouldn-affect-separate-nypd-suit-lawyers-article-1.3033620> [<https://perma.cc/JK44-QBMC>].

167. Hayes, *supra* note 60; Taggart & Hayes, *supra* note 17.

168. *E.g.*, *CONN. GEN. STAT.* § 1-210(b)(2) (2013) (exempting personnel records from disclosure to the public if such disclosure would constitute an "invasion of personal privacy"); *D.C. CODE* § 2-534(a)(3) (2018) (exempting records of investigations conducted by the Office of Police Complaints, to the extent disclosure of such records would "[c]onstitute an unwarranted invasion of personal privacy"); *MICH. COMP. LAWS* § 15.243(1)(a), (b) (2018) (precluding disclosure of personal information or law enforcement investigative records that would "constitute a clearly unwarranted invasion of . . . privacy"); *N.H. REV. STAT. ANN.* § 91-A:5(IV) (2009) (exempting personnel records "and other files whose disclosure would constitute invasion of privacy").

histories of police misconduct and growing controversy surrounding non-disclosure of records that Part I discussed, this Article now turns to existing privacy law and theory in an effort to unearth unifying principles that can guide states attempting to reform, or even interpret, their existing records disclosure policies.

While the Supreme Court's informational privacy jurisprudence leaves some clarity to be desired, it provides little to suggest that most police misconduct records would fall within the kinds of highly personal information the Court has recognized as private. *Whalen* and *Nelson* both involved claims to privacy in medical and mental health information, specifically drug use, drug treatment, and counseling.¹⁶⁹ Although the Court acknowledged that both cases arguably implicated constitutional privacy rights, it grounded this reasoning in the notion that such information was "personal."¹⁷⁰ Even the *Reporters Committee* Court, which reasoned that disclosure of criminal history records could constitute an unwarranted invasion of personal privacy, made clear that its concern was rooted in information "containing personal details about private citizens."¹⁷¹ Lower court jurisprudence has similarly limited infringements of informational privacy to those involving intimate or personal information, generally defined by example as including details about medical, sexual, or financial history and activities.¹⁷²

Although scholars have endorsed slightly broader approaches to informational privacy rights, their analyses also would exclude the content of most police misconduct records. Police misconduct records do not generally fall within the categories of either intimate or political information, which are the two areas of informational privacy that Professor Skinner-Thompson suggests the Constitution should protect.¹⁷³ Professor Kreimer's examples of information that should be deemed private similarly include political viewpoints, voting activity, and that central to the formation of identity.¹⁷⁴

Other privacy scholars—Daniel Solove, Helen Nissenbaum, and Christopher Slobogin, to name a few—contend that informational privacy rights should generally be limited to records involving the same kinds of intimate and

169. *NASA v. Nelson*, 562 U.S. 134, 138 (2011); *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977).

170. *See Nelson*, 562 U.S. at 138, 144, 155; *Whalen*, 429 U.S. at 605.

171. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 766 (1989).

172. *See Lee v. City of Columbus*, 636 F.3d 245, 248, 260 (6th Cir. 2011); *Seaton v. Mayberg*, 610 F.3d 530, 536–40 (9th Cir. 2010); *Lankford v. City of Hobart*, 27 F.3d 477, 479 (10th Cir. 1994); *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994); *Walls v. City of Petersburg*, 895 F.2d 188, 189–90, 192–94 (4th Cir. 1990); *Borucki v. Ryan*, 827 F.2d 836, 839–49 (1st Cir. 1987); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 112–14 (3d Cir. 1987); *Barry v. City of New York*, 712 F.2d 1554, 1558–62 (2d Cir. 1983); *J.P. v. DeSanti*, 653 F.2d 1080, 1089–90 (6th Cir. 1981); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577–80 (3d Cir. 1980); *Plante v. Gonzalez*, 575 F.2d 1119, 1132–36 (5th Cir. 1978).

173. *See Skinner-Thompson, supra* note 108, at 175–76 ("Informational privacy's more nuanced constitutional value is in protecting two categories of information—intimate or political information—and preventing that information from serving as the basis for discrimination or political marginalization.")

174. Kreimer, *supra* note 147, at 67–68.

personal information the courts have recognized, including medical or financial information.¹⁷⁵

Most police misconduct records do not fall within these categories of highly personal, intimate, or political information. Officer Noor's decision to point a gun at a motorist's head during a traffic stop has no apparent relationship to his medical, sexual, or financial history. Similarly, little can be deemed either intimate or political about Officer Pantaleo's alleged use of excessive force on civilians prior to his deadly encounter with Eric Garner, nor of the other leaked records regarding NYPD officers who committed perjury or assault while on duty.¹⁷⁶ Yet, because of the inconsistent privacy approaches in the two states, Minnesotans learned far more about Officer Noor's conduct than New Yorkers about Officer Pantaleo.¹⁷⁷

Several courts faced with claims regarding disclosure of police misconduct records have concluded that the records were not private. In *Denver Policemen's Protective Association v. Liechtenstein*, the Tenth Circuit rejected the notion that police personnel records necessarily fall within the zone of information that should be deemed private.¹⁷⁸ *Liechtenstein* involved a Denver police union's objection to court-ordered disclosure of police officers' personnel files to a criminal defendant who had been arrested for allegedly assaulting one of the officers.¹⁷⁹ The court noted that information within personnel records regarding possible officer misconduct was comparable to criminal history records of ordinary civilians, which were routinely discoverable under Colorado law.¹⁸⁰ The court found it "ironic" that the police union on one hand argued that officers' right to privacy was the same as any civilians, while on the other hand asserting that personnel files should receive greater privacy protections than criminal history records.¹⁸¹

A Missouri appellate court considered and rejected the notion that police officers have a constitutional right to privacy in the content of their disciplinary records, at least when the disciplinary records involve sustained findings of on-duty misconduct against the officers.¹⁸² After St. Louis Metropolitan Police Department officers were internally investigated and disciplined for confiscating World Series tickets from scalpers and using the tickets for their own benefit, John Chasnoff¹⁸³

175. Nissenbaum, *supra* note 144, at 128; Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 828 (2005); Solove, *supra* note 68, at 1129–30, 1135.

176. *See Officer History*, *supra* note 165; Hayes, *supra* note 60; Taggart & Hayes, *supra* note 17; Townes & Jenkins, *supra* note 165.

177. *Compare* MINN. STAT. § 13.43, subd. 2 (2015), *with* N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2014).

178. *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432 (10th Cir. 1981).

179. *Id.*

180. *Id.*

181. *Id.* at 436–37; *see also* Flanagan v. Munger, 890 F.2d 1557, 1570 (10th Cir. 1989) (finding police internal affairs files not protected by the right to privacy when the "documents related simply to the officers' work as police officers").

182. *Chasnoff v. Mokwa*, 466 S.W.3d 571 (Mo. Ct. App. 2015).

183. The appellate decision does not explain the relationship, if any, of John Chasnoff to this investigation.

sought access to the complaints and investigative reports regarding this incident.¹⁸⁴ The police department refused to produce the entire investigative file,¹⁸⁵ and Chasnoff sued.¹⁸⁶ The police officers asserted a “legally protected privacy interest in their personnel records” and testified that disclosure of the records would cause embarrassment and damage to their reputations.¹⁸⁷ After reviewing the files, the Missouri Court of Appeals found no information “even arguably of a purely personal character in the disputed records. . . . Rather, this is simply a case of substantiated on-the-job misconduct, namely the misuse of evidence.”¹⁸⁸ The court held that “police officers lack a protectable privacy interest in these records of their substantiated on-the-job police misconduct” and rejected the officers’ claim that a constitutional or common-law right to privacy would protect against disclosure of the records.¹⁸⁹

The Louisiana Court of Appeals also held that records of internal investigations into police misconduct and resulting discipline are not private.¹⁹⁰ In the wake of Hurricane Katrina, a newspaper sought records regarding discipline imposed against, or investigations into alleged misconduct and excessive force by, Baton Rouge police officers.¹⁹¹ The police department and individual officers objected, arguing that disclosure of the records would violate the officers’ rights to privacy.¹⁹² At a hearing on the issue of whether the records should be released, the president of Louisiana’s Fraternal Order of Police testified that he believed release of the disciplinary or investigative records would “injure law enforcement officers, cause embarrassment, and hinder relations with other co-workers.”¹⁹³ The court reasoned that the right to privacy encompasses, *inter alia*, “the individual’s right to be free from unreasonable intrusion into his seclusion, solitude, or private affairs.”¹⁹⁴ Despite recognizing a right to privacy in the abstract, the court held that it did not find “any legitimate reasonable expectations of privacy” in the misconduct records, as the investigations concerned “public employees’ alleged improper activities in the workplace” rather than private behavior.¹⁹⁵ The court did, however, order redaction of personal phone numbers, home addresses, medical records,

184. *Chasnoff*, 466 S.W.3d at 574–75.

185. The file consisted of “59 documents from the IAD investigation, namely interview transcripts and recordings of the interviews with each of the 19 police officers in the *Ishmon* case, the ‘advice of rights’ form executed by 16 officers, seven officers’ consent-to-discipline forms, a computerized summary of the investigation results covering 16 officers, and IAD administrative reports.” *Id.* at 576.

186. *Id.* at 574.

187. *Id.* at 576–77.

188. *Id.* at 579–80.

189. *Id.* at 573, 580.

190. *City of Baton Rouge/Parish v. Capital City Press, LLC*, 4 So. 3d 807 (La. Ct. App. 2008).

191. *Id.* at 810–12.

192. *Id.* at 812–16.

193. *Id.* at 813.

194. *Id.* at 819.

195. *Id.* at 821.

social security numbers, and other personal information unrelated to the misconduct.¹⁹⁶

While the Missouri and Louisiana courts' opinions dealt primarily with records of substantiated misconduct rather than mere allegations, the South Carolina Court of Appeals has rejected officers' claims of a right to privacy in records of unproven allegations.¹⁹⁷ The court held that, although South Carolina's open records act exempts from disclosure information that would "constitute an unreasonable invasion of privacy,"¹⁹⁸ that provision does not apply to records regarding allegations of on-duty misconduct by police officers or sheriff's deputies.¹⁹⁹ The court also concluded that law enforcement officers do not have a constitutional privacy interest in information regarding their on-duty conduct and declined to extend the right of privacy beyond "the most intimate decisions affecting personal autonomy—namely reproductive rights, familial and marital relations."²⁰⁰

The four cases discussed above all involved records of on-duty misconduct. One federal district court, in an unpublished decision, has held that police officers could not establish a privacy interest in the contents of internal affair records into their off-duty misconduct, where the records discussed use of racial slurs, intoxication, and embarrassing conduct at a bar, none of which rose to the level of a constitutionally protected privacy interest.²⁰¹ The court did not, however, address the issue of off-duty conduct more broadly or whether such conduct bears greater resemblance to information falling within a protected privacy right.

The fact that many police misconduct records do not contain the kinds of information that the law traditionally deems private is a factor weighing in favor of increasing public access to these records, and jurisdictions should take this into account when crafting or amending their own disclosure provisions. But that is not to say that *no* misconduct records can be deemed private. Consider, for example, the case of an officer struggling with alcohol or drug abuse. Although a history of substance abuse may be relevant to an officer's ability to perform his or her job well, it also falls within the category of medical and mental health information, generally deemed private.²⁰² And for good reason: a workplace policy that automatically grants public access to information detailing employee struggles with substance abuse may well have the detrimental effect of deterring that employee from admitting to a problem or seeking treatment, thus exacerbating an already problematic situation.

196. *Id.*

197. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 352–53 (App. Ct. 2004).

198. S.C. CODE ANN. § 30-4-40(a)(2) (2001).

199. *Burton*, 358 S.C. at 352–53.

200. *Id.* at 354.

201. *Olivera v. Vizzusi*, No. CIV. 2:10-1747 WBS GGH, 2011 WL 1253887, at *1–6 (E.D. Cal. Mar. 31, 2011).

202. *Supra* Part II.B.–C.

It is not hard to envision other situations where the boundaries of what constitutes intimate and private information are blurry. Imagine a police officer going home after work and getting into regular shouting matches with a spouse or intimate partner, leading the partner to eventually complain to the police department that the officer has a violent temperament and should not be allowed to bring his or her service weapon home. While evidence that the officer has difficulty controlling her temper may well be information the public has a legitimate interest in knowing, the context of the marital dispute is also much more akin to the kind of intimate and personal information that courts contemplate as within the scope of a right to privacy.²⁰³

ii. Status of the actor: police officers as public actors

While the content of police misconduct records is critical to the analysis of whether the records should be deemed private, it is not the end of the inquiry. The next step is examining whether the subject of the records is a public or private actor.

As noted in the introduction to this article, there is an almost complete void in legal scholarship regarding the application of privacy theory to police officers.²⁰⁴ But privacy theory has long demarcated private and public actors, reasoning that public actors cannot demand the same level of privacy as those who have not knowingly exposed their activities to the public.²⁰⁵ Warren and Brandeis drew a line in the sand between information regarding conduct by private persons and that regarding people holding positions of public trust. In *The Right to Privacy*, they argued that privacy rights “do[] not prohibit any publication of matter which is of public or general interest.”²⁰⁶ They went on to explain that, while some people could reasonably claim a right to privacy in actions they did not willingly expose to the public, others by virtue of their “public or quasi public position” have “renounced the right to live their lives screened from public observation.”²⁰⁷ The line they drew was unequivocal: matters involving the “private life, habits, acts, and relations of an individual” should be deemed private.²⁰⁸ In contrast, actions associated with the discharged of a public duty were not private.²⁰⁹ For Warren and Brandeis the question seemed to center around not simply whether the actor was acting in a

203. *Supra* Part II.C.

204. Kate Levine, who cautions against requiring public disclosure of police disciplinary records, has acknowledged that police officers likely do not have the same privacy rights as ordinary citizens. *See* Levine, *supra* note 1, at 856 (“Of course, the right to privacy for an individual private citizen is not the same thing as the right to privacy for elected government officials or, perhaps, even for individuals, like the police, who work for an elected government.”). Levine’s article does not, however, attempt to analyze the privacy rights of police officers or other public actors.

205. *See* Larremore, *supra* note 73, at 698–702 (discussing the difference between “public and private characters,” and the law’s unwillingness to afford the same privacy protections to public actors).

206. Warren & Brandeis, *supra* note 69, at 214.

207. *Id.* at 215–16.

208. *Id.* at 216–17.

209. *Id.*

public capacity—*e.g.*, on duty as a police officer—but whether by virtue of a public position his actions, on duty or not, were within the realm of the public’s interest.²¹⁰

More recent jurisprudence has continued to maintain this distinction between private and public actors. In *Nixon v. Administrator of General Services* the Supreme Court, rejecting President Nixon’s claim to privacy in certain presidential records, concluded that people who enter public life “voluntarily surrender[] the privacy secured by law for those who elect not to place themselves in the public spotlight.”²¹¹ The Court distinguishes between public and private actors in other arenas as well. One example is the First Amendment context, where the Supreme Court has held that public actors must prove actual malice in order to succeed on a claim of defamatory falsehood relating to official conduct,²¹² whereas private actors have a lesser burden because they have not “voluntarily exposed themselves” to public scrutiny and criticism.²¹³

The Supreme Court has yet to set forth a clear definition of what constitutes a “public official.”²¹⁴ While police officers have presumably not assumed the burden of public scrutiny to the same extent as the President of the United States, at least two state supreme courts, Hawaii and Washington, have utilized this public/private actor distinction in the context of police misconduct records.²¹⁵ Both courts concluded that, due to police officers’ status as public employees, instances of on-duty misconduct by a police officer are “not private, intimate, personal details of the officer’s life,” but rather “matters with which the public has a right to concern itself.”²¹⁶

State and federal statutes take a mixed approach to the privacy rights of public actors. Illinois’s Freedom of Information Act specifically exempts from disclosure “[p]rivate information,” as well as “[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”²¹⁷ The statute goes on, however, to state that “disclosure of information that bears on the public duties of public employees and officials shall

210. *Id.* at 216–17 (positing that actions of a public actor, even those in the discharge of a “private duty,” are not protected by the right to privacy).

211. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 455 (1977) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

212. *Sullivan*, 376 U.S. at 279–80, 283.

213. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974); *Sullivan*, 376 U.S. at 269–71.

214. *See Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979) (acknowledging that the Court has not established precise boundaries for the definition of public official); *see also* Jeffrey O. Usman, *Defamation and the Government Employee: Redefining Who Constitutes a Public Official*, 47 *LOY. U. CHI. L.J.* 247, 255 (2015) (recognizing confusion among the lower courts as to the definition of public official and arguing for an expansive definition).

215. *Cowles Publ’g v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988); *State Org. of Police Officers (SHOPO) v. Soc’y of Prof’l Journalists-Univ. of Haw.* Chapter, 927 P.2d 386, 398–99 (1996).

216. *Cowles Publ’g*, 748 P.2d at 605; *SHOPO*, 927 P.2d at 398–99.

217. 5 *ILL. COMP. STAT.* 140/7 (2018).

not be considered an invasion of personal privacy.”²¹⁸ In contrast, a number of states exempt the personnel records of all public officials or employees from their open records act.²¹⁹ The Electronic Communications Privacy Act prevents federal government agencies from disclosing certain records about their employees, including but not limited to “education, financial transactions, medical history, and criminal or employment history,” if a name or other identifying characteristic is attached.²²⁰ The Act does contain a number of exceptions permitting disclosure in specific circumstances, including by court order or for law enforcement activities.²²¹

iii. Comparison to similar records of other actors

The analysis of whether police officers have legally cognizable rights to privacy in their misconduct records would not be complete without considering what privacy is afforded to comparable records of other employees. Due in large part to the power of police unions and their collective bargaining agreements, police officers enjoy many procedural protections during misconduct investigations that other public employees do not.²²² Common examples of these protections include the opportunity for a waiting period between a misconduct complaint and subsequent investigation, laws precluding outside review agencies from conducting the investigation (instead limiting the investigation to internal affairs units), and laws that mandate the destruction of police misconduct records after a period of years.²²³

To the specific question of whether personnel records can be disclosed, however, most states do not distinguish between police officers and other public employees. Of the roughly thirty-eight states that exempt some or all misconduct records from public disclosure, nearly all apply that exemption generally to public

218. 5 ILL. COMP. STAT. 140/7(c) (2018). Illinois also exempts from disclosure records possessed by law enforcement and created for “law enforcement purposes,” but only to the extent that disclosure would interfere with law enforcement proceedings, endanger the life or safety of a law enforcement officer, or other exceptions not related to privacy. *See id.* at (d); *see also* Fraternal Order of Police, Lodge No. 7 v. City of Chicago, 2016 IL App (1st) 143884, ¶¶ 1, 36, 40 (concluding that records regarding civilian complaints of police misconduct are not exempt from disclosure under the State FOIA law).

219. IDAHO CODE § 106(1) (2018); IOWA CODE § 22.7(11) (2018); S.D. CODIFIED LAWS § 1-27-1.5(7) (2019); *see also infra* notes 25-26.

220. 5 U.S.C. § 552a(a)(4), (b) (2016).

221. 5 U.S.C. § 552a(b).

222. Fisk & Richardson, *supra* note 14, at 718 (2017) (police officers receive “significantly more procedural and substantive protections against discipline” than many other employees); Keenan & Walker, *supra* note 14, at 185 (noting that U.S. police officers, mostly through the work of their unions, have achieved “a special layer of employee due process protections when faced with investigations for official misconduct”); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) (discussing the special protections police officers receive when suspects in criminal cases); Rushin, *supra* note 40, at 1194–98, 1208–09 (explaining that law enforcement officer bills of rights “provide police officers with due process protections during disciplinary investigations that are not given to other classes of public employees”); *id.* at 1208–09, 1222, 1229–31, 1236–37, and cites therein (detailing the various procedural protections police officers receive that most other civilians do not).

223. *See, e.g.,* Rushin, *supra* note 40, at 1194–98, 1209–11, and sources therein (discussing many of these protections); Keenan & Walker, *supra* note 14, at 185.

employees, rather than specifically to law enforcement officers.²²⁴ Only three states—California, Delaware, and New York—have confidentiality laws that specifically single out police personnel records for greater disclosure protections,²²⁵ and even California now permits disclosure of certain police misconduct records.²²⁶ It is important to note, however, that personnel records are often defined more broadly than misconduct records. While personnel records may contain personal and financial information that fits more neatly within traditional conceptions of privacy rights, misconduct records are a subset of records that specifically involve allegations or findings of inappropriate conduct.²²⁷ The states that exempt all personnel records from public disclosure generally do not distinguish between misconduct records and other categories of personnel records.

Among states that do provide special protection for records involving law enforcement, the differences in what the public can learn about police officers versus other public employees is stark. One example is the termination of a New York State Department of Transportation employee.²²⁸ To explain the basis for termination, an aide to the governor publicly explained that the employee was fired for, among other concerns, “internet misuse, email misuse, department vehicle misuse, blackberry misuse, [and] conflict of interest.”²²⁹ Had that employee been a police officer with a history of excessive force complaints, in contrast, the public would have had no right to know, and the police department could not have revealed this information.²³⁰

B. Balancing police officers’ privacy rights against other interests

As discussed in Part III.A., privacy law and theory does not support a constitutional right to privacy in most police misconduct records. But some misconduct records likely do implicate the kinds intimate and personal issues generally deemed private, like the examples of officer substance abuse or domestic

224. Lewis et al., *supra* note 2; *see also, e.g.*, IDAHO CODE § 106(1) (2018) (exempting personnel records from public records law); KAN. STAT. ANN. § 45-221(a)(4) (2018) (exempting personnel records from public disclosure); S.D. CODIFIED LAWS § 1-27-1.5(7) (prohibiting disclosure to the public of personnel records other than “salaries and routine directory information”); *supra* notes 2, 25-26, 28.

225. CAL. PENAL CODE §§ 832.7, .8 (2019); DEL. CODE ANN. tit. 11, § 9200(d) (2018); N.Y. CIV. RIGHTS LAW § 50-a; Dillon, *supra* note 18.

226. CAL. PENAL CODE §§ 832.7, .8 (amended statute effective Jan. 1, 2019).

227. For example, Minnesota’s definition of personnel records includes salary, wage, and compensation information, time spent on leave, authorizations for deduction or withholding of pay, and benefit information. MINN. STAT. § 181.960, subd. 4. The Americans with Disabilities Act requires employers to maintain medical examination data in separate files. 42 U.S.C. § 12112(d) (2009); 29 C.F.R. § 1630.14 (2019); *see also* U.S. EQUAL EMP. COMM’N, TECHNICAL ASSISTANCE MANUAL FOR THE AMERICAN WITH DISABILITIES ACT § 6.5 (1992) (stating that employers should not include medical information in personnel files).

228. *See* Robert Lewis et al., *supra* note 2.

229. *Id.*

230. *See* N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2014); *In re* N.Y. Civil Liberties Union v. N.Y. City Police Dep’t., No. 133, slip op. 08423 (N.Y. Dec. 11, 2018), <https://www.nycourts.gov/capps/Decisions/2018/Dec18/133opn18-Decision.pdf> [<https://perma.cc/6QFH-PP3D>].

disputes used above. Where records do implicate a privacy right, the subsequent analysis of how to balance officers' privacy rights against other relevant interests is crucial.

When the law recognizes a right to privacy, that right is not absolute.²³¹ Most courts recognizing a privacy right in information then go on to apply a balancing test, assessing whether the privacy right outweighs (or is outweighed by) a governmental or public interest.²³² Other courts invoke a test more akin to strict scrutiny, asking whether the privacy right is overridden by a compelling governmental interest.²³³ Under either standard, the relevant question is what other interests may outweigh the police officers' rights to privacy. Part III.B. raises five interests that should factor into this balancing test: (1) the governmental interest in ensuring accountability of employees in positions of trust; (2) the right of the public to protect itself from abusive officers; (3) the interest in protecting privacy rights of civilians; (4) the governmental interest in effective decision-making regarding public employees; and (5) in the context of litigation, the right of defendants to access exculpatory information.

i. Interest in enhancing public trust in law enforcement

Our nation's police departments have a serious trust problem. Lawyers and scholars agree that trust between police departments and the communities they are created to serve is "essential" to the stability and safety of the community.²³⁴ Mistrust of the police undermines the legitimacy of both law enforcement and the

231. *See In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999).

232. *Id.* at 959 (the right to informational privacy "is a conditional right which may be infringed upon a showing of proper governmental interest."); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1987) (disclosure of private information "may be required if the government interest in disclosure outweighs the individual's privacy interest."); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (noting that most courts apply "some form of intermediate scrutiny or balancing approach" when analyzing informational privacy rights); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577–78 (3d Cir. 1980) (concluding that employees have a privacy interest in their medical records, but that such right is "not absolute," and "even material which is subject to protection must be produced or disclosed upon a showing of proper governmental interest").

233. *See, e.g., Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) ("[I]f the information is protected by a person's right to privacy, then the [entity seeking the information] has the burden to prove that a compelling governmental interest in disclosure outweighs the individual's privacy interest."); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 436 (10th Cir. 1981) ("Assuming that the police officers have a legitimate expectation of privacy [in personnel files], the right may be overridden by a compelling state interest."); *Martinelli v. Dist. Court of Denver*, 612 P.2d 1083, 1091 (Colo. 1980) (adopting a three-part test when party invokes right to informational privacy: "(1) does the party seeking to come within the protection of right to confidentiality have a legitimate expectation that the materials or information will not be disclosed? (2) is disclosure nonetheless required to serve a compelling state interest? (3) if so, will the necessary disclosure occur in that manner which is least intrusive with respect to the right to confidentiality?").

234. U.S. DEP'T OF JUSTICE, PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 1 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/69E2-44F4>].

rule of law more generally.²³⁵ There is a strong correlation between trusting the police and willingness to obey or assist the police, such that communities with high trust of police may even be safer because of that trust.²³⁶

Such trust is deservedly absent in many neighborhoods and cities across the United States. Communities of color in particular often feel estranged from the police, in part because the police seem to have virtually unlimited authority without corresponding accountability.²³⁷ Gallup polls conducted biannually between 1985 and 2017 show that, over the past thirty years, consistently less than one-half of people of color surveyed nationwide express confidence that the police will serve and protect them, and many believe that the police are willing to use excessive force on them.²³⁸ Unchecked misconduct alienates those the police should serve and creates a fertile breeding ground for officers to abuse their positions of trust.²³⁹

A particularly vivid example of unchecked misconduct is the Chicago Police Department's response to the murder of Laquan McDonald by officer Jason Van Dyke, referenced in Part I.²⁴⁰ After Van Dyke fired sixteen shots at McDonald, five fellow police officers at the scene of the shooting filed reports claiming that McDonald was aggressively moving toward the officers when Van Dyke shot him.²⁴¹ Although squad car footage of the shooting contradicted these accounts, the City of Chicago refused to release the footage for more than a year after McDonald's murder, until it was finally court-ordered to do so.²⁴² One of the journalists at the center of the effort to obtain the video described the horror of the murder itself as "compounded by the institutional response to it—by the knowledge that the city

235. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1119 (2000).

236. See, e.g., Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1119 (2000); Stoughton, *supra* note 40, at 2188–90; Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 514 (2003).

237. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017), <https://www.yalelawjournal.org/essay/police-reform-and-the-dismantling-of-legal-estrangement> [https://perma.cc/489Z-UEJF].

238. Jens Manuel Krogstad, *Latino Confidence in Local Police Lower Than Among Whites*, PEW RES. CTR. (Aug. 28, 2014), <http://www.pewresearch.org/fact-tank/2014/08/28/latino-confidence-in-local-police-lower-than-among-whites> [https://perma.cc/PPN4-26R6]; Justin McCarthy, *Nonwhites Less Likely to Feel Police and Serve Them*, GALLUP (Nov. 17, 2014), <http://www.gallup.com/poll/179468/nonwhites-less-likely-feel-police-protect-serve.aspx> [https://perma.cc/AP9R-P3BL]; Jim Norman, *Confidence in Police Back at Historical Average*, GALLUP (July 10, 2017), <https://news.gallup.com/poll/213869/confidence-police-back-historical-average.aspx> [https://perma.cc/EZ9Z-9L3H].

239. Moran, *supra* note 47, at 843.

240. See Guarino & Berman, *supra* note 48.

241. Monica Davey, *Officers' Statements Differ from Video in Death of Laquan McDonald*, N.Y. TIMES (Dec. 5, 2015), http://www.nytimes.com/2015/12/06/us/officers-statements-differ-from-video-in-death-of-laquan-mcdonald.html?ribbonad-idx=4&rref=world&_r=0&module=ArrowsNav&contentCollection=U.S.&action=swipe®ion=FixedRight&pgtype=article [https://perma.cc/8YG3-BKMU].

242. See Jason Meisner & Jeremy Gomer, *Chicago Forgoes Appeal After Judge Orders Release of Video of Fatal Police Shooting*, CHI. TRIB. (Nov. 20, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-judge-orders-release-of-video-showing-fatal-shooting-by-police-officer-20151119-story.html> [https://perma.cc/A9YM-6HLU].

knew what happened and withheld that information from the public for over a year, while maintaining a patently false official account of the shooting.”²⁴³

Passively permitting and hiding wrongdoing is all too common in many police departments around the country,²⁴⁴ and laws preventing disclosure of police misconduct records “affect[] significantly the degree to which the political process can be used to hold the police accountable for their actions.”²⁴⁵ When access to records regarding police misconduct is limited to internal affairs units—which in many police departments are staffed by the friends and coworkers of the accused officers²⁴⁶—departments have no external incentive to ensure that officers who engage in misconduct are held accountable.²⁴⁷ Conversely, when the public cannot access either records of allegations against officers or investigations into and assessments of those allegations, it cannot fairly judge whether its accountability system is working.²⁴⁸

Preventing corruption and ensuring accountability of public servants like police officers are generally recognized as “strong public interest[s].”²⁴⁹ Although the Supreme Court has never opined specifically on the issue of whether disclosure of police misconduct records promotes the public interests in preventing corruption and ensuring accountability, it has endorsed transparency in other contexts. The constitutional right to a public trial, for example, is grounded in the ideal that public access to trials ensures transparency, promotes trustworthiness of judicial proceedings, and discourages witness perjury.²⁵⁰ As the Court observed in *Richmond Newspapers*, “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”²⁵¹ Erik Luna has argued that the same demands should be made of law enforcement and that citizens cannot be expected to trust police without “systematic visibility of policing decisions and concomitant justifications The

243. Jamie Kalven, *Chicago Faces a Defining Moment in Police Reform and Civil Order*, INTERCEPT (Aug. 15, 2018), <https://theintercept.com/2018/08/15/chicago-police-reform-rahm-emanuel-laquan-mcdonald/> [https://perma.cc/3FQC-CE8B].

244. Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 979–90 (2017); Moran, *supra* note 47, at 853–68; *see also* Ciara Cummings, *Bodycam Footage Shows Possible Police Cover Up in Orangeburg*, WRDW (Sept. 5, 2018), <http://www.wrdw.com/content/news/Local-attorney-to-address-prosecution-of-man-in-Orangeburg-492493261.html> [https://perma.cc/G3ZU-BUVB] (after falsely charging black man with assault and battery of an officer, police officers in Orangeburg, South Carolina colluded on a story and failed to disclose body camera footage proving that the man did not assault the officers, resulting in a 127-day jail stay for the man).

245. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 808 (2012).

246. Moran, *supra* note 47, at 859–61.

247. Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 135 (2016).

248. Conti-Cook, *supra* note 39.

249. *See Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 116–17 (3d Cir. 1987); *see also* *NASA v. Nelson*, 562 U.S. 134, 150–53 (2011) (recognizing the government’s “strong interest” in employing a competent workforce).

250. *See* *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980).

251. *Richmond Newspapers*, 448 U.S. at 572.

electorate should be able to observe and scrutinize the substantive and procedural policy choices of criminal law enforcement.”²⁵² Monica Bell also suggests that transparency measures in law enforcement can “contribute to the overall democratization of policing in a way that could begin to root out legal estrangement.”²⁵³

In the context of police misconduct records, an unusual alliance of journalists, activists, lawmakers, and even police chiefs and police department lawyers is beginning to coalesce around the idea that increased transparency is important in improving public trust.²⁵⁴ When a Hawaii newspaper sought records regarding Honolulu police officers who had been disciplined for on-duty misconduct, it argued that providing public access to the disciplinary records “minimizes the possibility of abuse by ensuring that police departments and officers are held accountable for their actions.”²⁵⁵ In California, the *LA Times* reported that approximately 92–98 percent of civilian complaints regarding police misconduct are rejected by internal affairs units across the state without any public explanation, and thus civilians “have no ability to evaluate the fairness of the process.”²⁵⁶ Both arguments met with some recognition from the various branches of government: in Hawaii the Supreme Court ruled that misconduct records could be disclosed if the trial court found that the public interest in accessing the records outweighed the officers’ privacy rights;²⁵⁷ and in California the legislature finally passed and the governor signed in late 2018, a bill authorizing disclosure of certain misconduct records.²⁵⁸

252. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1120 (2000); *see also id.* at 1131 (“[A]ccessibility, responsiveness, and accountability require some minimal amount of openness in state information. It is difficult to argue that government officials are accessible to the citizenry in any meaningful sense if they deny public access to the materials upon which their decisions are made.”).

253. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017), <https://www.yalelawjournal.org/essay/police-reform-and-the-dismantling-of-legal-estrangement> [<https://perma.cc/4JEG-AVNQ>].

254. *See* 2018 Cal. Legis. Serv. Ch. 988 (S.B. 1421) (effective Jan. 1, 2019); Conti-Cook, *supra* note 39; Sullivan et al., *supra* note 39; NEW YORK CITY BAR ASSOCIATION, REPORT ON LEGISLATION BY THE CIVIL RIGHTS AND THE CRIMINAL COURTS COMMITTEE 1 (May 2018), <http://s3.amazonaws.com/documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency.pdf> [<https://perma.cc/8NJC-9SY9>]; Neill Franklin, *The Video Doesn't Lie—Even If the Officer Did*, TMP (Oct. 16, 2018), https://www.themarshallproject.org/2018/10/16/the-video-doesn-t-lie-even-if-the-officer-did?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20181017-1166 [<https://perma.cc/2KFB-5JVB>] (Executive Director of the Law Enforcement Action Partnership calling for increased transparency of information pertaining to police misconduct).

255. *Peer News LLC v. City of Honolulu*, 138 Haw. 53, 74 (2016) (explaining why public interest in production of records may outweigh police privacy interest); *see also* *Cowles Publ'g v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) (Officers’ privacy considerations are “overwhelmed by public accountability” interests.).

256. *See* Queally, *supra* note 35.

257. *Peer News LLC*, 138 Haw. at 73–74.

258. S.B. 1421, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

Some police chiefs also support increased transparency of misconduct records, arguing that disclosing the names of officers accused of misconduct builds community trust.²⁵⁹ In New York, which has the strictest non-disclosure law in the country,²⁶⁰ the New York City Bar Association issued a report in 2018 concluding that the non-disclosure law improperly stymies public awareness of police misconduct and raises concern that officers are insufficiently accountable to the public.²⁶¹ Even NYPD lawyers have acknowledged that the law “does not adequately address the public interest in transparency and accountability for those in positions of public trust.”²⁶²

ii. Interest in physical protection from abusive officers

A related but distinct public interest is at play in the idea that disclosing misconduct records may make some communities physically safer by exposing abusive officers. The history of policing in the United States is replete with routinized practices of officers using unauthorized or illegal force in order to investigate crime, increase arrest numbers, and subjugate certain populations, generally people of color.²⁶³ While police violence has received significant attention in recent years, lack of access to information regarding how frequently these incidents occur and how the police department responds has made it easier for departments to paint these incidents as isolated and unavoidable, rather than troubling patterns deserving attention and reform.²⁶⁴

259. Sullivan et al., *supra* note 39 (citing several police chiefs who opposed police unions’ efforts to prevent disclosure of the names of officers involved in shootings of civilians).

260. N.Y. CIV. RIGHTS LAW § 50a (McKinney 2014).

261. NEW YORK CITY BAR ASSOCIATION, *supra* note 254.

262. Kendall Taggart & Mike Hayes, *The NYPD Is Arguing, Once Again, That Punishments for Police Misconduct Remain Secret*, BUZZFEED NEWS (Mar. 28, 2018), https://www.buzzfeed.com/kendalltaggart/nypd-officer-discipline-secrecy-misconduct-court?utm_term=.wwZyDVvkW#.bmAXZq01V [<https://perma.cc/3TUV-NQVC>].

263. Luna, *supra* note 252, at 1145; Stephen Stirling & S.P. Sullivan, *Hundreds of N.J. Cops Are Using Force at Alarming Rates. The State’s Not Tracking Them. So We Did.*, N.J.COM (Nov. 29, 2018), https://www.nj.com/news/index.ssf/2018/11/nj_police_use_of_force_punch_kick_pepper_spray_sho.html [<https://perma.cc/8PKU-7A8E>] (concluding that black people in New Jersey are three times more likely to experience a police officer using force on them than white people); U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 5, 28 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/Y3X5-RSFP>] (documenting disproportionate use of force by police against African Americans); U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE DIVISION OF POLICE 12–24 (2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [<https://perma.cc/Z4KZ-93RL>] (detailing patterns of excessive force by Cleveland police officers); U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 3-9 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [<https://perma.cc/6QZB-6P5K>] (discussing “use of unreasonable force” by New Orleans police officers).

264. Rushin, *supra* note 247, at 135.

In Chicago, where police misconduct records were routinely withheld from the public until a 2014 court order ordering their release,²⁶⁵ results from the released complaints revealed “patterns of abuse” that many argued could have been detected earlier had the complaints been publicly available.²⁶⁶ A recent empirical study tracking a full decade of civilian complaints regarding misconduct by Chicago police officers found a statistically significant correlation between police officers who received numerous complaints, and the likelihood of those same officers being involved in “serious misconduct as measured by civil rights litigation.”²⁶⁷ The study also found that Officer Van Dyke, who murdered Laquan MacDonald in 2014,²⁶⁸ fell among the worst three percent of officers in terms of complaints received before the murder.²⁶⁹

Making police misconduct records publicly available could empower civilians, journalists, and advocacy groups to identify both problematic police officers (who have, for example, received multiple or serious complaints regarding excessive force) and patterns of violence in certain police departments.²⁷⁰ In turn, this could motivate an accounting of law enforcement officials for retaining abusive officers and failing to reform departments that routinely engage in unauthorized force.²⁷¹

iii. Interest in protecting privacy rights of civilians

It may seem counterintuitive to consider the privacy rights of civilians as a factor weighing against the privacy rights of police officers. But unchecked police powers result in significant intrusions on the privacy of ordinary civilians. Policing is, in the words of former police officer-turned-professor Seth Stoughton, “uniquely invasive.”²⁷² Officers have tremendous discretionary authority regarding

265. *Kalven v. City of Chicago*, 7 N.E.3d 741 (Ill. App. Ct. 2014).

266. Jeremy Gerner & Annie Sweeney, *Cops in SOS Unit Amassed Citizen Complaints*, CHI. TRIB. (July 30, 2014), <http://www.chicagotribune.com/news/local/breaking/chi-4-chicago-cops-at-center-of-scandal-had-amassed-more-than-200-complaints-20140730-story.html> [<https://perma.cc/45EU-64N3>].

267. Rozema & Schanzenbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct*, 11 AM. ECON. J. 225, 227 (2019); *see also* Mari Cohen, *Study: Van Dyke's Complaint History Could Have Foretold Shooting of McDonald*, INJUSTICE WATCH (Sept. 5, 2018), <https://www.injusticewatch.org/news/2018/study-van-dykes-complaint-history-could-have-foretold-shooting-of-mcdonald/> [<https://perma.cc/YGW3-6Z53>].

268. Guarino & Berman, *supra* note 48.

269. Rozema & Schanzenbach, *supra* note 267, at 258.

270. Rushin, *supra* note 247, at 120–21; *id.* at 132; *see also* Michael Sisitzky & Simon McCormack, *This Law Makes It Nearly Impossible to Police the NYPD*, ACLU (Apr. 8, 2018), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/law-makes-it-nearly-impossible-police-nypd> [<https://perma.cc/967V-X42S>] (“keeping [misconduct records] hidden makes it easier for the NYPD to avoid holding its officers accountable, which can put New Yorkers’ lives in danger.”).

271. Rushin, *supra*, note 247, at 120–21; Sisitzky & McCormack, *supra* note 270.

272. Seth Stoughton, *Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2187 (2014).

who to surveil, stop, frisk, search, arrest, and even kill.²⁷³ Put another way, they have discretion over whose privacy to invade.

As with other abuses, police-initiated invasions of privacy tend to fall disproportionately on marginalized populations. Mary Ann Franks has noted that police surveillance of marginalized people “has a long and troubling history. Race, class, and gender have all helped determine who is watched in society, and the right to privacy has been unequally distributed according to the same factors.”²⁷⁴ Young black men and women are especially likely to have their privacy invaded in the form of illegal stops, frisks, and searches, and the country has generally tolerated or even sanctioned these privacy invasions in the name of preserving order.²⁷⁵

With great power should come great responsibility,²⁷⁶ and perhaps similarly great transparency. Where patrol officers’ daily decisions regarding whose privacy to invade can create such significant social cost, courts and legislators need to consider these costs in determining whether to protect the privacy of police misconduct records.²⁷⁷

iv. Interest in effective decision-making

Effective social policy and decision-making is predicated on access to information.²⁷⁸ Government officials faced with decisions about whether to retain a police chief, spend money on improving police training, or create a civilian review board to investigate complaints of officer misconduct—to name just a few tasks

273. JOHN KLEINIG, *ETHICS OF POLICING* 204 (1996); Harmon, *supra* note 245, at 762; Rushin, *supra* note 40, at 1247–48; Stoughton, *supra* note 272, at 2187.

274. Franks, *supra* note 68, at 441; *see also* Scott Skinner-Thompson, *Privacy’s Double Standards*, 93 WASH. L. REV. 2051, 2055 (2018) (“Marginalized communities are disproportionately surveilled and subject to privacy violations.”).

275. *E.g.*, Franks, *supra* note 68, at 428–30, 443; NEW YORK CIVIL LIBERTIES UNION, *STOP AND FRISK DURING THE BLOOMBERG ADMINISTRATION 2002–2013*, at 1 (Aug. 2014), https://www.nyclu.org/sites/default/files/publications/stopandfrisk_briefer_2002-2013_final.pdf [<https://perma.cc/68J2-F37P>] (detailing the disproportionately high percentages of people of color who were stopped and frisked by police); Tanvi Mishra, *Where Chicagoans Are Being Stopped and Frisked*, CITY LAB (June 8, 2018), <https://www.citylab.com/equity/2018/06/where-chicagoans-are-being-stopped-and-frisked/562160> [<https://perma.cc/PE8H-TYV9>] (data confirming that “Chicagoans of color are disproportionately affected” by stop and frisk practices).

276. The precise origins of this familiar quote are difficult to track, but the general sentiment dates back to at least the New Testament Scriptures. *See Luke* 12:48 (New International Version) (“From everyone who has been given much, much will be demanded; and from the one who has been entrusted with much, much more will be asked.”). A statement made at the French National Convention of 1793 is also sometimes attributed as the source of this quote; the English translation is “They must consider that great responsibility follows inseparably from great power.” *Collection Générale des Décrets Rendus par la Convention Nationale* 72 (Chez Baudouin, Imprimeur de la Convention Nationale. A, Paris, 1793), <https://books.google.com/books?id=D55aAAAAcAAJ&q=ins%C3%A9parable#v=snippet&q=ins%C3%A9parable&f=false> [<https://perma.cc/9FMC-N29J>].

277. Rushin, *supra* note 40, at 1247–48; *see also* Lewis et al., *supra* note 2 (quoting the executive director of New York State’s Committee on Open Government bemoaning that police officers “are the public employees who have the most power and control over people’s lives,” and yet the least public accountability due to laws protecting misconduct records from public access).

278. Kreimer, *supra* note 147, at 73.

city officials commonly confront—need information regarding how the police department is addressing allegations of officer misconduct.

Prosecutors also must have access to information about misconduct of officers they rely on for charges and convictions in criminal cases. Although California recently amended its law to permit access to certain misconduct records,²⁷⁹ the California Supreme Court is still weighing whether to permit prosecutors access to misconduct records even of officers who the prosecutors are utilizing as witnesses.²⁸⁰ In New York City, the NYPD routinely fails to notify the District Attorney's office of police officers who have disciplinary issues that could impact their credibility as witnesses.²⁸¹

Without this information, prosecutors are hampered in assessing whether the officer is a credible witness and whether a potential case should be charged or move forward to trial.²⁸² In May of 2018 the general counsel for the Manhattan District Attorney's Office drafted a letter addressing this very issue, complaining that the office's lack of access to police misconduct records "frustrate[s] our ability, not only to prepare for trial, but to make early assessments of witness credibility, explore weaknesses in a potential case, and exonerate individuals who may have been mistakenly accused."²⁸³

v. Interests specific to the context of litigation

The Tenth Circuit recognized in *Denver Policemen's Protective Association v. Lichtenstein* that the rights to "ascertainment of the truth" and a complete presentation of relevant evidence in litigation can override police officers' rights to privacy in their personnel records.²⁸⁴ This is particularly true in the context of criminal prosecutions, where the government has easy access to information about defendants' alleged misconduct, but defendants routinely are denied reciprocal access to information about officer misconduct.²⁸⁵ Criminal defendants have a constitutional right to obtain exculpatory evidence in the government's

279. S.B. 1421, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

280. See *Ass'n for L.A. Deputy Sheriffs v. Superior Court*, 13 Cal. App. 5th 413, 436-39, cert. granted, 403 P.3d 144 (Cal. 2017).

281. 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), https://www.buzzfeed.com/mikehayes/nypd-cops-lying-discipline-disrict-attorneys-prosecutors?utm_term=.rw8kqB2YP#.bi67dELMa [<https://perma.cc/8HGL-9KUB>].

282. *Id.*

283. *Id.*

284. *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 436 (10th Cir. 1981); see also Luna, *supra* note 252, at 1123 ("Rights are particularly important in criminal justice, where the full power of the state is marshaled against the individual suspect or defendant.").

285. Moran, *supra* note 3, at 1340-77; see also Levine, *supra* note 1, at 901 (making case for disclosure of police disciplinary records in specific context of criminal litigation); Slobogin, *supra* note 175, at 806-07, 815-25, 839-40 (2005) (discussing the ample means the government has to subpoena information about private citizens).

possession.²⁸⁶ While that includes the right to access evidence that could impeach the credibility of the witnesses against a defendant,²⁸⁷ in practice many states get around this constitutional requirement by imposing significant procedural barriers on defendants' ability to obtain police misconduct records.²⁸⁸

Notably, New York's and California's statutes preventing public access to police misconduct records were both designed specifically with the goal of preventing defense counsel from using a police officer's disciplinary records as impeachment in criminal cases.²⁸⁹ These statutes have almost certainly contributed to wrongful convictions of defendants who were unable to adequately contest the credibility of the officers testifying against them. An investigation by the *New York Times* found that on at least twenty-five occasions between 2015 and early 2018 alone, judges or prosecutors determined that a key aspect of an NYPD officer's testimony was probably untrue.²⁹⁰ In many cases the motive for lying was either to skirt constitutional prohibitions against unreasonable searches and seizures, or to concoct evidence that would support an otherwise unlikely conviction.²⁹¹ These cases likely represent only a small fraction of instances in which officers lied to obtain a conviction.²⁹²

IV. PRACTICAL CONCERNS REGARDING DISCLOSURE OF POLICE MISCONDUCT RECORDS

While there are many reasons to permit public access to police misconduct records, it is important to recognize the possible practical consequences of disclosure. Part IV acknowledges four speculative harms related to disclosure of police misconduct records: (1) making records publicly accessible may deter police departments from accurately recording misconduct; (2) unreliable records could unfairly damage the reputations of police officers who have not actually engaged in misconduct; (3) permitting public access to records could incentivize retaliation against officers; and (4) officers who are concerned about incurring complaints may be reluctant to police proactively.

As to the first concern, that making records publicly accessible may deter departments from reporting and recording misconduct, Kate Levine has accurately

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

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

288. See *Moran*, *supra* note 3, at 1368–77.

289. See *In re Daily Gazette Co. v. City of Schenectady*, 710 N.E.2d 1072, 1075 (N.Y. 1999) (“The statute was designed to prevent abusive exploitation of personally damaging information contained in officers’ personnel records—perhaps most often in connection with a criminal defense attorney’s . . . cross-examination of a police witness in a criminal prosecution.”); Dillon, *supra* note 18 (describing origins of California’s law restricting access to misconduct records).

290. 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?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=photo-spot-region®ion=top-news&WT.nav=top-news> [<https://perma.cc/HAD6-WTAE>].

291. *Id.*

292. *Id.*

noted that police officers are already notorious for their solidarity and reluctance to snitch on each other.²⁹³ Levine, expressing concern over the prospect of making police disciplinary records accessible to the public, writes, “Because of this solidarity, it is not hard to imagine antiaccountability consequences arising from forced transparency.”²⁹⁴

This is a legitimate concern, and perhaps no longer even speculative. As I have written in the past, police departments do indeed have a storied history of protecting and defending their own, often at the expense of fairly investigating or validating justified complaints of misconduct.²⁹⁵ Just recently, some California police departments, immediately prior to the enactment of California’s new bill permitting disclosure of some police misconduct records, began destroying the records altogether.²⁹⁶ But kowtowing to the bullying of police departments is not a solution. Increasing public access to misconduct records may actually represent a step in the direction toward solving police departments’ unwillingness to discipline their own. If the public can review these records and identify patterns of police departments rejecting civilian complaints and absolving their officers—or particular officers—of responsibility for misconduct, it can begin to demand accountability from police department leadership. Without access to such data, the public cannot detect patterns in whether and how the department responds to misconduct allegations, and thus police departments may continue unabated to prioritize defending their officers over responding to civilian complaints.

A related fear is that public access laws could incentivize police departments not to record misconduct data at all, so that the public has no information to review. This too can be prevented. Some jurisdictions permit civilians to file complaints about police officers with an outside review board rather than the police department itself, so that the police department is not the only entity entrusted with review of the misconduct allegation.²⁹⁷ Advances in technology such as body-worn cameras also help ensure that possible misconduct is recorded.²⁹⁸

293. Levine, *supra* note 1, at 876.

294. *Id.*

295. Moran, *supra* note 47, at 853–68; Moran, *supra* note 244, at 972–86.

296. Liam Dillon & Maya Lau, *California Police Unions Are Preparing to Battle New Transparency Law in the Courtroom*, L.A. TIMES (Jan. 9, 2019), <https://www.latimes.com/politics/la-pol-ca-police-records-law-challenges-20190109-story.html> [<https://perma.cc/ZPQ9-P8S3>] (The police departments denied that their records purges were a response to the new law.).

297. E.g., *Online Complaint Form*, CHICAGO CIVILIAN OFFICE OF POLICE ACCOUNTABILITY, <https://www.chicagocopa.org/complaints/intake-form/> [<https://perma.cc/6U4X-PCGJ>] (last accessed Sept. 10, 2019) (example of a complaint intake process that does not require filing with the police department); see also Moran, *supra* note 47, at 893–94 (describing methods by which complaints can be handled by agencies other than the police department).

298. E.g., *Study: Police Body-Worn Cameras Reduce Reports of Misconduct, Use of Force*, UNLV NEWS CENTER (Nov. 27, 2017), <https://www.unlv.edu/news/release/study-police-body-worn-cameras-reduce-reports-misconduct-use-force> [<https://perma.cc/AKD8-L6P6>]; Amanda Ripley, *A Big Test of Police Body Cameras Defies Expectations*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/upshot/a-big-test-of-police-body-cameras-defies-expectations.html> [<https://perma.cc/LGZ7-CZ6F>] (most large police departments now use body worn cameras).

A second, related worry is that inaccurate records could cause unfair damage to the reputations and careers of police officers who have done nothing wrong.²⁹⁹ This concern is especially acute for officers of color and female officers. Police department leadership, who are most likely to be involved in disciplinary decisions, are still predominantly white and male³⁰⁰ and anecdotal evidence suggests that officers of color and female officers are more likely to be exposed to unfair and discriminatory discipline than their white male counterparts.³⁰¹

Officers who defy the norm in ways other than race or gender may also experience inequitable discipline. A police officer in Weirton, West Virginia, was fired for *not* shooting a man who was holding a gun during a domestic disturbance; while the officer explained that he believed the man was suicidal but not homicidal and thus de-escalation tactics were more appropriate than shooting, the police department terminated him a few weeks later for “failing to eliminate a threat.”³⁰² While this is a dramatic example, it does not stand alone. Police departments in Buffalo, New York, and Newark, New Jersey, have disciplined officers for attempting to deescalate situations rather than using the force to which so many officers quickly resort.³⁰³

L. Song Richardson and Catherine Fisk have acknowledged this problem, noting that for some officers, the unreliability of police records is a reason to oppose public access to these records.³⁰⁴ While inaccurate disciplinary records are a real concern, shielding them from public eye is a myopic solution. Many of the states that permit limited public access to misconduct records do so only in the context of disciplinary records—that is, situations where police officers have actually been disciplined for alleged misconduct.³⁰⁵ This Article, in contrast, focuses on the more

299. Fisk & Richardson, *supra* note 14, at 752 (acknowledging some officers believe that “public accessibility of the records will only compound the harm of the unfair discipline by stigmatizing an officer and might facilitate reprisals if the officer’s name and home address are released”).

300. *Police Officers*, DATAUSA, <https://datausa.io/profile/soc/333050/#demographics> [<https://perma.cc/4FUF-VSDE>] (collecting data showing that as of 2016 police officers in the United States were nearly 87% male and 79% white); *see also* GOVERNING, DIVERSITY ON THE FORCE: WHERE POLICE DON’T MIRROR COMMUNITIES (Sept. 2015), <http://media.navigatored.com/documents/policediversityreport.pdf> [<https://perma.cc/3KGP-U9BP>] (detailing underrepresentation of people of color on police forces nationwide).

301. *See* George Joseph, *An Inside Look at an Ohio Police Force’s Race Problem*, APPEAL (Aug. 13, 2018), <https://theappeal.org/columbus-ohio-police-department-racism-retaliation-discrimination/> [<https://perma.cc/BUF8-QRZQ>] (detailing claims of discriminatory discipline against black officers in Columbus, Ohio police department); *see also* JAMES FORMAN, LOCKING UP OUR OWN ch. 3 (detailing the struggles of black police officers attempting to integrate mostly white forces).

302. *See* Taylor Elizabeth Eldridge, *When Trying to Help Gets You Fired*, TMP (Sept. 17, 2018), https://www.themarshallproject.org/2018/09/17/when-trying-to-help-gets-you-fired?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20180918-1143 [<https://perma.cc/HM9Q-92RQ>] (Another officer on the scene did “eliminate the threat” by shooting and killing the man with the gun.).

303. *Id.*

304. Fisk & Richardson, *supra* note 14, at 752.

305. *See* IOWA CODE § 22.7(11)(a)(5) (2018) (permitting disclosure of disciplinary records resulting in discharge or demotion); N.C. GEN. STAT. § 153A-98(a)-(b) (2018) (protecting personnel

broadly defined misconduct records, which include all records pertaining to alleged misconduct regardless of whether it resulted in discipline. Making all misconduct records publicly available could help combat discrimination by allowing the public to see which populations of officers are incurring complaints, versus those actually being disciplined.³⁰⁶ In that way patterns of discrimination would be easier to detect than when limiting review to instances in which discipline was imposed.

A third concern, voiced primarily by police unions, is that permitting public access to police misconduct records may incentivize retaliation against officers. When the California legislature was considering amending its draconian law enforcement records statute, the head of a major police union in the state labeled the proposed amendment “one of the most insidious and dangerous bills we’ve seen come along in many years and maybe decades in Sacramento.”³⁰⁷ In 2016, the Virginia legislature considered a bill that would have prevented police departments or government agencies from disclosing any names of police officers, including those accused of misconduct.³⁰⁸ The president of Virginia’s Fraternal Order of Police claimed that the bill was necessary “to keep our officers safe,” arguing that “law enforcement officers have been attacked and even assassinated” because of anti-law enforcement sentiments and that disclosing even the names of police officers “puts them at risk.”³⁰⁹

The notion that disclosure of police records encourages or enables retaliation by the public against officers is, as criminology professor John Worrall has noted, based on a “total lack of data.”³¹⁰ No credible evidence exists to indicate that

files and disciplinary records from disclosure, but permitting disclosure of limited information pertaining to dismissal, suspensions, or demotions); OKLA. STAT. tit. 51, § 24A.7 (2014) (making personnel and disciplinary records confidential except to the extent they pertain to “final disciplinary action resulting in loss of pay, suspension, demotion of position, or termination”); 65 PA. CONS. STAT. § 67.708(b)(7) (2009) (exempting information pertaining to criticism, demotion, discipline, or discharge, except for the “final action of an agency that results in demotion or discharge”); VT. STAT. ANN. tit. 20, §§ 1923(d), 2409 (2018) (limiting public access to certain situations in which officers were discipline).

306. Cf. Conti-Cook, *supra* note 1, at 166 (arguing that, when police departments hide the results of misconduct investigations, “it prevents officers who have been treated unfairly from analyzing whether their penalty was disproportionately harsh. Investigations into racially biased or disproportionately punitive treatment could utilize data of reasonable or average penalties for similar misconduct”).

307. Dillon, *supra* note 18.

308. Tom Jackman, *Secret Police? Virginia Considers Bill to Withhold All Officers’ Names*, WASH. POST (Feb. 24, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/02/24/secret-police-virginia-considers-bill-to-withhold-all-officers-names/?noredirect=on> [https://perma.cc/K78B-PDYE].

309. *Id.*; see also Jason Tidd, *Should Wichita Police Name Cops Who Shoot People? Citing Death Threats, Board Says No*, WICHITA EAGLE (May 29, 2019), <https://www-1.kansas.com/news/local/crime/article228859984.html> [https://perma.cc/QD9A-C4F9].

310. Jackman, *supra* note 309 (citing Professor John Worrall stating that claims of retaliation against police officers after disclosure of misconduct records are based on “a total lack of data”).

providing access to misconduct records statistically increases the likelihood of physical harm to officers, and thus this concern should hold little weight.³¹¹

Lastly, police officers have in recent years repeatedly expressed concern that external oversight of police officers, which includes public access to misconduct records, will make officers reluctant to police “proactively.”³¹² As an attorney for a California police union argued, “Knowing internal investigations will be disclosed . . . could lead some officers to hesitate during violent confrontations, endangering their lives.”³¹³

Given the deeply concerning numbers of people who have been killed in recent years by officers who were quick to pull the trigger in what they erroneously perceived to be a threatening situation, a moment of hesitation before engaging in a violent confrontation may be a positive development.³¹⁴ But even if one were to accept uncritically the argument that effective policing requires officers to act without hesitation, there is again no evidence to support the argument that public access to police misconduct records has any impact on daily police interactions or the effectiveness of patrol officers. Without additional (or any) evidence to support this argument, it is not a persuasive counterweight to the public interests in favor of disclosure.

311. Professor Jordan Woods has written that the inherent dangerousness of policing is routinely overstated, and that statistically policing is not a dangerous job as compared to many others. See Jordan Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635 (2019). Even if one were to assume that policing is a dangerous job, however, there is no data to indicate that disclosure of misconduct records enhances that danger.

312. See Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 724–26, 731, 736–37 (2017) (citing numerous sources and studies for notion that police officers believe that increased external regulation of police makes them hesitant to engage in proactive policing); Wesley Lowery, *FBI Chief Again Says Ferguson Having Chilling Effect on Law Enforcement*, WASH. POST (Oct. 26, 2015), https://www.washingtonpost.com/politics/fbi-chief-again-says-ferguson-having-chilling-effect-on-law-enforcement/2015/10/26/c51011d4-7c2c-11e5-afce-2afd1d3eb896_story.html [<https://perma.cc/Q2QC-HKVV>].

313. Dillon, *supra* note 18.

314. See, e.g., Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (June 21, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/?utm_term=.93df9928beb8 [<https://perma.cc/VRY5-RNJ7>]; Max Blau et al., *Tulsa Police Shooting Investigated by Justice Department*, CNN (May 18, 2017), <https://www.cnn.com/2016/09/20/us/oklahoma-tulsa-police-shooting/index.html> [<https://perma.cc/C3CK-UL2R>]; Anita Chabria et al., *‘There Is No Justice Yet.’ Six Months After Stephon Clark, Sacramento Still Seeks Answers*, SACRAMENTO BEE (Sept. 16, 2018), <https://www.sacbee.com/news/local/crime/article217806175.html> [<https://web.archive.org/web/20190707080305/https://www.sacbee.com/news/local/crime/article217806175.html>]; Faith Karimi & Emanuella Grinberg, *Texas Ex-Officer Is Sentenced to 15 years for Killing an Unarmed Teen*, CNN (Aug. 30, 2018), <https://www.cnn.com/2018/08/29/us/texas-jordan-edwards-death-sentencing-phase/index.html> [<https://perma.cc/GE8H-YDB6>].

CONCLUSION

This Article examines the question that others have failed to ask: whether privacy doctrine supports officers' claims of a right to privacy in their misconduct records. Although it may in limited circumstances, such as misconduct records containing medical or mental health information or involving instances of off-duty conduct that have no bearing on the officer's fitness for his or her job, this Article ultimately concludes that privacy is overused as a justification for denying public access to misconduct records.

Why, then, has privacy so long served as a legal basis for protecting misconduct records from disclosure? One implication, arising from Professor Solove's explanation of privacy, is that privacy serves as "an issue of power; it is not simply the general expectations of society, but the product of a vision of the larger social structure."³¹⁵ This idea of privacy as a "vision of the larger social structure" may help explain why society has deferred for so many years to police officers' assertions of a right to privacy in their misconduct records, with very little interrogation of whether privacy doctrine supports that right. The American social structure—and the legal system as a manifestation of that structure—is extraordinarily deferential to police officers, oftentimes at the expense of careful legal analysis or application.³¹⁶ It is time to rethink that deference.

315. Solove, *supra* note 68, at 1142.

316. Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017); Moran, *supra* note 244, at 961–83.