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Reevaluating California's Pitchess Process In Light of the Police Officer Misconduct Problem

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REEVALUATING CALIFORNIA’ S \textit{PITCHESS} PROCESS
IN LIGHT OF THE POLICE OFFICER MISCONDUCT PROBLEM

JAIME A. LUBBOCK
INTRODUCTION AND SUMMARY

The California Supreme Court's decision in *Pitchess v. Superior Court*, allowing defendants access to police officer employment files under certain specific circumstances, was intended to strike a balance between a criminal defendant’s right to a fair trial and a legitimate interest in maintaining the confidentiality of police officer employment files.\(^1\) The statutory reaction to the *Pitchess* decision and subsequent court rulings have tipped this balance in favor of officer privacy, sacrificing not only the individual fair trial right, but foregoing a valuable tool in the exposure and deterrence of officer misconduct. The relevant statutes within California’s penal and evidence codes safeguard police officers from the "fishing expeditions" into their employment files allegedly authorized by the *Pitchess* decision. In practice, however, the *Pitchess* process goes well beyond stopping “fishing expeditions” and ultimately shields police officers engaged in ongoing acts of misconduct from public scrutiny. Two aspects of the *Pitchess* process in particular appear to exist for the sole purpose of providing additional, unnecessary barriers to officer employment files. First, California Evidence Code section 1045 holds that a judge "shall" exclude from discovery any citizen complaint of police officer misconduct older than five years, regardless of the relevance of that complaint.\(^2\) This aspect of the statute also serves as authorization for the systematic destruction of complaints older than five years, making it rare that a judge will even see such a complaint when reviewing an officer's file.\(^3\) Second, the statutes and subsequent case law provide virtually no reviewable rules for determining which records are discoverable. The custodian of the employment files is required to bring in only those records likely to be relevant, without satisfying any guidelines for

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\(^1\) *Pitchess v. Superior Court*, 522 P.2d 305 (Cal. 1974).


\(^3\) *Los Angeles v. Superior Court (Brandon)*, 52 P.3d 129, 135 (Cal. 2002).
determining that relevance.\(^4\) Furthermore, during an *in camera* review of the file, the judge must follow strict exclusionary rules but is provided with no statutory criteria for inclusion beyond basic relevance.\(^5\)

In the name of protecting good officers from undue harassment and exposure of their employment records, the *Pitchess* process provides an unnecessary and inappropriate shield for officers who have a history of misconduct. Part I of this paper begins with a review of the development of the *Pitchess* process from the original decision to its current statutory form and judicial interpretations. This Section concludes with an evaluation of the interests being served by the process in its current application. Section II provides an analysis of the prevalence and forms of police officer misconduct within the United States in order to help clarify the problem that the *Pitchess* process could be developed to address. Finally, in Section III, I consider the two aspects of the *Pitchess* process that I argue serve no purpose beyond a bald protection of officers from scrutiny. Addressing both California Evidence Code section 1045 and the lack of reviewable rules for determining record discoverability, I provide specific recommendations for changes that would not only establish greater balance between the fair trial right of a defendant and the privacy right of an officer, but would also make the *Pitchess* process a more effective tool in addressing officer misconduct.

In a society where police misconduct is an ongoing problem, the *Pitchess* process should be viewed not as an assault on officer privacy, but as an additional opportunity to address officer misconduct. By redrawing the statute to eliminate those aspects which do not serve the legitimate protection of officers from “fishing expeditions,” the *Pitchess* process will cease to be a shield for officers with a history of misconduct. While still protecting the legitimate privacy interest in

\(^4\) *People v. Mooc*, 36 P.3d 21, 30 (Cal. 2001).
officer employment files, the *Pitchess* process could be used to bring those officers with career histories of misconduct into the public view through impeachment on the witness stand and jury assessment of credibility. Finally, by changing the statute to tie the release of misconduct information to the continuation of the officer’s misconduct over time, the *Pitchess* process could act as an incentive for officer discipline and reform. In this way, the *Pitchess* process can reflect neither our worst fears about officer behavior nor our unrealistic ideals, but rather effectively serve our actual needs.

I. THE CURRENT *PITCHESS* PROCESS

A. The Case

In 1974, the California Supreme Court decided *Pitchess v. Superior Court*.6 In *Pitchess*, Cesar Echeveria sought documents relating to investigations against several deputy sheriffs, being conducted in response to citizen complaints of officer misconduct by those deputies.7 Echeveria was a defendant facing several charges of battery against four deputy sheriffs and intended to assert self-defense at trial.8 The documents included information about other instances where the deputy sheriffs allegedly used excessive force and the trial court ordered the documents produced.9 The Sheriff refused production and ultimately sought a mandate by the California Supreme Court to compel the superior court to quash the subpoena duces tecum for production.10

According to the court “the right of an accused to seek discovery in the course of preparing his defense to a criminal prosecution is a judicially created doctrine evolving in the

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6 522 P.2d 305 (Cal. 1974).
7 *Id.* at 307.
8 *Id.*
9 *Id.*
10 *Id.*
absence of guiding legislation.”\textsuperscript{11} The power to order discovery rests with the trial court which is charged to act in the interest of justice.\textsuperscript{12} The court went on to say that “Allowing an accused the right to discovery is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.”\textsuperscript{13} In other words, justice demands that a defendant have access to information supporting his defense, even if that information belongs to the state. The court’s position in \textit{Pitchess} was not novel. In 1963 the United States Supreme Court held that the prosecution has a duty to disclose any evidence that is “favorable to the accused” and “material” to guilt or punishment.\textsuperscript{14} In \textit{Brady v. Maryland} the Supreme Court recognized that “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”\textsuperscript{15} The California Supreme Court’s decision in \textit{Pitchess}, though providing a broader right of access than \textit{Brady}, rests squarely on the same belief in the necessity of fair criminal trials for both a defendant and society at large.

In light of strong support for the defendant’s right to a fair trial, the court next considered the need of the particular discovery Eschevaria requested – the citizens’ complaints within each deputy’s employment file. In addressing Echeveria’s need for the documents, the court accepted that evidence of a deputy sheriff’s “tendency to violence” was “unquestionably relevant and admissible under Evidence Code section 1130” in support of a self-defense argument.\textsuperscript{16} It further found that discovery is warranted where a defendant cannot easily obtain the desired information on his or her own.\textsuperscript{17} Finally, the court noted that the specificity of the affidavits in

\begin{itemize}
  \item \textsuperscript{11} \textit{Id.} at 308 (citing \textit{Ballard v. Superior Court}, 64 Cal. 2d 159, 176 n.12 (Cal. 1966)).
  \item \textsuperscript{12} \textit{Id.} (citations omitted).
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Brady v. Maryland}, 373 U.S. 83, 86-87 (1963).
  \item \textsuperscript{15} \textit{Id.} at 87
  \item \textsuperscript{16} \textit{Pitchess}, 522 P.2d at 309.
  \item \textsuperscript{17} \textit{Id.}
\end{itemize}
support of the discovery request “preclude[d] the possibility that defendant is engaging in a ‘fishing expedition.’”\textsuperscript{18} Relevance, unavailability of the information through other means, and specificity of the request together established good cause to grant Escheveria’s discovery request.

Undeniably, the \textit{Pitchess} holding was concerned with the fair trial right of a defendant. It was unconscionable in the view of the court to bring an individual to trial and then deny access to information which would be relevant to their defense. This is not to say that the \textit{Pitchess} court was ignorant of the possibility that some defendants would abuse this right by “fishing” for embarrassing or unflattering information on officers which would ultimately not support a valid defense.\textsuperscript{19} Rather, the court found that the specificity of the affidavit in support of discovery, detailing the defense strategy and relevance of the information expected to be found in the officer’s file, was a sufficient protection of the officer’s interest.\textsuperscript{20} In this manner, the \textit{Pitchess} court decidedly struck the balance between a defendant’s right to a fair trial and the confidentiality of police officer employment files.

\textbf{B. The Statutes}

In reaction to \textit{Pitchess v. Superior Court} and the noted “absence of guiding legislation” for discovery of officer-related documents, the California Legislature in 1978 enacted a series of applicable statutes.\textsuperscript{21} The history of this legislation suggests that the statutes are not simply a codification of the court’s holding in \textit{Pitchess}, but actually an attempt to provide limits to access to officer’s files which the Legislature felt were lacking in the \textit{Pitchess} holding itself.\textsuperscript{22} The California Supreme Court in \textit{Santa Cruz v. Municipal Court (Kennedy)}, found that the \textit{Pitchess}
process created by the Legislature “not only reaffirmed but expanded” the principles of *Pitchess.* However, Judge Panelli of the dissent points out that the legislative history is equally supportive of the notion that the statutory *Pitchess* process was intended to be a “significant restriction on defendants’ access to police personnel files.” The following is a summary of the statutory *Pitchess* process.

California Penal Code section 832.7 states that “Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code.” Therefore, the starting point in the *Pitchess* process is that an officer’s records are confidential.

Where a defendant wants to develop, as part of a defense strategy, allegations of officer misconduct, he or she may seek the documents within an officer’s employment file which illustrate a history of similar misconduct. The information from these documents can be used on cross examination of the officer or even to locate witnesses who may impeach the officer’s credibility by testifying themselves about past incidences of the officer’s misconduct. California Evidence Code section 1043 lays out the steps an individual must take in seeking discovery of the confidential files. The party seeking discovery must file a written motion which includes the following:

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23 776 P.2d 222, 227 (Cal. 1989) (internal citation omitted).
24 Id. at 236 (Panelli, J. dissenting).
26 Pitchess, 522 P.2d at 308 (citing Ballard v. Superior Court, 64 Cal. 2d 159, 176 n.12 (Cal. 1966)).
27 Id.
28 Unless otherwise indicated, references to statutory sections are references to the California Evidence Code.
Identification of the proceeding, the parties (including the officer whose records are being sought and the agency maintaining the records) and the time and place for a hearing on the discovery motion;\(^{29}\)

“A description of the type of records or information sought;”\(^{30}\)

Affidavits establishing “good cause” for the release of the information or documents and “setting forth the materiality thereof to the subject matter” of the proceeding.\(^{31}\)

Section 1046 of the California Evidence Code adds that in any case where there are allegations of excessive force by the police officer, the party moving for discovery must include a copy of the police report for the incident in which the alleged actions occurred.\(^{32}\)

Once the paperwork is filled with the court, a hearing is held to determine if the moving party has established the necessary good cause for discovery of the records.\(^{33}\) Even where good cause is found, however, the records are not automatically turned over to the movant.\(^{34}\)

Following a showing of good cause, the trial court must review in camera the files in question for their relevance to the case at hand.\(^{35}\) The legislature specifically addressed judicial standards for review of officer files where a party seeks records of complaints against an officer. Under California Evidence Code section 1045, a judge must review the discovery sought in chambers and shall exclude from discovery the following:

- “complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation” at issue;\(^{36}\)

- “In any criminal proceeding the conclusions of any officer investigation a complaint filed” against the officer;\(^{37}\)


\(^{31}\) Cal. Evid. Code § 1043(b)(3)

\(^{32}\) Cal. Evid. Code § 1046

\(^{33}\) Cal. Evid. Code § 1043

\(^{34}\) Cal. Evid. Code § 1045

\(^{35}\) Id.


“Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.”

The resulting discovery received by a defendant includes only those documents which the trial judge has found to be relevant and not in violation of section 1045.

C. Subsequent Development of the Law

Following the enactment of the statutory Pitchess process, the California Supreme Court and courts of appeal have decided a number of cases which add further content to the requirements for gaining access to police officer employment files.

1. Mechanics of the Process

Section 1043(b) does not require that the affidavit establishing good cause be based on personal knowledge. A counsel’s declaration where the allegations of officer misconduct are made on “information and belief” is sufficient to establish good cause for release of the files. The statute contains no personal knowledge requirement. As a result, counsel for an individual can file an affidavit on information and belief that a certain incident took place and that officers engaged in some form of misconduct during the incident, simply based on the client interviews. Additionally, the court rejected the requirement that under section 1043 a movant must know of and ask for specific documents within an officer’s file. The statute itself demands only a description of the “type of records or information sought.” In light of the fact that the city attorney “is not an entirely neutral third party” a defendant may be allowed to file his affidavit under seal. Further, where such occurs the trial court may release a redacted version of the

39 Santa Cruz v. Municipal Court (Kennedy), 776 P.2d 222, 229 (Cal. 1989).
40 Id. at 225.
41 Id. at 230.
42 Id. at 229.
43 Id. at 232.
45 Garcia v. Superior Court, 63 Cal. Rptr.3d 948, 958 (Cal. 2007).
affidavit to the city attorney and is not required to release the complete affidavit with only a protective order.46

Following a successful showing of good cause for discovery, the city attorney must produce documents to the trial court for an in camera review on relevance.47 It is not necessary for the custodian of the files to provide the court with the entire personnel file for which good cause was established.48 Rather, the custodian may do an initial review of the file and bring only potentially relevant documents to the trial court.49

2. What Constitutes “good cause”? A party seeking discovery through the Pitchess process must establish good cause by showing both the materiality of the documents requested to the case at bar and a reasonable belief that the information sought is held by the agency from which it is being requested.50 In Santa Cruz v. Municipal Court (Kennedy), the California Supreme Court found the particular affidavit in the case established good cause because “counsel’s averments establish a plausible factual foundation for an allegation of excessive force, put the court on notice that the officers’ alleged use of excessive force will likely be an issue at trial, and articulate a valid theory as to how the information sought might be admissible.”51 In Warrick v. Superior Court the court clarified the materiality requirement (resolving a division at the appellate level52) by stating that in order to establish good cause “a defendant need only demonstrate that the scenario of alleged

46 Id. (expressly overruling Los Angeles v. Superior Court (Davenport), 116 Cal. Rptr. 2d 807, 813 (Cal. Ct. App. 2002) to the extent that it held that an affidavit in support of a Pitchess motion filed under seal could be released to the city attorney under a protective order alone).
48 People v. Mooc, 36 P.3d 21, 30 (Cal. 2001).
49 Id.
50 Warrick v. Superior Court, 112 P.3d 2, 7 (Cal. 2005).
51 776 P.2d 222, 229 (Cal. 1989).
52 According to the court, some California Courts of Appeal assessed good cause “under a two-part test requiring a ‘specific factual scenario’ that establishes a ‘plausible factual foundation.’” Warrick, 112 P.3d at 7-8. Other Courts of Appeal have focused on a factual showing that the information is material to the case or that the officer’s credibility is material. Id at 8.
officer misconduct could or might have occurred.”53 The affidavit need not present a motive for the officer’s alleged misconduct.54 In sum, when the following materiality inquiry is satisfied, good cause for discovery has been established:

Has the defense show a logical connection between the charges and the proposed defense? Is the defense request for Pitchess discovery factually specific and tailored to support its claim of officer misconduct? Will the requested Pitchess discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial?55

A more rigorous standard of materiality at the discovery stage such as “credibility or persuasiveness” has been found to be “inconsistent” both with the statutory language and prior court decisions.56

3. What Information is Released and What can be Done with it?

Section 1045(a) of the California Evidence code allows for a broad understanding of relevance when the trial court conducts the in camera review. “Relevant information under section 1045 is not limited to facts that may be admissible at trial, but may include facts that could lead to the discovery of admissible evidence.”57 That said, following a showing of good cause for discovery and an in camera review for relevant documents, the trial court traditionally only releases the names, addresses and telephone numbers of those individuals who filed relevant complaints against the officer.58 They do not release copies of the complaints themselves. As noted in Haggerty v. Superior Court, “This judicially created rule seeks to ensure a defendant will not rely solely on prosecution investigation efforts and imposes a further safeguard to protect officer privacy where the relevance of the information sought is minimal and the officer's

53 Id. at 5.
54 Id. at 12.
55 Id. at 13.
56 Id.
58 29 Cal. Rptr. 3d at 475.
privacy concerns are substantial. A defendant, then, will have to find the individual complainants, based on possibly inaccurate contact information, to learn the details behind each individual conduct complaint.

In 2003 the California Supreme Court addressed confusion concerning language in section 1045 which directs that the trial court “shall…order that the records disclosed or discovered many not be used for any purpose other than a court proceeding pursuant to applicable law.” The court affirmed the appellate court’s decision that the legislative history of the 1982 addition of section 1045(e) and its position as part of a legislative scheme balancing the competing interests of officer and defendant, indicated that information disclosed through the Pitchess process could only be used in the specific case for which it was requested. However, information derived from the Pitchess discovery in one case (such as declarations by the complainant or other witnesses to the officer’s misconduct) can be used to the benefit of another case where the same Pitchess discovery is provided in the second case. The Chambers ruling opens the door to a new level of information sharing and tracking and recognizes the difference between the information released through the Pitchess process – names, addresses and phone numbers – which must be obtained on a case by case basis, and the more substantive information derived from such, through a defense investigation.

D. The Balance of Interests in the Pitchess Process

The court in Pitchess v. Superior Court was concerned with the confidentiality of officer employment files, but found that a defendant’s right to a fair trial and an intelligent defense was

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59 Id.
62 Chambers v. Appellate Division of the Superior Court of San Diego County, 68 Cal. Rptr.3d 43, 47-48 (Cal. 2007).
sufficiently important to justify certain limited access to those files. In doing so, the court implicitly recognized a distinction between a legitimate interest in limiting access to police employment files to only relevant situations and an illegitimate interest in protecting a record of misconduct from public scrutiny. The current *Pitchess* process fails to make this distinction and so inappropriately serves both the legitimate and illegitimate confidentiality interests. The result is a process that inadequately protects the right of a defendant to a fair trial while also ensuring that systematic officer misconduct remains unexposed when an officer takes the stand.

Maintaining confidentiality of officers’ employment records can encourage both citizens and other officers to report misconduct accurately. Additionally, maintaining confidentiality may allow an officer with a single incident on his record to be more effectively counseled towards proper behavior. In *Behind the Shield? Law Enforcement Agencies and the Self-Critical Analysis Privilege*, Josh Jones discusses the impact of revealing documents such as officer employment files. He recognizes the impact on self-policing within a department, which the release of such files could have (a direct chilling effect), but in the context of officer misconduct cases finds the indirect chilling effect on the accuracy of reporting by other officers particularly concerning. “Fellow officers may be less critical in their evaluations if their opinions may be used against the department.” While Jones is primarily concerned with the ability to assert privilege over internal reports and investigations within officer employment files, it is not a stretch to see officers and police departments similarly chilled in their self-regulating activities if disclosure of citizen complaints is arbitrary and loose. Officers too have an interest in not having

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63 *Pitchess*, 522 P.2d at 308.
64 Self Critical analysis privilege: (1) “documents must consist of self-evaluative materials undertaken by the asserting party;” (2) “the privilege generally protects only the subjective aspects of the documents, not the underlying factual basis;” (3) “the defendant must demonstrate clearly that the factors favoring protection outweigh the policies favoring disclosure.” Josh Jones, *Behind the Shield? Law Enforcement Agencies and the Self-Critical Analysis Privilege*, 60 WASH. & LEE L. REV. 1609, 1612-14 (2003).
65 Jones, 1646.
their credibility publicly damaged for isolated, remote and unrelated mistakes. For the officer with one incident where a citizen has complained of force used many years ago, the release of that information is likely more prejudicial than probative as there is no real pattern of practice to be shown when the officer takes the stand. For these reasons, the state has a legitimate interest in ensuring that police officers’ employment files are released with caution and for appropriate reasons.

By starting with the presumption that an officer’s employment file is confidential, Penal Code section 832.5 places the burden on those wanting the file to show that a sufficiently great competing interest justifies release of the information. Under section 1043 anyone wishing to obtain files must show good cause for their release. While the California Supreme Court has noted that the good cause standard is a relatively low hurdle, it is a hurdle nonetheless and one which many defendants fail to meet. The good cause showing is a significant protection against the disruption and damage which could be potentially caused by endless fishing expeditions into the employment files. Similarly, the in camera review of the officer’s files also provides protection and is a disincentive to fishing expeditions. Finally, the adversarial process itself is a safeguard. Any witnesses put on the stand in order to illustrate an officer’s misconduct history, must themselves be sufficiently credible to withstand cross examination. These aspects of the Pitchess process each play a discernable role in filtering out frivolous or harassing attempts to expose officer employment files. In doing so, they ensure an appropriate measure of balance between the confidentiality interest and the defendant’s “fundamental” right to fully defend himself.

67 Santa Cruz v. Municipal Court (Kennedy), 776 P.2d 222, 227 (Cal. 1989).
69 Pitchess, 522 P.2d 305, 308 (Cal. 1974).
Not every aspect of the statutory *Pitchess* process, however, aids the legitimate interest in confidentiality of officer employment files. The *Pitchess* process allows as little information to be released as possible, even where limiting the release of information does not further the legitimate underlying policy goals discussed above. Mandatory exclusion of complaints older than five years under section 1045 is the most flagrant example of this problem. The sweeping discretion allowed the court and the custodian of records through the *in camera* review process also provides a protective layer to the process which in no way advances the legitimate confidentiality interest. Each of these elements of the *Pitchess* process is discussed in Section III. In addition to showing that these elements serve no legitimate purpose, I provide suggestions for re drafting the statutes to eliminate these overprotective elements while still protecting the officer’s privacy interest. However to better understand what could be gained by changing the *Pitchess* process, it is first important to consider the form and magnitude of the officer misconduct problem.

II. ADDRESSING POLICE OFFICER MISCONDUCT: HOW PERVERSIVE IS THE POLICE OFFICER MISCONDUCT PROBLEM?

There has been no shortage of media coverage for the most egregious illustrations of police officer misconduct in the last 20 years. The beating of Rodney King, the large scale corruption of the Rampart Scandal, the 2006 shooting of Sean Bell and the very recent allegedly improper shooting of a man by the officers arresting him in a San Francisco BART station are but a few examples of incidents was saw dissected and displayed in the media. While these incidents shock us and often drive the call for police department reform, they do not necessarily provide a clear picture of the officer misconduct problem. More specifically, they leave us with a conflicting sense of just how pervasive this problem is. Before discussing the potential of the
Process to help address officer misconduct, a more comprehensive assessment of the problem itself is needed.

Following the shooting of unarmed Sean Bell in New York on the eve of his wedding day, leaders in the African American community demanded that the NYPD deal with the small number of involved officers who they identified as “rogue” officers. The Rev. Calvin O. Butts III of the Abyssinian Baptist Church in Harlem commented that “There are police officers that must be dealt with. . . They are culturally ignorant and racially insensitive.” This position on the pervasiveness of the police officer misconduct problem is strikingly different from the outcry following the beating of Rodney King where riots erupted out of anger and frustration with ongoing racially motivated misconduct within the LAPD. Following the King incident, the Christopher Commission recommended department-wide reform. Rather than illustrating a change in the prevalence of officer misconduct problem over the past twenty years these two different reactions to incidences of misconduct reveals the problem to be a complicated mix of rogue officers, institutional support and police culture.

A. Rogue Officers

In 2006, the San Francisco Chronicle began a series of articles analyzing the use of force by San Francisco police officers. As part of the series, the paper obtained all of the department’s use-of-force logs (8,601 individual logs) from 1996 to 2004 and created a computer database of that information which allowed them to analyze the frequency with which individual officers

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http://www.nytimes.com/2006/12/16/nyregion/16butts.html?n=Top%2fReference%2fTimes%2fTopics%2fPeople%2fB%2fBell%2c%20Sean
71 Id.
72 *Rodney King reluctant symbol of police brutality*, March 3, 2001,
http://archives.cnn.com/2001/LAW/03/02/beating.anniversary.king.02/
73 Id.
used force during those years. An officer in San Francisco must submit a use-of-force report whenever force is used in the course of duty and “force” includes even physical restraint resulting in a claim of injury by the restrained individual. Using force, therefore, is part of the job and does not always rise to the level of misconduct. The Chronicle’s analysis found that in a police force of 2,200 officers, “100 officers were responsible for 25 percent of all the force reported over those years.” The analysis further showed that although some of these 100 officers worked in high-crime neighborhoods (where using some amount of force in the course of duty may be more likely) they still had significantly greater numbers than other officers in the same neighborhoods. The Chronicle’s research indicates that there are rogue officers who use force on the job with statistically abnormal frequency. There are, however, limits to these numbers. The numbers don’t explain why it is that the same few officers use force with such abnormal frequency, year after year, without an institutional reaction to bring them into line with the majority of officers. Additionally, the logs only reflect force used; they do not discuss other forms of misconduct including perjury.

B. Institutional Support and Police Culture

In a 2001 Symposium for the Loyola Law Review, Susan Bandes analyzed the similarities between the Rampart Scandal in Los Angeles, the Area Two Scandal in Chicago and the Abner Louima incident in New York. She asked “How and why do department-wide, citywide, even nationwide patterns of brutality become transformed into the story of systemic probity and efficiency, occasionally sullied by the aberrant behavior of a few bad cops?” In

75 Id.
77 Id.
other words, why do we insist that officer misconduct is caused by rogue officers alone? The Christopher Commission report following the Rodney King incident and the Mollen Commission report analyzing misconduct in New York City’s police department set out significant factual support for the argument that officer misconduct is not only tolerated, but actually fostered by departmental culture.\textsuperscript{79} The Chronicle’s analysis of the San Francisco Police Department is informative here as well. The data collection and analysis conducted by the Chronicle was the first such assessment of the use-of-force logs ever done in San Francisco.\textsuperscript{80} Citizen complaints may be filed and officers may be required to log any use of force, but to what result where a department fails to keep track of the information in a consistent and useful way?\textsuperscript{81}

Without monitoring, an officer with repeated uses of force or multiple citizen complaints may even be rewarded for his misconduct if his force results in a greater number of arrests and convictions (record numbers of which are certain to be closely monitored). Perhaps the most extreme example of this failed system is found in the record of former San Francisco officer Anthony Nelson. The Chronicle found that Officer Nelson logged 27 uses of force in 33 months.\textsuperscript{82} Not only was he promoted during this time, but the department also allowed him to become a field training officer; his job was to help train and guide new officers.\textsuperscript{83} Despite a record of use-of-force entries that was significantly greater than most officers, Officer Nelson


\textsuperscript{80} Susan Sward, Bill Wallace & Elizabeth Fernandez, \textit{The Use of Force: When SFPD officers resort to violence}, S.F. CHRON., February 5, 2006.

\textsuperscript{81} In February 2007, the San Francisco Police Commission, perhaps recognizing this gap internal monitoring of the misconduct problem, approved the implementation of a computerized tracking system which “will track use of force, citizen complaints, internal department complaints, officer-involved shootings whether anyone is hit or not, legal claims and lawsuits against officers, on-duty accidents and vehicle pursuits.” Susan Sward, \textit{Tracking S.F. Police Approved: Computerized system will tally each officer’s use of force.} S.F. CHRON., February 21, 2007.

\textsuperscript{82} Susan Sward, Bill Wallace & Elizabeth Fernandez, \textit{The Use of Force: Officer’s use of force is excused – until a camera documents it}, S.F. CHRON., February 6, 2006.

\textsuperscript{83} Susan Sward, Bill Wallace & Elizabeth Fernandez, \textit{The Use of Force: Officer’s use of force is excused – until a camera documents it}, S.F. CHRON., February 6, 2006.
was a rising star in the San Francisco Police Department until he was videotaped shattering the arm of a war protestor with his baton. The lesson of Officer Nelson is that there is no shortage of opportunities for rogue officers.

The “blue wall of silence” - a cultural resistance to any inquiries into officer behavior – is also part of the larger institutional police misconduct problem. Thought of as a refusal of officers to “rat” out their fellow officers for misconduct, a 1998 article by Gabriel Chin and Scott Wells includes data showing that the “blue wall of silence” isn’t just about officer silence. Not only will officers passively resist informing, they will actively perjure themselves in order to protect themselves and fellow officers. Significantly, perjury is so pervasive that even officers who do not engage in other forms of misconduct (such as excessive force or evidence planting) will fabricate their reports or lie on the stand in order to cover up the actions of other officers. In incidences such as the Rampart Scandal, perjury once leads to a pattern of perjury. As Susan Bandes writes “The blue wall of silence, though, does not protect just ‘a little’ excessive force. In rewarding both loyalty and silence, it protects corruption, and it implicates all those who perjure themselves in corruption as well. Thus, everyone has something to lose when corruption is uncovered.” The “blue wall of silence” is an internal limitation on the ability of the institution to self-correct. As the impact of this wall is also found in perjured testimony and incident reports, it is also a significant barrier to correction of officer misconduct from outside institutions such as the courts which will be limited in their knowledge of the full extent of the problem.

84 Id.
86 Id. at 234-36.
87 Id. at 261.
88 Bandes. 679.
The officer misconduct problem has individual, institutional and cultural components. The numerical findings of the Chronicle indicate that there are specific officers with whom we should be concerned. The failure of police departments to track and correct these officers widens the responsibility for the problem beyond just the rogues. The pervasiveness of police perjury illustrates how the individual and institutional elements come together within an even broader police culture. Individual officers are choosing to perjure themselves in far greater numbers than the number of officers engaging in other forms of misconduct such as use of excessive force. This wider group of officers act as the institutional buffer for more egregious and individual forms of misconduct. Finally, the lack repercussions within the institution, whether due to lack of awareness as a result of widespread perjury or due to cultural acceptance of these behaviors supports the notion that responses to officer misconduct must come, wherever possible, from outside of the institution. An ideal response would have an impact on both individual officers and the institution itself.

III. THE PITCHESS PROCESS IN LIGHT OF THE POLICE OFFICER MISCONDUCT PROBLEM

When an officer engages in misconduct, there are a variety of processes in place for documenting the misconduct, penalizing the officer and restoring the individual who suffered from the misconduct. The Pitchess process is just one system in place in recognition of the impact of officer misconduct. Though, the Pitchess process was not created with misconduct deterrence in mind, the process can and should be considered part of a comprehensive reaction to the officer misconduct problem. Where other systems for reducing officer misconduct are limited, as discussed below, the Pitchess process may provide a chance to expose and correct such misconduct.
A. **Existing Systems for Addressing Officer Misconduct**

Any citizen in California can file a complaint against an officer with the Office of Citizens Complaints. As a result of those complaints or also stemming from observations made by other officers, an officer can be subjected to internal review and punishment. In a department with a culture of tolerance, however, the repercussions for individual officer misconduct will often lack real impact on an officer’s career, if action is taken at all. The *Pitchess* process may, in fact, give the greatest impact to the citizens’ complaints by using them collectively to show an individual officer’s pattern and practice of misconduct to impeach that officer on the witness stand.

When the misconduct of an officer rises to the level of criminal action, both the state and federal government can prosecute. As seen in the acquittal of the officers who beat Rodney King, however, juries can be reluctant to convict officers – even in extreme circumstances. Additionally, this system does not address the institutional and cultural role in officer misconduct. As Susan Bandes argued, officers who are prosecuted for egregious conduct are usually portrayed as “rogues,” making no connection between the individual and the broader forces behind misconduct.  

Perhaps the most well known option for addressing officer misconduct is 42 U.S.C. § 1983. This statute allows an individual who is the victim of officer misconduct to sue the officer for damages or an injunction if the action was part of a wider police practice. At first glance, 42 U.S.C. § 1983 appears to be a comprehensive solution to the problem of officer misconduct. An individual officer is held accountable in a public manner, entire departments can be subject to injunctions against any institutional practices which are deemed unacceptable and

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89 Cal. Penal Code § 832.5 (Deering 2007) (establishing the procedure for review of complaints against an officer).
90 Bandes, 34 LOY. L. REV. at 667.
the government is financially penalized for employing the officer or allowing the practice to go on. However, in her article, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, Alison Patton argues that there are three key limitations on the effectiveness of 42 U.S.C. § 1983 as a deterrent to police misconduct: (1) Actions under 42 U.S.C. § 1983 are both expensive and difficult to bring; (2) The reach of the statue is shortened by the Supreme Court’s limitation on enjoining specific police techniques which often result in misconduct; and (3) juries are biased in favor of officer testimony.\footnote{Id. at 753-754.}

While the *Pitchess* process appears to be a much less direct way of addressing officer misconduct because its focus is the use of officer misconduct information by a criminal defendant in support of a defense theory, it is actually uniquely suited to deterring misconduct while at the same time has consequences for the individual. This is so for two reasons. First, the *Pitchess* process functions within an already operating legal system eliminating the challenges of cost and difficulty in bringing a suit which 42 U.S.C. § 1983 actions face. Second, the *Pitchess* process may, in fact, have the most direct impact on an officer and police departments, by affecting their conviction rates. If convictions can’t be obtained because jurors do not find officers credible in light of their misconduct history, an institutional incentive to control and eliminate misconduct is created. Individual officers may also find their career development limited if they can’t fulfill their secondary role as credible witnesses.

The *Pitchess* process in its current form, however, does not play this invaluable role as effectively as it could. Instead, it functions primarily to shield all officers’ records from public scrutiny, while only secondarily allowing some defendants access to information that will help impeach an officer’s credibility in recognition of their fair trial right.
B. The Five Year Exclusion Rule

Once a defendant has established good cause to obtain discovery of an officer’s employment records, the court must determine which, if any, records in an officer’s file are relevant.93 California Evidence Code section 1045 provides instructions for any judge conducting the *in camera* review for relevance.94 While the instructions in section 1045 will be evaluated collectively in Section IVB of this paper, the mandatory exclusion of all conduct complaints against an officer older than five years has an independently significant impact, warranting a separate discussion. A judge “shall exclude from disclosure…[i]nformation consisting of complaints concerning conduct [of an officer] occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.”95 This rule draws an arbitrary line through an officer’s employment file which not only stands in opposition to California’s movement towards inclusion of all relevant evidence in criminal trials, but also fails to provide any meaningful protection for the legitimate concern with police employment file confidentiality. Ultimately an exclusion of conduct information older than five years only protects those officers with a long history of misconduct complaints and privileges those officers above all other witnesses. Finally, the protection provided by this rule serves as a disincentive to both officers and police departments to correct patterns of misconduct.

1. Interests Served by the Five Year Exclusion Rule

The mandatory exclusion of and the corresponding permission to destroy conduct complaints after five years as part of a regular document retention policy is a commitment by the California Legislature that an officer who receives a misconduct complaint only faces possible

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94 *Id.*
exposure of that complaint for five years. After that, the complaint is “permanently” confidential in the sense that it will likely be destroyed as part of the agency’s document retention policy and if not destroyed, it must be excluded from disclosure unless it falls within the much narrower category of *Brady* material. The interest in officer employment file confidentiality is not served by this arbitrary five year cut off. The same elements of the *Pitchess* process that protect a complaint which is one year old or four and a half years old from unnecessary disclosure will protect a complaint made five years and a day before the incident at hand.

The California Supreme Court has attempted to bolster the basis on which the five year exclusion rule rests by noting “other” policy grounds which support it. In *Los Angeles v. Superior Court (Brandon)*, the court considered the five year period in section 1045 in light of *Brady v Maryland* and ultimately concluded that the exclusion of records older than five years did not violate a defendant’s constitutional right to due process. The court noted that both section 1045 and section 832.5 of the California Penal Code allow for destruction of citizen complaints after five years. The five year periods in both statutes, they stated, “may well reflect legislative recognition that after five years a citizen’s complaint of officer misconduct has lost considerable relevance.” Furthermore, the court held that “routine destruction by a law enforcement agency acting…in accord with [its] normal practice tends to indicate good faith.” As such, to destroy citizen complaints after five years does not violate due process. In accepting that the legislature may pre-determine the relevance of the complaints in this manner,

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96 See *Los Angeles v. Superior Court (Brandon)*, 52 P.3d 129, 135 (Cal. 2002). Under the *Brady v. Maryland* constitutional materiality standard, evidence is material if it is “reasonably probable” that the outcome of the case would be changed whereas under *Pitchess*, evidence need only be show as material “to the subject matter of the case. *Id.* at 133, 134-35.

97 52 P.3d at 136.

98 *Id.* at 135.

99 *Id.*

100 *Id.* at 136 (internal citations and quotations omitted).

101 *Id.*
guaranteeing that complaints older than five years will not be evaluated for relevance in a specific case, the court, just as the Legislature, implicitly valued an officer’s privacy above all else.

2. **A History of Inclusion for All Relevant Evidence**

The exclusion of complaints older than five years also stands on weak footing in light of California’s otherwise inclusive policy for relevant evidence, particularly in support of cross-examination in a criminal trial. This policy is codified in California Constitution Section 28 which was adopted in 1982. The protection from credibility impeachment afforded an officer-witness through the *Pitchess* process is significantly greater than the limits on impeachment provided for all other witnesses. This difference is exhibited by the rules for the admissibility of a witness’ prior convictions during a criminal trial.

Under the Right to Truth-in-Evidence section 28(d) of the California Constitution, “relevant evidence shall not be excluded in any criminal proceeding.” Section 28(f) states that “[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment...” The California Supreme Court has adopted the most expansive reading of these two subsections, holding in *People v. Wheeler* that the Right to Truth-in-Evidence section 28(d) is in no way limited by section 28(f) in the area of impeachment. The court concluded that the Right to Truth-in-Evidence section 28(f) was intended only to invalidate case law which had previously imposed “rigid restrictions on the circumstances in which [felony] convictions could be deemed

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103 Relevant evidence is defined as “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” Cal. Evid. Code § 210 (Deering 2006).
more probative than prejudicial” and was not intended to limit allowable impeachment evidence to felony convictions alone.\textsuperscript{107} As a result, misdemeanor convictions are admissible impeachment evidence on the issue of honesty and veracity, if relevant, following the mandate of Right to Truth-in-Evidence section 28(d).\textsuperscript{108} Furthermore, California Evidence Code section 788 allows for the use of felony convictions to attack a witness’ credibility without providing any exclusion of convictions occurring too remotely from the case at hand.\textsuperscript{109} A witness with a criminal record, therefore, will almost certainly find that record exposed during trial, saved only by a determination of the trial judge of irrelevance or that the probative value of the record is outweighed by the risk of undue prejudice through section 352 of the California Evidence Code.

The importance of the Truth-in-Evidence mandate cannot be underestimated. In a criminal trial evidence cannot be withheld from a jury because of its age or type alone. California has accepted that in most instances, witnesses facing cross examination are sufficiently protected from impeachment with inappropriate evidence by the judge’s determinations of relevance and risk of prejudice. In other words, old evidence is not presumptively irrelevant – a direct contradiction to the court’s assumption in \textit{Los Angeles v. Superior Court (Brandon)} that conduct complaints older than five years are excludable because of a legitimate legislative determination that they are more likely to be irrelevant.\textsuperscript{110}

\section*{3. A Different Standard for the Officer-Witness}
The five year mandatory exclusion rule clearly provides the officer acting as a witness (“officer-witness”) with a level of protection against impeachment which is special in

\textsuperscript{107} \textit{Id.} at 944.

\textsuperscript{108} See People v. Lopez, 29 Cal. Rptr. 3d 586, 596 n.8 (Cal. Ct. App. 2005) (summarizing that \textit{Wheeler} allowed a witness to be impeached by evidence of “misdemeanor conduct,” but not of a misdemeanor conviction, while the subsequently enacted Evidence Code § 452.5 made evidence of a misdemeanor conviction admissible as a hearsay exception).


\textsuperscript{110} 52 P.3d at 136.
comparison to the exposure faced by the typical witness. Whether or not this level of protection can be justified is guided by two questions: is the officer-witness distinguishable from the ordinary witness, and; if a special kind of witness, does the officer-witness need or warrant a level of protection for his privacy interest not afforded the average witness?

Is the Officer-Witness Different From Other Witnesses?

In answer to the first question, police officers are a different breed of witness than all others. They are responsible for investigating and resolving the very crimes which are central to each criminal trial. As a result, they are repeat players in the courtroom, testifying regularly in order to finalize their own work in a conviction. They are, in a sense, similar to paid expert witnesses. Their life experience is considered relevant to the case at hand and they can testify based on that experience. Distinct from the expert witness, however, the officer-witness not only testifies from the perspective of a removed analyst or observer (focused on summarizing existing evidence), but also introduces new evidence to the fact finder. The officer-witness is as much a participant in or eye witness to the critical events as he is an analyst of them.

Police officers also hold a special place within our society. Their very existence is premised on the notion that every community needs people who can be relied upon to be truthful, chivalrous, brave and concerned only with the safety of the community. This idealization arguably exists even within today’s distrustful and skeptical society – why else are we so shocked and disappointed when we hear about officer misconduct, except that it violates our expectations? Ultimately, our societal view of police officers influences the stature of the officer-witness in the courtroom.
Is a Different Level of Protection Necessary for the Officer-Witness?

It is a mistake to see the distinct role of police officers in the criminal justice system and in society as justifying super protective measures when the police officer becomes an officer-witness. Instead, the officer-witness is someone we should be particularly concerned about effectively impeaching. This is true for two key reasons. First, officer perjury is a known and pervasive problem. Second, despite growing skepticism about police officers as white knights within society, there is still evidence that a testifying officer is regarded as more credible by juries than the average witness.

Police perjury is a common occurrence in the United States. This should not be at all surprising given that the role a police officer plays in the criminal justice system. Police officers are the prosecution’s witnesses and when they are testifying it is against a defendant who they investigated and/or arrested. Often they are also testifying against a defendant who is as much a repeat player in the criminal justice system as they are. The Mollen Commission, in conducting a study of officer misconduct in New York City, concluded that “falsification” by police officers is “probably the most common form of police corruption facing the criminal justice system.” Of particular relevance to the Pitchess process, the Mollen Commission spoke with several officers who admitted that instances of excessive force by the officers were covered up by adding claims that the defendant “resisted arrests” to their police reports. Such a claim would also have to be supported by officer testimony at trial, meaning that for one instance of excessive force there would be at least two additional acts of perjury. The Mollen Commission found that falsification could be distinguished from other forms of police corruption in part

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111 “Falsification” was explained to include testimonial perjury, documentary perjury and falsification of police records. The City of New York Commission to Investigate Allegations of Police Corruption and Anti-Corruption Procedures of the Police Department (the “Mollen Commission”), Commission Report, 36, July 7, 1994.
112 Mollen Commission at 36.
113 Mollen Commission at 37.
because, unlike other forms of corruption which are driven by greed, falsification appears to stem from the officer’s sense that the end result (conviction of the defendant) is legitimate. In the opinion of the officers, “regardless of the legality of the arrest, the defendant is in fact guilty and ought to be arrested.” Furthermore, the officer’s frustration with rules governing their conduct and a perception in high crime precincts that they are not affecting change drive the officers to falsify in order to achieve what they believe is the right result. In other words, officer-witnesses are heavily influenced by their other role in the criminal justice system (as investigator and enforcer) to commit perjury on the stand when fulfilling their role as officer-witness.

In addition to having a personal stake in the outcome of any given trial, officer-witnesses are driven by extraordinary cultural pressure to keep unfavorable facts concerning misconduct to themselves. As discussed in section III.B, this cultural pressure has been termed the “blue wall of silence” and it influences both the truth of the reports filed by the officers and the testimony on the stand. Finally, there is also institutional ignorance as to police perjury. Judges, prosecutors and even defense attorneys are far more aware of and accepting of (or perhaps resigned to) police perjury than one would imagine. “[T]he tolerance the criminal justice system exhibits [for officer perjury] takes the form of a lesser level of scrutiny when it comes to police officers’ testimony. Fewer questions are asked; weaker explanations are accepted.” This reality alone should encourage a critical eye towards any limitation of evidence in relation to the officer-witness’ credibility.

114 Mollen Commission at 37.
115 Mollen Commission at 38.
116 Mollen Commission at 38.
117 Mollen Commission at 42.
Despite these incentives to commit perjury, an officer-witness is afforded a measure of credibility by a jury that the ordinary witness does not receive.\textsuperscript{118} As the Mollen Commission put it “[a] police officer’s word is a pillar of our criminal justice system. On the word of a police officer alone a grand jury may indict, a jury convict, and a judge pass sentence.”\textsuperscript{119} Robin K. Magee uses the term “the good cop paradigm” to describe the “false myth of the police officer as a law-abiding citizen who is chiefly, if not totally, motivated by law enforcement interests when appropriate and who can be trusted to behave within constitutional parameters.”\textsuperscript{120} She argues that the good cop paradigm is so imbedded in Fourth Amendment jurisprudence that it ultimately promotes a pro officer bias within a jury by coloring their interpretation of the facts - “juries read actions by the police favorably, even where they are personally dubious.”\textsuperscript{121} The difference between California’s mandate for inclusion of all relevant evidence and the strict five year exclusionary rule for evidence concerning a police officer’s credibility is simply another manifestation of the misperception that officers are more truthful individuals who do not need to be exposed to rigorous credibility examinations.

\textbf{4. The Five Year Exclusion Rule in Light of the Truth-in-Evidence Mandate.}

Once recognizing that the five year exclusion rule does not serve a legitimate state interest, it is hard to justify the rule in light of the mandate presented by section 28 of the California Constitution. In order to accept the rule, one must accept that police officers are different from other witnesses in a way deserving of special protection. The reality of police culture in this country, however, contradicts the generally accepted belief that the officer-witness

\textsuperscript{118} Gabriel Chin & Scott Wells, \textit{Police testimony, even perjurious testimony, is more persuasive to juries than testimony by civilian witnesses}, 59 U. Pitt. L. Rev. 233, 245 (1998).
\textsuperscript{119} Mollen Commission at 36.
\textsuperscript{121} Magee at 214.
should be more protected than the ordinary witness – in fact, the findings of the Mollen Commission and the impact of the blue wall of silence indicates that we should be more critical of an officer-witness. Despite this, the *Pitchess* process provides officers with greater privacy protection than others who are called to the witness stand.

The statute should be re drafted in two ways in order to bring it into line with the constitutional mandate of the Truth-In-Evidence amendment, while still protecting a legitimate interest in confidentiality of the employment files. First, police departments should not be allowed to destroy conduct complaints older than five years. This practice is not based on any real recognition of the potential relevance of the complaints and serves no purpose but to insulate the officers and the department from scrutiny. Second, the trial court should be allowed, though not required, to exclude conduct complaints older than five years only if no conduct complaint has been filed within the two years prior to the case at hand. In other words, an officer who received a conduct complaint six years ago, but reformed his behavior such that he has had no complaints filed within the last two years, would still be protected from the potential prejudice caused by release of the old complaint. If, however, the officer has a recent complaint, then all relevant complaints would be discoverable regardless of age. This system provides officers and police departments with an incentive to address officer misconduct and deter behavior which would result in complaints going forward. It rewards officers who reform. At the same time, such a rule would allow a defendant to provide a jury with a complete picture of an officer’s relevant misconduct history where the officer has continued to engage in misconduct.

C. The In Camera Review

As explained in Section I, following a defendant’s showing of good cause for the release of an officer’s employment file, the trial judge conducts an *in camera* review of the file to
determine which documents may be disclosed. The *in camera* review is the stage in the *Pitchess* process intended to protect the officer’s interest “whereby the trial court can determine whether a police officer's personnel files contain any material relevant to the defense, with only a minimal breach in the confidentiality of that file.”\textsuperscript{122} The balance of interests, therefore, is found in the matching of a relatively low threshold for the showing of good cause to access the files with an *in camera* review process dedicated to releasing only relevant files. The value of the *in camera* review, in general, is easily recognized: first, it establishes review of the files in a confidential manner; and, second, it allows a neutral third party, the judge, to make the final determination as to which documents are discoverable and which are not. Importantly, the *in camera* review is both a familiar and common procedure in dealing with sensitive evidence. The fact that the judge often plays this role further legitimates the review as a process which generally can be trusted to achieve the right results. Allowing the judge to determine which documents in an officer’s employment file are relevant to a particular case and which are not is an appropriate way to address the competing interests at stake.

Even accepting that the *in camera* review is likely the best way to balance the state’s interest in the confidentiality of the files against the defendant’s interest in a fair trial, the review process outlined in section 1045 leaves far too much discretion in the hands of the custodian of the files and the judge. This current rule, with a lack of guiding criteria, leads to inconsistency at the trial level while providing no basis for appellate review. Three aspects of the *in camera* review illustrate the role of the *Pitchess* process as an inappropriate shield for officer misconduct. These aspects are: (1) the unfettered discretion allowed to the record keeping agency in determining which files to present at the *in camera* review; (2) the lack of representation of the defendant’s interest during the review process; and, (3) the failure to

\textsuperscript{122} *People v. Jackson*, 920 P.2d 1254, 1285 (Cal. 1996).
provide clear, reviewable standards for the judge to use in determining relevance. These three aspects of the in camera review are grounded in a presumption that a defendant is fishing for an improper advantage through the exposure of an officer-witness to cross examination with evidence of irrelevant past conduct. This presumption is so strong that it survives into the in camera review, despite the fact that the defendant has already shown that there is a legitimate basis for the release of the files. Once again, viewing the process with concern for what the defendant is trying to “gain” rather than acknowledging the type of information the government is hoping to withhold – impeachment evidence of an officer’s prior misconduct – leads to the overprotection of officers with substantial records of misconduct both at the trial and appellate level.

1. Unfettered Discretion of the Record Keepers

In Santa Cruz v. Municipal Court (Kennedy), the California Supreme Court stated that upon a showing of good cause under the Pitchess process, the custodian of an officer’s employment file must present the trial court with all “potentially relevant documents.” In People v. Mooc the court held that “Documents clearly irrelevant to a defendant’s Pitchess request need not be presented to the trial court for in camera review.” Where the custodian is unsure of a document’s relevance, however, he should include it in the documents presented to the court. As a result, when the custodian of police files is presented with a Pitchess Motion which the court has determined is supported by good cause, the custodian may first review the officer’s file for potentially relevant or responsive documents and bring only those documents to the court’s attention. The Mooc Court found that allowing the custodian of records to cull through an officer’s employment file was “consistent with the premise of Evidence Code

124 36 P.3d 21, 30 (Cal. 2001).
125 Id.
sections 1043 and 1045 that the locus of decision-making is to be the trial court, not the prosecution or the custodian of records."⁻¹²⁶ In its determination, however, the California Supreme Court failed to account for the role played by the custodian within the *Pitchess* process and failed to provide any reviewable standards for the discretion given to the custodian.

The custodian of records is usually the city attorney and, therefore, an employee of the city and an officer of the court.⁻¹²⁷ The court in *Mooc* accepted that as an officer of the court, a lawyer from the City Attorney’s Office could be trusted not to remove damaging but responsive documents from an officer’s file.⁻¹²⁸ While such trust in the City Attorney’s Office may not be misplaced, this conclusion does not address the situation where a custodian makes a good faith review of the file, but nonetheless excludes documents which any experienced judge or defense attorney would find relevant. Additionally, as noted by the California Supreme Court in *Garcia*, a custodian is not an entirely neutral third party.⁻¹²⁹ For the purpose of the *Pitchess* process the custodian represents the state and officer’s interests and is bound to be sympathetic to the police officers when handling requests for documents. The custodian works with officers regularly and her employment may leave her open to the very same pressures and even intimidation that builds the blue wall of silence.

The *Mooc* Court also felt that since an “unscrupulous custodian” can remove damaging evidence at any time, a defendant receives no greater protection from a rule requiring the entire employment file be provided to the court.⁻¹³⁰ This reasoning, however, ignores the impact a rule requiring the relinquishment of an entire employment file might have on the custodian and the reviewing trial judge. The trial judge, who becomes comfortable with seeing complete officer

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¹²⁶ *Id.*
¹²⁷ *Id.* at 31, fn.4.
¹²⁸ *Id.*
¹²⁹ 63 Cal. Rptr.3d at 958.
¹³⁰ *Id.*
employment files will be more likely to notice when tampering has occurred. Furthermore, if the custodian was statutorily required to turn over complete files, the trial courts would not have to allow a significant amount of time for the file to be delivered. The time allowed by the courts currently, between a hearing on good cause and the in camera review, is the result of the custodian’s need to review the file prior to the court’s review. Instead, the file could be ordered into the custody of the court at the filing of the Pitchess Motion and returned to the custodian following either a failure of the defense to establish good cause or after the judge has completed the in camera review. Eliminating the need for that window of time significantly reduces the opportunity of an “unscrupulous custodian” to review a file and remove damaging evidence.

Finally, the Mooc court stated that a defendant will always be able to move for a new trial under Penal Code section 1181(8) or seek relief through a writ of habeas corpus, should the defendant find out that documents were improperly withheld.\(^\text{131}\) This answer is both inefficient and an unlikely solution. It in no way recognizes the challenge facing a defendant who may believe that documents were withheld – how does the defendant question the decisions of the custodian? It will be the very rare incidence where someone comes forward and informs on the custodian. Additionally, all the defendant gains with this information is the right to ask for a new trial. It will be months, if not years, to resolve an issue which can be completely avoided by removing custodians from the review process.

Against these weak justifications supported by the California Supreme Court, the statute provides no safeguards for the custodian’s discretion. It is simply not sufficient that a custodian must “be prepared to state in chambers and for the record what other documents (or category of documents)” were not presented to the court.\(^\text{132}\) There are no rules that the custodian must

\(^{131}\) Id.
\(^{132}\) Id. at 30.
follow when determining which documents within an officer’s file are relevant and which are not. The Court in *Mooc* left the initial determination of relevance entirely to the custodian’s judgment. While the trial court may inquire into which documents were excluded and why, the California Supreme Court provided no criteria upon which a judge could second guess the explanation of a custodian.

The *Pitchess* process entrusts the court to determine relevance. Even the *Mooc* Court appeared to recognize this while simultaneously assigning away that responsibility to the custodian.  

133 By allowing the custodian to conduct a primary review of the file, the *Pitchess* process provides officers with another layer of protection. This protection serves no legitimate interest because the file is ultimately reviewed by the judge. As the judge is considered a sufficient protection for the defense’s interest – charged with releasing all relevant documents – so too should the judge be a sufficient protection of the legitimate confidentiality concerns of the state and therefore trusted to review the entire file.

2. **The Defense is Barred from the Room**

Counsel for a defendant is not a participant in the *in camera* review. Under California Evidence Code section 915, only the trial judge and the party interested in withholding the records (or anyone they allow) may participate in the review.  

134 As a result, a defendant who has shown good cause to receive discovery has no chance to enforce that right and must trust the trial judge to represent his interests. In light of the fact that the *in camera* proceeding itself is considered the stage of the process intended to protect the officer’s interest in confidentiality, it is difficult not to be troubled by the defense’s exclusion.

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133 *Id.*
There are a number of precautions which are already taken or could be taken to protect the privacy interest at stake while still allowing defense counsel to be present for the review of the officer’s file. First, the record of the review can, and is often, ordered sealed.\(^{135}\) This means that no discussion of the documents found by the court to be irrelevant will find its way into a courtroom or to the public. Second, there is no reason to believe that a court order that defense counsel not discuss any of the file’s contents would be violated. A defense lawyer has both an ethical obligation and a professional interest in following such an order. The court, additionally, has the power to impose significant repercussions in the rare instance that a lawyer for the defense violates such an order. The danger to any privacy interest, therefore, of allowing defense counsel to participate in the \textit{in camera} review, is minimal. Certainly, defense counsel will gain some knowledge of a particular officer’s file, including knowledge of documents found to be irrelevant for the case at bar, but which could be relevant in a later case handled by the lawyer. This, however, is not a real advantage given the structure of the \textit{Pitchess} process. The defense is never required by section 1043 to know of specific relevant documents and can file a successful \textit{Pitchess} Motion regardless of what is know about the officer’s file. Whether or not defense counsel knows that the file contains a document she believes is relevant, she must still establish good cause for review of the file in that case by presenting a factual scenario where similar misconduct “could or might have occurred.”\(^{136}\)

Alternatively, the advantages of allowing defense counsel to participate in the review are great. First, defense counsel will act to protect the defendant’s already established interest in the files. Second, where the relevance of a particular document is unclear or disputed, a judge will have the benefit of the adversarial process. Finally, barring the defense from the \textit{in camera}

\(^{135}\) Cal. Evid. Code § 1045(d) (Deering 2006).
review limits the defense’s awareness of appealable violations. Access to the review would make it possible for the defendant to file an appeal of the trial judge’s decision with full knowledge of the documents considered and the judge’s own rational for exclusion.

3. **Loose-at-Best Standards for the Judge to Follow When Reviewing the File.**
   
   Even if the defense’s lack of access is accepted as standard or necessary for the *in camera* review, the fact that the defense is barred from participating in a determination of relevance only supports a need for more explicit rules that the judge must follow in considering the relevance of documents in the officer employment file. Procedure must stand in the place of defense counsel to ensure that the process does not tip in favor of the officer’s interest. Procedure must be the force at each stage of the judge’s review pushing through every single relevant document within an officer’s file.

   **The In Camera Review Process**
   
   In addition to the five year exclusionary rule, section 1045 mandates that a judge also exclude from discovery complaints containing the “conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code” (in a criminal proceeding) or “facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit.”[^137] This is the extent of the guidance provided within the statute for the judge’s review. The Court in *Mooc* added that a trial judge must keep a complete record of his or her review so that an appeals court would be able to assess their decision if necessary, recognizing that failure to make such a record compromises a defendant’s ability to gain review.^[138]

   The starting point for determining whether or not these procedures sufficiently protect the defendant’s interest in gaining access to relevant documents at the trial level as well as the

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[^138]: 36 P.3d at 30-31.
defendant’s right to appeal decisions of the trial court on evidentiary issues is to look at exactly what a determination of relevance entails under the current process. Though charging the trial judge with “determining relevance” in its review of the officer’s file, section 1045 provides no independent definition of the term “relevance.” California Evidence Code section 210 defines relevant evidence to mean evidence “including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” The facts “of consequence” will be those set out in the defendant’s *Pitchess* Motion where, under section 1043 he is required to provide affidavits “showing good cause for the discovery” and “setting forth the materiality thereof to the subject matter involved in the pending litigation.” By the time the trial judge is conducting the *in camera* review, the defendant has already established good cause for discovery of any documents within the file that fit the descriptions within the *Pitchess* Motion. In order to establish good cause, the defendant will have provided a satisfactory explanation of the materiality of any such documents. *Black’s Law Dictionary* defines “material” as “Having some logical connection with the consequential facts” and references the term “Cf. relevant.” The only determination remaining at the point of the *in camera* review, therefore, is to decide which documents, if any, have “any tendency in reason to prove or disprove” and in doing so “[t]rial courts are granted wide discretion when ruling on motions to discover police officer personnel records.” No other guidelines are in place to ensure that the trial judge is reviewing for relevance not just with the goal of protecting officer privacy from unnecessary intrusion, but also with concern for preserving the defendant’s right to a fair trial.

Reviewable standards are critical to the defendant’s ability not only to gain complete access to relevant documents at trial, but also to ensure that an effective appellate review is possible where the defendant feels the trial judge did not release documents necessary for a fair trial. As exhibited in *People v. Jackson*, on appeal, the record of the *in camera* proceeding is reviewed, but not necessarily the documents.\textsuperscript{144} In *Jackson* the officer’s personnel records were destroyed under the police department’s record retention and destruction policy before the case could be reviewed by the appellate court.\textsuperscript{145} If the *in camera* proceeding does not have specific guidelines for determining relevance and the records themselves are destroyed, a reviewing court has little to consider and a successful defendant has nothing to gain.

**Alternative Standards for Review**

The first step in a more comprehensive review of the officer’s file is to switch the current presumption underlying the review from the belief that no document is released unless the judge determines it is relevant, to the belief that the entire file is relevant unless the judge finds that a document should be excluded. This would place the judge’s thought process in line with the statutory guidance currently provided as well as recognize that the defendant has already shown good cause for the release of the file.

Following that presumption, the statute should further safeguard the defendant’s interest by providing specific guidance on what documents must be included not just what documents must be excluded. Where everything is presumed irrelevant from the start, additional statutory guidelines for exclusion of documents only provide judges with additional justification for refusal to release those documents. Alternatively, however, where the presumption is that the file is admissible after a showing of good cause, additional factors mandating admission simply

\textsuperscript{144} *People v. Jackson*, 920 P.2d 1254, 1286 n.10 (Cal. 1996).
\textsuperscript{145} *Id.*
ensure that the court looks at the file with the admissibility mindset. A useful example of such a statutory system comes from New York Correction Law sections 752 and 753. Section 752 states that an employer may not deny an individual a license or employment on account of past criminal convictions.\footnote{NY CLS Correc. § 752 (Bender 2007).} Section 753 goes on to provide eight factors which an employer must keep in mind when following the mandate of section 752 or when considering the few exceptions to that mandate which would allow denial of a license or employment.\footnote{NY CLS Correc. § 753 (Bender 2007).}

Within section 1045 of the California Penal Code, there could also be a list of factors which a judge must consider during the review of documents. These factors could either be simply “relevant” to the judge’s considerations or could actually represent conditions which, if found in a document, mandate its release. For example, a judge could be required to release any documents which detail actions taken by the officer which are sufficiently similar in method to those alleged by the defendant. At the same time, a judge could be instructed not to exclude documents simply because of “technical” differences from the alleged conduct such that documentation of an officer’s use of his baton against a citizen is not excluded where the defendant alleges the officer hit him with his fists. A judge could be required to release all documents in which the officer was specifically accused of lying as these documents would go directly to the officer’s credibility, regardless of the underlying conduct alleged by the defendant. Ultimately, such a list of criteria not only serves the interest of the defendant in the release of all useful and relevant information, but also still protects the officer by laying out exact standards for relevance which the officer can be certain will be followed.
IV. Conclusion

Traditionally, the *Pitchess* process has been viewed as a balance of the defendant’s right to a fair trial against an officer’s right to confidentiality and privacy of his employment file – a file which is believed to be especially vulnerable to “fishing expeditions” by defendants looking for any opportunity to challenge an officer’s credibility. This view of the *Pitchess* process, however, does not fully account for the fact that the information sought by a defendant is not just valuable impeachment evidence, but also information of value in light of the public’s concern with the officer misconduct problem. The current process shields police officers with career histories of misconduct from credibility challenges which could expose that misconduct when the officer takes the stand. By changing the five year exclusionary rule to recognize when police officers and police departments address instances of misconduct, the *Pitchess* process could provide an incentive for reform currently lacking in the greater system of responses to officer misconduct. By reducing the discretion of the court and the custodian of records in relation to an officer’s employment file, the *Pitchess* process would cease to be a needless shield for officers with histories of misconduct, ensuring that an officer is impeached with all relevant information when he takes the stand. The *Pitchess* process not only helps assure a defendant’s fundamental right to a fair trial, but can and should be a tool in the more comprehensive system for addressing officer misconduct in our society.