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## Pretrial Procedures for Innocent People: Reforming Brady

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Pretrial Procedures for Innocent People:  
Reforming *Brady*

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## I. INTRODUCTION

This symposium,<sup>1</sup> *Exonerating the Innocent: Pre-Trial Innocence Procedures*, presents an unusual and fascinating opportunity. The organizers of the symposium have proposed that the current adjudication process be scrapped for a defendant who certifies his innocence and waives all constitutional rights.<sup>2</sup> For those of us who find that proposal troubling, the symposium challenges us to ask what pretrial changes could be made, short of an entirely new adjudication track, to protect the innocent defendant.

My choice is the prosecutor's obligation to disclose exculpatory information to the defense. In 1963, in what was intended to be a landmark decision, the U.S. Supreme Court held in *Brady v. Maryland* that the prosecution has a due process obligation to provide favorable evidence to the defense when that evidence is material to guilt or punishment.<sup>3</sup> Over the ensuing forty-five years, it has become clear that this constitutional doctrine is inadequate to protect the integrity of the criminal process and certainly has failed to protect the innocent.<sup>4</sup> These failures result from flaws in the *Brady* doctrine itself: its reliance on an outcome-determinative "materiality" standard, its abject inability to ensure that investigating agencies disclose exculpatory information to prosecutors, and its lack of any meaningful time requirements. In the absence of meaningful judicial guidance, many states have enacted statutes addressing a prosecutor's obligation to disclose exculpatory information;<sup>5</sup> most federal jurisdictions have created similar court rules.<sup>6</sup> Congress also has enacted Rule 16 of the Federal Rules of Criminal Procedure (Rule 16).<sup>7</sup> The language and content of all of these provisions, however, are extremely general, and it has been almost universally acknowledged that these requirements have not resulted in sufficient disclosure by prosecutors.<sup>8</sup>

At the same time, in the more than two decades since DNA testing revolutionized our understanding of wrongful convictions, we have learned much about what causes wrongful convictions in the first place.<sup>9</sup> This knowledge has led to changes in investigative techniques, such as recording confessions and using more reliable

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1. Symposium, *Exonerating the Innocent: Pre-Trial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 825 (2011–12).
  2. See Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547 (2008); Lewis M. Steel, Op-Ed., *Building a Justice System*, NEWS & OBSERVER (Raleigh), Jan. 10, 2003, at A17.
  3. 373 U.S. 83 (1963).
  4. Many excellent scholars have addressed the inadequacies of *Brady*. See Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685 (2006).
  5. See *infra* note 69 and accompanying text.
  6. See *infra* note 69.
  7. FED. R. CRIM. P. 16; see *infra* note 115 and accompanying text.
  8. See generally Medwed, *supra* note 4; Gershman, *supra* note 4.
  9. For an example of an article discussing the causes of wrongful conviction, see Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542–45 (2005).

identification procedures.<sup>10</sup> Curiously, however, as the organizers of this symposium astutely recognized, this knowledge has not yet resulted in reforms of the pretrial adjudicatory process. We persist in ignoring what we already know. This is most obvious in our failure to reform pretrial prosecutorial disclosure obligations.

For example, we know that the nondisclosure of exculpatory information is a major cause of wrongful convictions.<sup>11</sup> We know that particular aspects of the constitutional doctrine have caused this, especially the imposition of the outcome-determinative test of materiality on a prosecutor's decision whether to disclose.<sup>12</sup> We also know the precise kinds of suppressed information that result in wrongful convictions, such as prior identifications by witnesses,<sup>13</sup> tips relating to other suspects,<sup>14</sup> or leniency deals with witnesses.<sup>15</sup> We know that, although the Supreme Court has held prosecutors responsible for the consequences of suppression of exculpatory evidence by investigatory agencies,<sup>16</sup> there is yet no reliable mechanism for prosecutors eager to comply with this requirement to compel or even monitor such disclosure.<sup>17</sup> Finally, we know that the U.S. public has less confidence in the criminal justice system than in other parts of government.<sup>18</sup> Nothing is more destructive of confidence in the system than the discovery, after a wrongful conviction, that evidence of the defendant's innocence—or of someone else's guilt—was actually

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10. See *False Confessions & Mandatory Recording of Interrogations*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/False-Confessions.php> (last visited Oct. 27, 2011); *Eyewitness Identification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/Eyewitness-Identification.php> (last visited Oct. 27, 2011).

11. *Government Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Oct. 27, 2011); see also James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000).

12. See discussion *infra* notes 43–59 and accompanying text.

13. See *Government Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Oct. 25, 2011).

14. *Id.*

15. See, for example, *United States v. Bagley*, 473 U.S. 667 (1985), discussed *infra* note 48 and accompanying text.

16. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (noting that a “prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”).

17. *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2023 (2010) [hereinafter *Report of the Working Group on Best Practices*] (“Prosecutors are charged with effectuating disclosure obligations, and are hampered in doing so in a complete and timely manner if they do not receive evidence and information that is gathered by and known to police investigators. Hence, the relationship between prosecutors and law enforcement, and the procedures for ensuring information flow between those actors, are central to the discovery practices of a prosecutor’s office.” (footnote omitted)).

18. THE HINDELANG CRIMINAL JUSTICE RESEARCH CENTER, STATE UNIVERSITY OF NEW YORK AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 112 (Ann L. Pastore & Kathleen Maguire eds., 31st ed. 2003), available at [http://www.albany.edu/sourcebook/toc\\_2.html](http://www.albany.edu/sourcebook/toc_2.html) (using the statistics in Table 2.10 to show Americans have less confidence in the criminal justice system than in the banking, medical, public school, or television news).

in the hands of the prosecution or the police. No theory of fairness and efficiency can possibly justify this result.

Like Professor Robinson, therefore,<sup>19</sup> I am concerned about the moral accountability of the adjudicative process. Our process has not kept up with our knowledge about wrongful convictions. There is something horrible when the system not only convicts the wrong person but had the information it needed to get the right person. Like Professor Liebman,<sup>20</sup> I am concerned that exonerations of innocent, convicted individuals often reveal circumstantial evidence of the identity of the perpetrator—evidence that was available to police from the beginning and did not match the innocent defendant, but turns out to match the actual perpetrator.<sup>21</sup> Finally, like the Risingers,<sup>22</sup> I am concerned about the limited amount of information that ever enters the adjudication process pretrial and join their effort to make the investigative process more neutral as a way to yield more information that can be subject to adversarial testing.

But I also uniquely view this issue from a comparative perspective. Many of my proposals here are based on the discovery process in the United Kingdom, which, although not perfect, formalizes the prosecutor's obligation to disclose favorable information and neutralizes the partisan investigation of a criminal case, which results in feeding more information into the adversarial process. Such a system can serve to substantially help the innocent. In addition, the awareness that we stand alone internationally in the narrow view of fairness (or the naively expansive view of the adversary system) with respect to our limited disclosure rules informs my views here.<sup>23</sup>

There is a better way. In this article, I propose that the prosecution's obligation to disclose exculpatory information to the defense be formalized by statute, court rule, or internal protocol in ways that would reflect the current state of our knowledge of and experience with both *Brady* and wrongful convictions. This would improve on the current ineffective constitutional protection—and any existing statutory or rule-based regimes—in several ways. First, such a formalized regime would require disclosure of all materials that are reasonably helpful to the defense. Second, unlike the constitutional doctrine, which provides no reliable mechanism for monitoring police disclosure to the prosecution, an accompanying schedule (or “checklist”) would require specific categories of exculpatory information that the prosecution would have to secure from the police or other investigative agency and then disclose to the

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19. Paul Robinson, Professor, Univ. of Pa. Law Sch., Remarks at the New York Law School Exonerating the Innocent: Pre-Trial Innocence Procedures Symposium (Nov. 5, 2010), *available at* <http://nyls.mediasite.com/mediasite/Viewer/?peid=e599c53a63144b1d837d50148d48a5c41d>.

20. James S. Liebman, Professor, Columbia Law Sch., Remarks at the New York Law School Exonerating the Innocent: Pre-Trial Innocence Procedures Symposium (Nov. 5, 2010), *available at* <http://nyls.mediasite.com/mediasite/Viewer/?peid=18566e942c2248bab5097658c953b13e1d>.

21. *Id.*

22. D. Michael Risinger & Lesley C. Risinger, *Innocence is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 886–90 (2011–12).

23. Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 Ky. L.J. 211, 217, 274–75 (2005).

defense. Third, the prosecution would be required to certify that it has used due diligence to collect and disclose all of the required information. Fourth, unlike the constitutional *Brady* rule, which requires the defendant to show materiality whenever suppressed evidence is discovered post-conviction, if suppression of evidence required on the checklist is discovered post-conviction, the burden of proof would shift and the prosecution would be required to prove that the suppression was harmless beyond a reasonable doubt. As to any other information, the defendant would continue to bear the burden of showing materiality. Finally, there would be a public interest declination exception and a process for the prosecution to apply for a protective order where necessary to protect a witness or another investigation.

Several doctrinal strands and recent developments come together to support the creation of this new disclosure scheme. First, in several other jurisprudential contexts, the Supreme Court has recognized that the investigative stage of a criminal case is not as adversarial as the trial stage. Thus, for example, the police enjoy only qualified immunity for misconduct during an investigation,<sup>24</sup> and, of course, there is no Sixth Amendment right to counsel until formal proceedings have begun because the adversarial process has not yet commenced.<sup>25</sup> Requiring a less adversarial, more collaborative disclosure process would be consistent with this treatment of the

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24. In several areas, the Court has recognized that the investigative stage of a case is different—and less adversarial—than the adjudicative stage. This doctrine supports a less adversarial disclosure regime. First, the Court has distinguished the investigatory stage from the adversarial stage in the area of prosecutorial immunity. In *Imbler v. Pachtman*, the Court held that a prosecutor is entitled to absolute immunity from a civil suit for damages arising under 42 U.S.C. § 1983 for knowingly presenting perjured testimony. 424 U.S. 409 (1976). The Court explained that such immunity is quasi-judicial and is based on the need to protect the judicial process. *Id.* at 424–27. However, the Court has not applied that immunity to investigative actions. Police and other executive branch officials are only entitled to qualified immunity based on misconduct during the investigatory stage of a case.

Significantly, Justice White, joined by Justices Brennan and Marshall, concurring in the judgment, would have held that only qualified immunity applies where information relevant to the defense is “unconstitutionally *withheld* . . . from the court.” *Id.* at 433–34, 443 (White, J., concurring). That is, to the extent that absolute immunity is designed to protect the judicial process by ensuring that all relevant information is brought to the attention of the court, “[i]t would stand [this purpose] . . . on its head . . . to apply it to a suit based on a claim that the prosecutor unconstitutionally *withheld* information from the court.” *Id.* at 442–43. Indeed, recognizing only a qualified immunity might result in disclosure of more evidence, but “this will hardly injure the judicial process.” *Id.* at 443. Lower courts have held that suppression of exculpatory evidence is “beyond the scope of ‘duties constituting an integral part of the judicial process’” and have accordingly refused to extend absolute immunity to those actions. *Hilliard v. Williams*, 465 F.2d 1212, 1218 (6th Cir. 1972); *see also* *Haaf v. Grams*, 355 F. Supp. 542, 545 (D. Minn. 1973). Moreover, as Justice White recognized, unlike acts committed in the courtroom as part of the presentation of a case, for which the judicial process has the remedy of reversal, “the judicial process has no way to prevent or correct the constitutional violation of suppressing evidence” of which it usually will be ignorant. *Imbler*, 424 U.S. at 443–44 (White, J., concurring). Accordingly, it is important to use only qualified immunity to deter such violations when they do surface.

25. The Court has long recognized that the investigatory stage is not part of the adversary process by its decision that no right to counsel exists before the judicial process has begun until the filing of formal charges has occurred. *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *see also* *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (noting that prior cases in which the Court found the right to counsel attached all involved “points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment”).

investigative stage.<sup>26</sup> Second, the Supreme Court has required that prosecutors ensure that exculpatory evidence in the hands of the police is turned over and has assumed prosecutors have the mechanisms to do so.<sup>27</sup> Yet *Brady* and its progeny offer no method to accomplish this and naively ignore the realities that interfere with enforcement of disclosure by investigative agencies.<sup>28</sup> Third, the Supreme Court has explicitly recognized that the suppression of requested, potentially exculpatory evidence generally is prejudicial.<sup>29</sup> That presumption should apply here to create a presumption of prejudice where requested or itemized exculpatory information is suppressed. Fourth, several high-profile criminal cases have revealed substantial and systemic suppression of exculpatory evidence and have focused judicial and public attention on the problem.<sup>30</sup> Finally, the Supreme Court has recognized, in other contexts, that the United States is part of an international community.<sup>31</sup> The fact that prosecutorial disclosure is more limited in the United States than in most other criminal justice systems, and imposes “fewer demands for transparency and fair play than in almost any other mature legal system” in the world,<sup>32</sup> reinforces the notion that the time has come when we should abandon that dubious distinction.

A second development is reflected in recent scholarly and professional reform efforts that have focused on changing and formalizing the prosecutor’s *Brady* obligations. Recent proposals, like the one presented here, would, among other things, reform *Brady* by formalizing it in court rules and checklists that would make the prosecutor’s obligations clearer, more transparent, and more realistic, and, therefore, easier to implement and enforce.

Ultimately, *Brady*’s naive but necessary underlying assumption that prosecutors and their investigators will be able to wear two hats has been demonstrably disproved not only by experience but also by social science. Clear rules and expectations are required. Recent proposals suggest that this is the required reform; several states and

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26. For a fascinating and thorough discussion about the non-adversarial pre-charge role of the prosecutor, see Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923 (1996).

27. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (“[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that ‘procedures and regulations can be established to carry [the prosecutor’s] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.’” (alteration in original) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972))).

28. *Report of the Working Group on Best Practices*, *supra* note 17.

29. *See United States v. Agurs*, 427 U.S. 97, 106 (1976) (“When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.”).

30. *See, e.g., United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009); *United States v. W.R. Grace*, 429 F. Supp. 2d 1207 (D. Mont. 2006).

31. *See Graham v. Florida*, 130 S. Ct. 2011 (2010) (observing that in the Eighth Amendment context, “[t]he judgments of other nations and the international community are not dispositive . . . . But ‘the climate of international opinion concerning the acceptability of a particular punishment’ is also ‘not irrelevant.’” (quoting *Enmund v. Florida*, 458 U.S. 782, 796 n. 22 (1982))).

32. *Cerruti*, *supra* note 23, at 212.



district courts have already moved in this direction, and it closely resembles the process currently employed in the United Kingdom. We should have clear disclosure rules that ensure greater fairness and reliability of the criminal process.

Part II of this article sets forth the reasons to reform and formalize *Brady*, including the inadequacies of the current Constitutional, aspects of the common law regime, and recent scholarly and professional reform efforts. Part III analyzes the United Kingdom's statutory disclosure process, on which several of my suggested reforms are based. Part IV suggests a model for a formalized *Brady* disclosure regime. Appendices A, B, and C to this article offer model checklists and disclosure provisions forming the basis for thier reformed *Brady* regime.

## II. REASONS TO REFORM *BRADY*

### A. *The Inadequacy of the Common Law Brady Doctrine*

Much has been written about the lost promise of *Brady* and its failure to protect a defendant's right to fundamental fairness.<sup>33</sup> There is no reason to restate what has been so clearly and effectively documented and analyzed elsewhere. *Brady* promised to make the adversary system "less like a sporting event and more like a search for truth."<sup>34</sup> Theoretically, exculpatory evidence that might never have surfaced would now be revealed and subjected to adversarial testing as part of a fair search for truth. The prosecutor's superior investigatory resources would now be used to level the playing field in the criminal process. Many have concluded, however, as the courts developed and refined the *Brady* doctrine, the protections afforded have been easily and frequently evaded.<sup>35</sup>

The failings of *Brady* may be due, in part, to its uniqueness. It was and still is the only rule of U.S. criminal procedure that imposes an affirmative duty of fairness on the prosecutor.<sup>36</sup> In addition, it was and still is the only area of constitutional criminal procedure in which the fairness of a prosecutor's pretrial decision is governed by an outcome-determinative standard—a standard that uniquely (1) puts the burden on the defendant to show that (2) the prosecutor's pretrial decision was unfair in light of what occurred at a subsequent trial.<sup>37</sup> Moreover, the defendant's burden of proof is

33. See Medwed, *supra* note 4, at 1536–44; Gershman, *supra* note 4, at 685–89. For a recent and thorough discussion of a specific case involving a massive failure to disclose, see Beth Brennan & Andrew King-Ries, *A Fall From Grace: United States v. W.R. Grace and the Need for Criminal Discovery Reform*, 20 CORNELL J.L. & PUB. POL'Y 313 (2010).

34. Gershman, *supra* note 4, at 708 (citing William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 8 (1990)); see also William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279.

35. See Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 278, 285 (2004) (analyzing the results of U.S. wrongful conviction studies); Gershman, *supra* note 4, at 687–89; Gross et al., *supra* note 9, at 542; Liebman et al., *supra* note 11, at 1849 (stating that prosecutorial or police suppression of evidence that the defendant is innocent or does not deserve the death penalty accounted for nineteen percent of reversals in capital cases).

36. See Gershman, *supra* note 4, at 685–89.

37. See discussion *infra* notes 45–59 and accompanying text.



uniquely high: no *Brady* violation is established absent a “reasonable probability” that the jury’s verdict would have been different had the information been disclosed.<sup>38</sup> Further, *Brady* necessarily rests on a remarkable—and perhaps blind—faith in the capacity of prosecutors, who are advocates, to subordinate their values, cognitive biases, and competitive instincts to undertake the role of “minister of justice.”<sup>39</sup> In a truly schizophrenic role,<sup>40</sup> prosecutors must sift through their own evidence for weaknesses, identify whether those weaknesses are serious, and nevertheless continue the prosecution regardless. In addition, by imputing police nondisclosure to the prosecution, *Brady* assumes, again, perhaps blindly, that there are procedures by which prosecutors can ensure the police disclose exculpatory information to them.<sup>41</sup> Yet there are none, and *Brady* provides the prosecutors with neither a carrot nor a stick to do so.<sup>42</sup> Finally, unlike other prosecutorial misconduct, a failure to disclose, as well as the information suppressed, remains hidden from judicial review both when it occurs and forever after, absent some serendipitous discovery by an already convicted—at that point probably unrepresented—defendant.<sup>43</sup>

Scholarly opinion seems to agree that *Brady* has floundered on the shoals of the materiality requirement. When it was decided, *Brady*’s directive to disclose favorable evidence that was material to guilt or punishment promised disclosure of a wide range of favorable evidence that would be considered material.<sup>44</sup> Thus, while *Brady* originally

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38. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (“The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”).
39. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. (2011); Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, AMICUS: HARV. C.R.-C.L. L. REV. 6–7 (Aug. 10, 2010), [http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman\\_Publish.pdf](http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman_Publish.pdf) (“The prosecutor is at once encouraged to be a zealous advocate charged with the responsibility of winning convictions against people who break the law, but at the same time is encouraged to be a neutral minister of justice with the duty to provide the defendant with exculpatory evidence that might assist the defendant in obtaining an acquittal. . . . *Brady* exemplifies a remarkable faith of the Supreme Court in the capacity of prosecutors to subordinate their moral values, personal biases, and competitive instincts to the overriding objective of the pursuit of truth in the service of justice.”); see also Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291.
40. See Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 486–98 (2009) (describing the prosecutor’s dual role as advocate and minister of justice in the *Brady* context).
41. See *infra* text accompanying notes 50–54.
42. See *infra* text accompanying notes 85–92.
43. See Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 537 (2007) (listing various ways previously suppressed evidence may be discovered, including Freedom of Information Act (FOIA) requests, investigation by defendants and their families, discovery in related cases, or simply by chance).
44. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Court suggested that its decision was merely an extension of earlier decisions concerning a defendant’s due process right to a fair trial, such as *Mooney v. Holohan*, 294 U.S. 103 (1935), where the Court reversed a conviction based on knowing submission of perjured testimony. The unifying theme of these cases is the recognition by the Court of the central role played by the prosecutor in ensuring that an accused receives a fair trial. See *Brady*, 373 U.S. at 87.

indicated that the prosecutor has an obligation to disclose “favorable” evidence,<sup>45</sup> the obligation is really to disclose only *material* “favorable” evidence, a much narrower category of disclosure. While the Court’s original decision might have suggested that a wide range of favorable evidence would be considered material, its subsequent treatment of that issue makes clear that the definition of materiality is extremely narrow. In *United States v. Agurs*,<sup>46</sup> a homicide case in which the defendant claimed self-defense, the defendant had not requested, and the government had not disclosed, clearly exculpatory evidence that would have shown that the deceased had a history of violence.<sup>47</sup> The Court prescribed two different materiality tests, depending on whether the defendant had requested the suppressed information, and found that the suppressed evidence of the deceased’s violent history, which was not requested by the defense, was not material. Later, in *United States v. Bagley*,<sup>48</sup> the Court explicitly held that “exculpatory evidence” includes impeachment evidence. In that case, the defense had requested, but the prosecution had failed to disclose, prior agreements with government witnesses by which they would be paid if the defendants were convicted. The Court also revisited the issue of materiality in the request-no-request dichotomy and adopted a unitary standard of materiality for all situations. Under this standard, evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>49</sup>

Later, in *Kyles v. Whitley*,<sup>50</sup> the Court explained that the materiality standard does not require a defendant to prove that disclosure of the suppressed material would have resulted in his acquittal. Instead, it requires a defendant to show that suppression of the evidence caused him to not receive a fair trial, meaning that the trial did not “result[] in a verdict worthy of confidence.”<sup>51</sup>

The *Kyles* decision is also important because it revealed another serious fault in the *Brady* doctrine: the Court made clear that when exculpatory information is withheld by the police, nondisclosure is imputed to the prosecutor even if he does not know anything about it. The *Kyles* court based that conclusion on the assumption

45. *Brady*, 373 U.S. at 87 (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . .”).

46. 427 U.S. 97 (1976).

47. *Id.* at 100–01. Justice Stevens observed:

[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client’s overriding interest that “justice shall be done.” He is the “servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.” This description of the prosecutor’s duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.

*Id.* at 110 (footnote omitted) (citation omitted) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

48. 473 U.S. 667 (1985).

49. *Id.* at 682.

50. 514 U.S. 419 (1995).

51. *Id.* at 434.

that the prosecution had a system for ensuring that the police disclosed such information to the prosecution. In *Kyles*, the Court reiterated that the

prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.<sup>52</sup>

In its brief, the State of Louisiana argued that because some of the concededly suppressed evidence had not been disclosed by the police to the prosecutor until after trial, the state "should not be held accountable . . . for evidence known only to police investigators."<sup>53</sup> The Supreme Court flatly rejected this argument, holding that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." The Court also assumed that a prosecutor "has the means to discharge the government's *Brady* responsibility" by establishing "procedures and regulations" to ensure a flow of "all relevant information" from the police to the prosecutor's office.<sup>54</sup>

Finally, in *Strickler v. Greene*,<sup>55</sup> the Court both took an extremely constricted view of materiality and repeated its reliance on the unrealistic assumption that the prosecutors had some sort of systematic access to exculpatory information in the hands of the police. The Court reviewed a prosecutor's failure to disclose exculpatory materials in police files, even though the prosecutor's office had alleged its compliance with an "open file" disclosure policy.<sup>56</sup> In *Strickler*, the prosecutor had failed to disclose a series of communications with its star witness, which were later found in police files after the defendant's conviction. The materials documented a course of police-witness interactions through which the witness's initial failure to even notice the defendant or the crime changed into a dramatic and harrowing tale of certainty, fear, and violence.<sup>57</sup> Undisclosed police notes of interviews with the key identification witness, and her undisclosed written messages to the police, showed that she initially could not identify the victim or Strickler, and that her memory improved only after several additional conversations with the police and the victim's boyfriend.<sup>58</sup> Nevertheless, the Court affirmed the conviction upon finding that the undisclosed evidence was not material.<sup>59</sup>

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52. *Id.* at 437–38 (citation omitted).

53. *Id.* at 438.

54. *Id.* at 437–38.

55. 527 U.S. 263 (1999).

56. *Id.* at 276.

57. *Id.* at 273–74.

58. *Id.* at 273–74, 274 n.9.

59. *Id.* at 296.

There is a second way in which the Court's interpretation of the materiality standard has interfered with the promise of *Brady*. "Materiality" is not merely an extremely high harmless error test; it is also the standard by which the police and prosecutor must judge, *pretrial*, whether to disclose.<sup>60</sup> That is, the same outcome-determinative standard governs whether a conviction should be reversed for failure to disclose and whether the prosecutor or police are even required to disclose something in the first, pretrial instance. This test requires the prosecution to "engage in a bizarre kind of anticipatory hindsight review."<sup>61</sup> That review is rendered even more difficult because prosecutors lack sufficient information to make the pretrial prediction of posttrial materiality and because it requires both the police and then the prosecution to overcome their own cognitive biases that lead them to arrest, charge, and prosecute the defendant in the first place. Then, having identified those weaknesses as material, this test requires prosecutors to nevertheless continue to prosecute the case.<sup>62</sup>

Additionally, as noted by several scholars, *Brady* is severely restricted by the Court's treatment of the right as a trial right in a criminal justice system in which ninety-five percent of criminal convictions are obtained by guilty pleas.<sup>63</sup> In *United States v. Ruiz*,<sup>64</sup> the Court held that the prosecutor was not required to disclose impeachment evidence prior to a guilty plea. This limitation has itself been exacerbated by the Court's failure to establish any timeliness requirements, suggesting that as long as prosecutors produce all material, exculpatory information at some point before trial, they have met their due process obligations.<sup>65</sup>

Apart from these limitations, the judiciary's permissive interpretation of the prosecutor's *Brady* obligation allows prosecutors to evade it, as decades of case law establish they have.<sup>66</sup> Indeed, apart from errors relating to incompetent counsel, the

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60. This is the standard for judging a claim of ineffectiveness of counsel, which also employs the "reasonable probability" materiality standard. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

61. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006); see also Burke, *supra* note 40, at 485.

62. See Medwed, *supra* note 4, at 1542.

63. This problem has existed for a long time. See Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651 (2007); Eleanor J. Ostrow, Comment, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581 (1981).

64. 536 U.S. 622 (2002).

65. *Id.* at 633 (noting that the "added burden imposed upon the Government by requiring its provision [of material exculpatory information] well in advance of trial (often before trial preparation begins) can be serious, thereby significantly interfering with the administration of the plea-bargaining process").

66. This history has been thoroughly documented by other scholars. See Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415 (2010) ("The government's duty to disclose favorable evidence to the defense under *Brady v. Maryland* has become one of the most unenforced constitutional mandates in criminal law."); Gershman, *supra* note 39, at 10, 14–15 n.61.

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most frequent basis for wrongful convictions has been the suppression of exculpatory evidence.<sup>67</sup>

Finally, as professional consensus has recognized,<sup>68</sup> existing statutory or rule-based requirements reflect the same flaws as the current common law doctrine.<sup>69</sup>

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67. See, e.g., *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Oct. 26, 2011).

68. See *infra* Part II.B.2–4.

69. In 2004, the Federal Judicial Center (FJC) published a report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States on the treatment of *Brady* materials in U.S. courts. Laural L. Hooper et al., *Treatment of Brady v. Maryland Material in United States District and State Courts' Rules, Orders, and Policies*, FED. JUD. CENTER (October 2004), [http://www.fjc.gov/public/pdf.nsf/lookup/bradymat.pdf/\\$file/bradymat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bradymat.pdf/$file/bradymat.pdf). At the request of the Judicial Conference Advisory Committee on Criminal Rules, the Federal Judicial Center updated that report in 2007. Laural Hooper & Shelia Thorpe, *Brady v. Maryland Material in the United States District Courts: Rules, Orders, and Policies*, FED. JUD. CENTER (May 31, 2007) [hereinafter FJC Report], [http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/\\$file/bradyma2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/$file/bradyma2.pdf). According to that report, thirty-seven of the ninety-four federal districts have a relevant local rule, order, or procedure governing disclosure of *Brady* material. *Id.* at 7. In defining the *Brady* obligation, nineteen of the thirty-seven districts use the term “favorable to the defendant.” *Id.* at 8. Nine others refer to the material as *Brady* material and nine others describe the material as evidence that is exculpatory. *Id.* Twenty-eight of the thirty-seven districts mandate automatic disclosure, nine require a request, one requires the parties to address the issue in a pretrial conference statement, and two presume the defendant has requested it unless the presumption is overcome. *Id.* Federal district timetables vary significantly. The most common is “within 14 days of arraignment,” but some districts require a response within five days of arraignment, “as soon as reasonably possible,” or “before trial.” *Id.* As to the prosecutor’s obligation to seek exculpatory evidence from investigators, thirteen districts have a specific due diligence requirement for prosecutors and two have a certificate of compliance requirement. *Id.* Finally, nine districts have declination procedures for specific types of information. *Id.* Detailed analysis and charts of the U.S. District Court Rules and Policies are set forth at pages 9–21 of the FJC Report and the actual district court materials are collected in Appendix B on pages 25–38 of the report. Sample orders addressing *Brady* disclosure are set forth in the FJC’s Report’s Appendix C on pages 39–41.

The 2007 report did not update its earlier 2004 survey of state codification of *Brady*, but included it as Appendix E to the FJC 2007 report. *Id.* at 49. The 2004 report indicated the following about state codification of *Brady*. First, thirty-three of the fifty-one jurisdictions have rules or procedures that codify the *Brady* rule. *Id.* at 50. Twenty-three of the thirty-three states define the material required to be disclosed as “any material or information which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the accused’s punishment therefor.” *Id.* at 51. Ten others refer to “exculpatory material.” *Id.* Although five other states use the term “favorable” in describing evidence subject to disclosure, all of them limit this clause with a condition that it must be “material and relevant to the issue of guilt or punishment.” *Id.* at 52. Twenty-six states use the terminology of Rule 16, requiring evidence that is “material to the preparation of the defendant’s defense.” *Id.* at 52.

Thirteen states require mandatory disclosure, regardless of whether the defendant has made a specific request. *Id.* at 54. Three of these states distinguish between information subject to mandatory disclosure and other information that must be requested or ordered by the court. *Id.* at 55. Hawaii requires disclosure of favorable evidence only in cases where the defendant is charged with a felony. *Id.* Thirty-eight states require a defendant to request favorable information before the prosecution’s obligation is triggered. *Id.* Ten states place an additional condition on the defense either to show that the items are material to the preparation of the defense and that the request is reasonable or that there is “good cause” for discovery of the information. *Id.*

All of the states require the disclosure of the types of information required by Rule 16, although many require more. Florida, Minnesota, and North Carolina all have “open file” discovery statutes. Other states have expanded their statutory disclosure obligations piecemeal by, for example, requiring

Two recent, widely publicized cases—the prosecutions of Senator Ted Stevens<sup>70</sup> in Alaska and of W. R. Grace in Montana<sup>71</sup>—may have brought new attention to the issue.<sup>72</sup> In *Stevens*, the trial court found that prosecutors had violated the court’s explicit *Brady* orders by doctoring documents to redact exculpatory statements, removing a witness from the jurisdiction upon learning the witness had exculpatory information, failing to turn over clearly exculpatory and inconsistent prior statements, and had lied repeatedly to the court about what they had done.<sup>73</sup> Ultimately, the case was dismissed.<sup>74</sup> In *Grace*, the prosecution’s failure to disclose impeachment evidence concerning its star witness (e-mails from the witness to the FBI agent that demonstrated his “intense prosecutorial partnership with the Government and his obsession with seeking revenge against” the defendants)<sup>75</sup> led the court to (1) permit the defense to cross-examine the witness a second time; (2) prohibit the government from redirect; (3) instruct the jury that the witness was back on the stand because the government had violated its legal obligations; (4) instruct the jury that the U.S. Attorney’s office had violated its constitutional obligations, the orders of the court, and the Federal Rules of Criminal Procedure; and (5) advise the jurors to examine the witness’s testimony with great skepticism and caution.<sup>76</sup> Ultimately, the case ended in an acquittal.<sup>77</sup> Although the court did not find that the prosecutors had

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the disclosure of one or more of the following items: witness names and statements, all police reports, or all statements relating to an identification. *Id.* at 52–54.

In terms of timing, twenty-eight states have specific time limits for disclosure, ranging anywhere from within ten, twenty-five, or thirty days after arraignment to not later than thirty days prior to trial. *Id.* at 56–58. Eighteen other states have non-specific, descriptive time requirements, such as “timely,” “as soon as practicable,” within a reasonable time, and the like. *Id.* at 58–59. Generally the states consider disclosure timely if it is “within a sufficient time for its effective use” in preparing a defense.

Five states have a due diligence obligation that requires submission of some type of certification of compliance. Such a certification generally states that the prosecutor has exercised due diligence to locate favorable evidence and that, to the best of his or her knowledge and belief, all such information has been disclosed. *Id.* at 59.

70. *United States v. Stevens*, No. 08-231, 2009 U.S. Dist. LEXIS 125267 (D.D.C. Apr. 7, 2009). For a discussion of the *Brady* issues in the *Stevens* case, see Jones, *supra* note 66, at 415–22.

71. See Brennan & King-Ries, *supra* note 33.

72. For other federal cases from the same period that involved failure to comply with disclosure obligations and received media attention, see *United States v. Zhenli Ye Gon*, 287 F. App’x 113 (D.C. Cir. 2008), *United States v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009), and *United States v. Shaygan*, 661 F. Supp. 2d 1289 (S.D. Fla. 2009).

73. Transcript of Motion Hearing at 4–6, *United States v. Stevens*, No. 08-231, 2009 U.S. Dist. LEXIS 125267 (D.D.C. Apr. 7, 2009) (No. 374).

74. *Id.* at 48. Several other federal judges also found that U.S. Attorneys committed prosecutorial misconduct by failing to disclose exculpatory evidence to defendants. See *Shaygan*, 661 F. Supp. 2d at 1322; *United States v. Jones*, 686 F. Supp. 2d 147, 149 (D. Mass. 2010); Jordan Weissmann, *Prosecutors in Kidnapping Case Rebuked Over Brady*, BLT: THE BLOG OF LEGAL TIMES (June 24, 2009, 2:04 PM), <http://legaltimes.typepad.com/blt/2009/06/prosecutors-in-kidnapping-case-rebuked-over-brady.html>.

75. Brennan & King-Ries, *supra* note 33, at 349.

76. *Id.* at 321.

77. *Id.*



committed misconduct, it did conclude that they had violated their ethical duties. As at least one commentator has noted, “[w]ith prosecutors [now] feeling the brunt of the chasm between vague legal rules and lofty ethical obligations—both individually and as representatives of the people—reform may finally be possible.”<sup>78</sup>

*B. Increasing Effectiveness, Encouraging Reform*

*1. Introduction*

Against this overwhelming evidence of the failure of *Brady*’s constitutional doctrine lies the promise of reform by formalizing an effective disclosure regime.

As demonstrated above, common law development in this area has left much to be desired. The courts have not kept pace with the realities of wrongful convictions, including the findings of various commissions and studies concerning the causes of wrongful convictions, or with the increased opportunities for exonerations created by technology.<sup>79</sup> Nor have the current federal or state statutory provisions kept pace.

The propriety of formal, rule-based changes has recently been recognized on several important scholarly and professional fronts. First, a substantial contribution to the kinds of formalized changes that should take place was made by Cardozo Law School’s *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?* symposium. The symposium, held in November 2009, brought together approximately seventy-five participants—representatives from the profession, including prosecutor’s offices, defense lawyers, judges, as well as legal academics, cognitive scientists, social psychologists, and medical professionals—to discuss the realities of prosecutorial disclosure and to suggest changes. Second, the American Bar Association (ABA) has

78. *Id.* at 322–23.

79. It may in fact be that issues surrounding wrongful convictions are particularly suitable to legislative response. This has been demonstrated by the approach to reform in the area of post-conviction DNA testing. In *Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308 (2009), the Supreme Court recognized the widespread legislative response to the need for postconviction DNA testing and expressly refused to impose a constitutional standard on the issue. *Id.* at 2322 (“The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems . . . as well as the opportunities it affords. To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response.”). In that context, the legislatures did not wait for the courts to deal with the problem piecemeal.

As *Osborne* recognized, the adversary system places a limit on the extent to which a court can remedy the deficiencies in current law. Common law development can only occur piecemeal since the court can only address an issue when it is presented in a particular case. Systemic changes or revision of a complicated set of principles is simply not possible. This is particularly true in criminal cases for two important reasons: the widespread summary treatment of criminal appeals, in which no precedential law is established, and the fact that more than 90% of cases result in guilty pleas. *Id.* at 2316 (“The dilemma is how to harness DNA’s power to prove innocence without unnecessarily overthrowing the established system of criminal justice. That task belongs primarily to the legislature.”); *id.* at 2322 (“To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response.”); *see id.* at 2323 (“Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers . . . .”); *see also* Minutes of the Judicial Conference Advisory Committee on Criminal Rules, U.S. COURTS (Oct. 13, 2009) [hereinafter Minutes of Advisory Committee 2009], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR10-2009-min.pdf> (suggesting that amendment of Rule 16 should most appropriately be done by Congress, rather than by court rule).



itself recently endorsed formalization of *Brady*. Third, the U.S. Attorneys' Manual (Manual) has undergone recent changes to its formal requirements.

## 2. *The Cardozo Symposium and a Consensus for Disclosure Checklists*

In 2009, Professor Ellen Yaroshefsky of Cardozo Law School convened a symposium entitled *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?* The stated goals of the symposium were to develop best practices to increase the reliability of results in criminal cases and to “optimize effective training, supervision, and control mechanisms for managing information within prosecutors’ offices.”<sup>80</sup> The seventy-five participants were split into six Working Groups, each of which addressed an aspect of the disclosure issue: obligations and practices, the process, training and supervision, systems and culture, internal regulation, and external regulation. Each group met for five hours and succeeded in reaching a consensus among the disparate participants—prosecutors, defense counsel, judges, and experts—on as many aspects of their subject as possible. The findings were reproduced in the *Cardozo Law Review*.<sup>81</sup>

The results of the Working Group on obligations and practices are the most relevant to this article. According to the report of that group, there was a consensus that the materiality standard should be omitted and that prosecutors should disclose “all evidence or information that they reasonably believe will be helpful to the defense or that could lead to admissible evidence.”<sup>82</sup> This should be a matter of law, but, where not codified, should be reflected in internal policy.<sup>83</sup> Second, to the extent that disclosure obligations are codified, these laws “should ideally be clear and conducive to ease of administration.”<sup>84</sup> That is, participants expressed

a preference for the development of a detailed statutory framework—one that streamlines discovery and makes explicit exactly what should be turned over—even if the statute (or rule of procedure) does not establish, and perhaps cannot be perfectly drafted to establish, the full limit of a prosecutor’s legal duties.<sup>85</sup>

Specifically, the Working Group endorsed explicit rules to ensure the full flow of information from the police to prosecutors and recommended that each jurisdiction adopt formal policies and procedures to do so. As discussed above, the Working Group agreed that the assumption that prosecutors can compel disclosure by the

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80. Ellen Yaroshefsky, Foreword, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 *CARDOZO L. REV.* 1943, 1944 (2010).

81. *Report of the Working Group on Best Practices*, *supra* note 17.

82. *Id.* at 1966.

83. *Id.* (“The idea was not that laws would necessarily codify this principle, but insofar as the law falls short, prosecutors would give effect to this principle as a matter of internal policy.”).

84. *Id.* at 1971.

85. *Id.* at 1966.

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police is unrealistic.<sup>86</sup> State and local police generally operate independently of prosecutors' offices, answer to different constituencies, and may work together over the course of many different cases, making their relationship extremely complicated.<sup>87</sup> A prosecutor's access to exculpatory evidence depends on police cooperation in recording, preserving, and revealing such evidence, and, despite *Kyles*'s clear mandate, prosecutors—acting in good faith—normally lack the power to insist upon access to exculpatory evidence known to the police.<sup>88</sup>

A consensus clearly emerged from the Cardozo symposium that *Brady*'s constitutional doctrine has not been successfully applied to the realities of law enforcement and that something both clearer and more realistic is required. First, prosecutors have difficulty determining pretrial what can or will change the result of

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86. See Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 *FORDHAM L. REV.* 1379, 1383 (2000). In contrast to the Court's unrealistic assumption, Fisher very realistically points out that the relationship between law enforcement and prosecutors is "governed by informal practices about which little is known." *Id.* Fisher states that an English-style legislative solution would be the most direct and effective remedy, but expresses doubt as to whether the "political will" needed to pass such legislation exists in the United States. *Id.* at 1385. Accordingly, Fisher puts forth amendments to both the ABA Model Rules of Professional Conduct and the ABA Standards for the Prosecution Function that would "aim to reinforce the prosecutor's responsibilities under *Brady* and *Kyles v. Whitley* to obtain access to relevant information known to the police." *Id.* Specifically, Fisher proposes adding the following subparagraphs to Model Rule 3.8, and to Prosecution Function Standards 3-2.7 and 3-3.11:

MODEL RULES OF PROFESSIONAL CONDUCT

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

.....

[Proposed] (c-1) *make reasonable efforts to ensure that investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case reveal to the prosecutor's office all material and information that tends to negate the guilt of the accused or mitigates the offense or sentence.*

STANDARDS FOR PROSECUTION FUNCTION

3-2.7. Relations with Police

.....

[Proposed] (c) *A prosecutor should become familiar with existing law enforcement record-keeping practices in the prosecutor's jurisdiction.*

[Proposed] (d) *The prosecutor should encourage and assist law enforcement agencies to adopt a uniform police report that will contain all information necessary for a successful prosecution and for compliance with the prosecutor's duty to disclose favorable information to the defense.*

3-3.11. Disclosure of Evidence by the Prosecutor

[Proposed] (a-1) *A prosecutor should make reasonable efforts to ensure that all material and information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused is provided by investigative personnel to the prosecutor's office.*

*Id.* at 1424.

87. *Id.* at 1382–83 (citing Stanley Z. Fisher, "Just the Facts, Ma'am": *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 *NEW ENG. L. REV.* 1, 53 (1993)).

88. Fisher, *supra* note 86, at 1384.

a future trial, if they are trying in good faith to comply. Even if they did, such a decision requires that they overcome well-recognized cognitive biases, cease being advocates, and suddenly become objective about the merits of their own cases.<sup>89</sup> Second, the constitutional doctrine that imputes police suppression to prosecutors is based on the Court's naive and untested assumption that there is a way for prosecutors to compel disclosure by the police—again, even if all parties are proceeding in good faith.<sup>90</sup> As a result, the doctrine has failed to ensure that the police reveal exculpatory information to prosecutors in the first instance. In addition, the police have even less of an idea of what needs to be disclosed than the prosecutors and have fewer professional restraints on their cognitive biases.<sup>91</sup> There is no doubt that “police generally want to do a good job, and that . . . [they] tend to be rule driven.”<sup>92</sup> As such, “formal rules can help them in their efforts to do a good job.”<sup>93</sup>

Accordingly, the Working Group reached a consensus that each jurisdiction should use checklists to “ensure full and timely transfer of all relevant information from police to prosecutors.”<sup>94</sup> These checklists would be technology based, would be provided by prosecutors to the police, and would require that all types of information on the checklist be provided to the prosecutors.<sup>95</sup>

Significantly, the consensus of the Working Group was that “developing constructive and productive relationships with law enforcement can be one of the most difficult aspects of the prosecutor’s job.”<sup>96</sup> Different cultures and distrust abound, with perceived “gulf[s] in motivations and incentives.”<sup>97</sup> The Working Group concluded that checklists might make the relationship more productive.<sup>98</sup> Police experts also thought such formal rules would help the police.<sup>99</sup> Indeed, it was noted that police are comfortable working with checklists in other areas and work best with clear rules, expectations, and training.<sup>100</sup> In addition, the Working Group recommended that police be involved in pretrial discovery conferences with the court, the idea being that such involvement would increase police accountability to the courts and prosecutors,

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89. See Gershman, *supra* note 39.

90. See *supra* note 27.

91. *Report of the Working Group on Best Practices*, *supra* note 17, at 1975.

92. *Id.*

93. *Id.*

94. *Id.* at 1974.

95. *Id.* “Remarkably,” the Working Group noted, “such a straightforward data system is not available in most prosecutors’ offices.” *Id.* at 2006.

96. *Id.* at 2023.

97. *Id.* at 2024.

98. *Id.* at 1994.

99. *Id.* at 1975.

100. *Id.*

and thus increase the likelihood of full cooperation and compliance by the police.<sup>101</sup> The courts might also require prosecutors to provide certifications of compliance. The group also recommended a variety of checklist requirements, including a checklist of items disclosed and privileged items withheld.<sup>102</sup>

Interestingly, the recommendation of checklists “grew from several considerations.”<sup>103</sup> Apparently, in the medical field, risk management has shifted its focus from prevention of individual errors to creating systems that provide support for performing a job correctly, rather than using threats of punishment.<sup>104</sup> Under this theory, a formalized checklist can be a tool that helps police identify and transfer required information.<sup>105</sup> In addition, it is clear that police generally want to do a good job and because police “tend to be rule driven, formal rules can help them in their efforts to do a good job.”<sup>106</sup> Police are also accustomed to working with checklists in other areas. Third, since cognitive biases impede effective investigation and disclosure, a checklist would counteract such bias. Finally, some jurisdictions have already begun using checklists.<sup>107</sup>

To be effective, checklists would ideally be filled out in real time, by a third party, with audits of police compliance and perhaps mandatory police participation in pretrial discovery conferences. If prosecutors determine that they have not received everything they should, they would submit a formal request to police with the specific information requested.<sup>108</sup> The group suggested that an expert panel develop model checklists that could then be tailored to meet particular, local needs.<sup>109</sup> Finally, the Working Group on internal regulations also recommended that prosecutors develop checklists that “enumerate the categories or items of evidence to be disclosed in the course of a criminal case, as well as other tasks associated with the discovery process.”<sup>110</sup>

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101. *Id.* at 1978–79.

102. *Id.* at 2033.

103. *Id.* at 1974.

104. *Id.* at 1974–75.

105. *Id.* at 1975.

106. *Id.*

107. *Id.* at 1976. For example, Prince George’s County, Maryland, uses a formal charging memo, which “essentially serves as an information checklist.” *Id.* The Working Group noted that such a form could easily be adapted to become the sort of checklist they envisioned. The Working Group also reported that in Oregon, “a new paperless file system will allow scanning [and coding] of documents . . . to identify what kind of records they are, and whether they have been disclosed to the defense.” *Id.* The Working Group noted that this kind of electronic file management system “has the potential to facilitate creation and use of an electronic checklist.” *Id.* Specifically, the Multnomah County, Oregon, District Attorney’s Office has implemented a checklist system for major homicide cases whereby one person is responsible for maintaining a “Homicide Major Crimes Discovery Assignment” form, which is “designed to ensure that job tasks, performance standards, and due dates are all met on all matters related to discovery.” *Id.* The Working Group noted that such an approach works well in big cases but acknowledged that it cannot be implemented in all cases. *Id.*

108. *Id.* at 1974.

109. *Id.* at 1977.

110. *Id.* at 2012.

At the same time, the current police disclosure obligations fail to take account of technological advances. The Working Group recognized that the most effective use of checklists involves “real time” entries. Several participants noted that their document management software could be used to include checklists of tasks, deadlines, and confirmation of completion.<sup>111</sup> Police disclosure could also be supported by giving the police access to smart phones or netbooks that would simultaneously deliver information to prosecutors. The standardized checklists and disclosure obligations discussed in more detail below can be programmed into these devices.<sup>112</sup>

Finally, rules on timeliness that have not been developed judicially can more appropriately be prescribed legislatively, as evidenced by many federal and state rules governing timely disclosure.<sup>113</sup> In those jurisdictions without such rules, timeliness can be better assured by statutorily prescribed time limitations. If this is accomplished, more information will be disclosed in time to render proceedings fairer and more reliable.

### 3. *Organized Professional Reform Efforts*

The organized bar has also recommended steps to formalize prosecutorial disclosure. Currently, prosecutorial disclosure is governed in federal courts by Rule 16 of the Federal Rules of Criminal Procedure.<sup>114</sup> In 2003, the American College of Trial Lawyers (ACTL) proposed amending Rule 16 by adding a new section that would require disclosure within fourteen days of a request of “all information favorable to the defendant,” without a requirement of materiality.<sup>115</sup> The prosecutor would be required to disclose all such information that “is known to the attorney(s) for the government or to any government agent(s), law enforcement officers or others who have acted as investigators from any federal, state, or local agencies who have participated in either the investigation or prosecution of the events underlying the crimes charged.”<sup>116</sup> The proposed amendment also required due diligence by the prosecutor in locating information and established deadlines for disclosure.<sup>117</sup> The

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111. *Id.* at 2021.

112. *See infra* Part IV.A–B.

113. *See supra* note 69; *see also* *Barker v. Wingo*, 407 U.S. 514 (1972) (stating that the legislature is the appropriate place for setting speedy-trial time periods).

114. FED. R. CRIM. P. 16. Under Rule 16, the prosecution must disclose: (1) statements made by the defendant; (2) the defendant’s prior criminal record; (3) documents and tangible objects within the government’s possession that are material to the preparation of the defendant’s defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant; (4) reports of examinations and tests that are material to the preparation of the defense; and (5) written summaries of expert testimony that the government intends to use during its case in chief at trial. *Id.*

115. Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 111 (2004).

116. *Id.*

117. *Id.*

Department of Justice (DOJ) opposed the recommendation on the grounds that no codification was warranted.

However, following the ACTL's recommendation, the ABA's Advisory Committee on the Federal Rules began to explore the question of amending Rule 16 to further codify and expand the government's disclosure obligation. The DOJ continually opposed any amendment, and, as an alternative to amending Rule 16, revised the text of the U.S. Attorneys' Manual regarding disclosure. In 2006, the Advisory Committee met to determine whether to forward the draft Rule 16 amendment to the Standing Committee for publication or to rely on the DOJ's revision of the Manual. Ultimately, the Committee voted 8–4 to forward the amendment to the Standing Committee.<sup>118</sup> The Standing Committee deferred consideration of the amendment.<sup>119</sup>

Most recently, in February 2010, the ABA's House of Delegates passed Report 102D, *Judicial Role in Avoiding Wrongful Convictions*, in which it urged all U.S. courts to adopt a procedure disseminating “to the prosecution and defense a written checklist delineating in detail the general disclosure obligations of the prosecution under . . . [*Brady*] and its progeny and applicable ethical standards.”<sup>120</sup> It was further resolved that all courts should create a standing committee of local prosecutors and defense attorneys “to assist the court in formulating and updating the written checklist delineating in detail the prosecution's general disclosure obligations.”<sup>121</sup> Finally, “any omissions or deficiencies in the written checklist” should not relieve either party “of their legal and ethical responsibilities with respect to providing and seeking disclosures.”<sup>122</sup> This set of resolutions is part of the ABA's study “of how the judiciary may minimize the danger of wrongful convictions.”<sup>123</sup>

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118. FJC Report, *supra* note 69, at 6–7; *see also* Minutes of Advisory Committee 2009, *supra* note 79; Brennan & King-Ries, *supra* note 33, at 330–31. The proposed amendment reads as follows:

*Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

FJC Report, *supra* note 69, at Appendix A.

119. One of the two reasons given by the Standing Committee was that there were “questions whether a need for the change had been sufficiently shown.” *Minutes of the Judicial Conference Advisory Committee on Criminal Rules*, U.S. COURTS (Oct. 1, 2007), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR10-2007-min.pdf>. The other reason was a concern that the government would be required to disclose information that is not “material.” *Id.*

120. *See* Am. Bar Ass'n, *Urges Changes to Criminal Trial Court Procedures*, ABA Now, <http://www.abanow.org/2011/01/104a/> (adopting, as revised, Resolution 104A).

121. *Id.*

122. *Id.*

123. AM. BAR ASS'N CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES: 102D (2010), <http://www.abanow.org/wordpress/wp-content/themes/ABANow/wp-content/uploads/resolution-pdfs/MY2010/102D.pdf>.

The ABA has been active on another front: revising the ABA Prosecution and Defense Function Standards, including the standards relating to prosecutorial disclosure of exculpatory evidence. The proposed revision, which is still in the drafting stages and thus not yet public, contains a broad definition of disclosable evidence without reference to its materiality and directs that the prosecutor promptly seek, identify, ensure the preservation of, and disclose such evidence.<sup>124</sup> The 1993 standard only directed a prosecutor not to “intentionally fail” to make timely disclosure of information, and it defined the scope of the information without reference to impeachment (i.e., as evidence that would “negate the guilt of the accused or mitigate the offense charged, or . . . reduce the punishment of the accused”).<sup>125</sup>

The revision also addresses the prosecutor’s obligation to seek exculpatory evidence from investigating agencies. In short, the revision includes a new subdivision that directs the prosecutor to promptly advise other government agencies involved in the case concerning their duties to identify, preserve, and share disclosable evidence, as defined above, and to make reasonable efforts to discover such information.<sup>126</sup>

#### 4. *Revision of the U.S. Attorneys’ Manual*

Finally, as noted above, in January 2010, the Department of Justice revised the U.S. Attorneys’ Manual’s provisions on disclosure. In short, the revised Manual requires prosecutors to disclose information “beyond that which is ‘material’ to guilt.”<sup>127</sup> It recognizes, however, that the trial should be limited to relevant and significantly probative information and that evidence that is not significantly probative should not be subject to disclosure.<sup>128</sup> According to the revised Manual, the prosecutor must also disclose, without regard to materiality: (1) information “inconsistent with any element of any crime charged”;<sup>129</sup> (2) information that “establishes a recognized affirmative defense”;<sup>130</sup> and (3) impeachment information that “casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged, or [that] might have a significant bearing on the admissibility of prosecution evidence.”<sup>131</sup> Unlike the *Brady*

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124. ABA Task Force to Revise the Prosecution and Defense Function, Standards, Prosecution Function, June 2010 draft (on file with author).

125. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-3.11(a) (1993).

126. *Id.*

127. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-5.001(C) (1997) [hereinafter U.S. ATTORNEYS’ MANUAL], [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.justice.gov/usao/eousa/foia_reading_room/usam/).

128. *Id.*

129. *Id.* § 9-5.001(C)(1)

130. *Id.*

131. *Id.* § 9-5.001(C)(2).



doctrine, the Manual requires the disclosure of information, “regardless of whether the information subject to disclosure would itself constitute admissible evidence.”<sup>132</sup>

In its comment section, the Manual refers the reader to Criminal Resource Manual 165, *Guidance for Prosecutors Regarding Criminal Discovery*, which was itself updated in January 2010.<sup>133</sup> This Resource Manual is a Memorandum for Department Prosecutors from Deputy Attorney General David W. Ogden (Ogden Memorandum).<sup>134</sup> Like the *Cardozo Law Review* symposium report, the Ogden Memorandum is a consensus document. Here, the consensus represents the conclusions of a working group of federal prosecutors.<sup>135</sup>

The Ogden Memorandum divides the prosecutor’s disclosure obligation into steps. Step 1: Gathering and Reviewing Discovery Information; Step 2: Conducting the Review; Step 3: Making the Disclosures; and Step 4: Making a Record. First, in relevant part, the Ogden Memorandum advises that the prosecutor “should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.”<sup>136</sup> It continues by stating that “[g]enerally, all evidence and information gathered during the investigation should be reviewed.” It also states that where the potentially discoverable information is voluminous, prosecutors may satisfy this obligation by disclosing the information to the defense.<sup>137</sup> Finally, “substantive case-related communications” that may contain discoverable information should be maintained in a case file or otherwise preserved and reviewed carefully.<sup>138</sup>

As to Step 2, “Conducting the Review,” the Ogden Memorandum advises that prosecutors may delegate the review of this material but that the disclosure determination should not be delegated.<sup>139</sup>

In Step 3, “Making the Disclosures,” prosecutors are “encouraged to provide discovery [that is] broader and more comprehensive than the discovery obligations”

132. *Id.* § 9-5.001(C)(3).

133. *Id.* § 9-5.001(F).

134. Memorandum from David W. Ogden, Deputy U.S. Att’y Gen., *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010) [hereinafter Ogden Memorandum], <http://www.justice.gov/dag/discovery-guidance.html>.

135. Ogden Memorandum, *supra* note 134. The memorandum explains that it was developed at Ogden’s request “by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the U.S. Attorney’s Offices, the Criminal Division, and the National Security Divisions” of the DOJ. Comments were also received from the Office of the Attorney General, the Attorney General’s Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* For the purpose of this step, “[s]ubstantive’ communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility.” *Id.*

139. *Id.*

set forth in *Brady*, *Giglio*, and the U.S. Attorneys' Manual.<sup>140</sup> Prosecutors are cautioned not to describe this process as “open file” discovery, because that title can be misleading. Disclosure should take place “reasonably promptly after discovery,” with prior witness statements disclosed “at a reasonable time before trial to allow the trial to proceed efficiently” but consistent, again, with countervailing considerations, such as witness and national security.<sup>141</sup>

Finally, as to Step 4 “Making a Record,” the Ogden Memorandum stresses the importance of keeping good records of when and how information is disclosed, particularly in order to avoid time consuming disputes and to enable meaningful responses to future claims of post-conviction relief.<sup>142</sup>

### III. THE UNITED KINGDOM'S STATUTORY DISCLOSURE SCHEME

The same evolutionary process that occurred in the United States occurred in the United Kingdom. Until the 1980s, prosecutorial disclosure in the United Kingdom was largely dictated by common law.<sup>143</sup> Then, following a series of notorious miscarriages of justice based on suppression of exculpatory evidence in cases arising out of the Irish Republican Army (IRA) terrorism prosecutions, several major reforms were enacted.<sup>144</sup> The U.K. government acted quickly: in the aftermath of these cases, Parliament passed the Criminal Procedure and Investigations Act (CPIA).<sup>145</sup>

Briefly, under the CPIA, as amended by the Criminal Justice Act 2003 (CJA), the prosecution's obligation is to disclose any “unused” material that “might reasonably be considered capable of undermining the case for the prosecution against the accused

140. *Id.*

141. *Id.*

142. *Id.*

143. See Mike Redmayne, *Criminal Justice Act 2003: (1) Disclosure and its Discontents*, 2004 CRIM. L. REV. 441, 441, 442. For a thorough discussion of the evolution of the U.K. disclosure regime, see Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1251–53 (2001), and Fisher, *supra* note 86.

144. Griffin, *supra* note 143; Fisher, *supra* note 86 at 1390–91.

145. Criminal Procedure and Investigations Act, 1996, c. 25 (U.K.). The CPIA's disclosure provisions were supplemented by the Criminal Justice Act, 2003, c. 44 (U.K.). The major amendment was to omit the distinction between a prosecutor's primary and secondary disclosure duties and to enact, instead, an initial duty to disclose that continues throughout the proceedings. The current, updated version is the subject of this discussion.

The United Kingdom has not only codified its *Brady* provisions, unlike the U.S. Congress, but also published several documents that detail what exactly must be done by the police and the prosecution with respect to the disclosure of exculpatory material. See CROWN PROSECUTION SERV., DISCLOSURE MANUAL (2005) [hereafter Disclosure Code], [http://www.cps.gov.uk/legal/d\\_to\\_g/disclosure\\_manual/](http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/); CROWN PROSECUTION SERV., ATTORNEY GENERAL'S GUIDELINES ON DISCLOSURE (2005) [hereinafter AG's Guidelines], [http://www.cps.gov.uk/legal/a\\_to\\_c/attorney\\_generals\\_guidelines\\_on\\_disclosure/](http://www.cps.gov.uk/legal/a_to_c/attorney_generals_guidelines_on_disclosure/); JUDICIARY OF ENGLAND AND WALES, DISCLOSURE: A PROTOCOL FOR THE CONTROL AND MANAGEMENT OF UNUSED MATERIAL IN THE CROWN COURT [hereinafter Court of Appeals Protocol], [http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/crown\\_courts\\_disclosure.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Protocols/crown_courts_disclosure.pdf).

or of assisting the case for the accused.”<sup>146</sup> This is an objective standard, replacing the previous subjective standard that required disclosure of any unused material that, “in the prosecutor’s opinion[,] might undermine” the prosecution’s case.<sup>147</sup> The prosecutor makes the disclosure determination based on two schedules that must be provided to the prosecution by the police: a schedule of sensitive unused material and a schedule of nonsensitive unused material.<sup>148</sup> These schedules provide the prosecution with access to the information in police files.

One important difference between the U.S. and U.K. disclosure regimes is that there is a detailed statutory code of practice in the United Kingdom (the “Disclosure Code” or the “Code”) that covers what must be disclosed, by whom, and when.<sup>149</sup> This Disclosure Code is binding as a statute and is much more detailed and specific than any other existing U.S. statute, court rule, or internal memoranda.<sup>150</sup>

#### *A. Police Disclosure Obligations*

Under the CPIA and the Disclosure Code, the police must

(1) take “all reasonable steps . . . for the purposes of the investigation,” and investigators must “pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.”<sup>151</sup> Such an obligation may include making inquiries of third parties or investigators in other investigations or prosecutions.<sup>152</sup>

(2) inform the prosecutor “as early as possible whether any material weakens the case against the accused.”<sup>153</sup>

(3) “[r]ecord and retain” “all material” that “may be relevant to the investigation,” i.e., information that appears to have “some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case.”<sup>154</sup> Appendix A to this article contains a chart listing the kinds of unused materials that may be created. By U.S. standards, the list is extensive.

146. Criminal Procedure and Investigations Act, 1996, c. 25, § 3(1)(a) (U.K.).

147. Criminal Justice Act, 2003, § 32 (U.K.); Redmayne, *supra* note 143, at 442.

148. Disclosure Code, *supra* note 145, at ch. 6.

149. *See generally* Disclosure Code, *supra* note 145.

150. *Compare* Disclosure Code, *supra* note 145, *with* U.S. ATTORNEYS’ MANUAL, *supra* note 127.

151. Disclosure Code, *supra* note 145, ¶¶ 3.5, 4.2.

152. *Id.* ¶ 4.4. The provisions of the Code prescribe detailed steps that must be taken to obtain unused evidence from third parties. *Id.* ¶¶ 4.4–27.

153. *Id.* ¶ 2.2.

154. *Id.* ¶ 5.2. The importance of the retention and recording requirement is obvious; unless information is retained and recorded, it cannot be revealed. See Fisher, *supra* note 86, at 1402, for his observation of police training sessions on the duty to pursue, record and retain exculpatory evidence. Professor Fisher attended several police disclosure training sessions and sets forth the participants’ experiences with, and their recordings of, “negative” evidence, including contradictory witness accounts, failures to identify the primary suspect, a retracted identification, confirmation of the defendant’s whereabouts at another location, and incorrect preservation of real evidence that rendered it inadmissible. *Id.*

(4) appoint an investigator, a disclosure officer, and an officer in charge of an investigation disclosure officer,<sup>155</sup> who must then list the retained materials on schedules to be turned over to the prosecution;<sup>156</sup>

(5) turn the schedules over to the prosecution, certify that all retained material has been revealed, and give the prosecution access to all investigatory materials in their possession.<sup>157</sup>

### 1. Retention

Paragraph 5 of the Disclosure Code also specifies what types of material should routinely be retained. Again, by U.S. standards, the list is incredibly detailed and extensive.<sup>158</sup> And, when there is any doubt about the relevance of any material, the investigator must retain it.

### 2. Scheduling (Checklists)

In addition, paragraph 6 of the Disclosure Code requires that the material be listed on a schedule of non-sensitive material (Form MG6C)<sup>159</sup> and a schedule of sensitive material (Form MG6D).<sup>160</sup> Sensitive material is material that the investigating officer believes would not be in the public interest to disclose, including national security information, information identifying police informants or the location of surveillance, and material relating to children.<sup>161</sup> All such material must still be disclosed to the prosecutor with an explanation by the disclosure officer as to why she believes disclosure would “give rise to a real risk of serious prejudice to an important public interest.”<sup>162</sup> This schedule is not disclosed to the defense.<sup>163</sup>

The material on both schedules must be listed in sufficient detail for the prosecutor to decide whether she needs to inspect the actual material before deciding

155. Disclosure Code, *supra* note 145, ¶¶ 3.1–.5.

156. *Id.* ¶ 3.9.

157. *Id.* ¶¶ 3.9–13.

158. The list includes: crime reports, custody records, records of any telephone calls, final versions of witness statements and draft versions if they differ, interview records, communications between the police and experts, information provided by an accused that indicates an explanation for the offense, any material casting doubt on the reliability of a confession, any material casting doubt on the reliability of a witness, and records of first description of a suspect by each potential witness who purports to identify or describe the suspect, whether or not the description differs from that of subsequent descriptions by that or other witnesses. *Id.* ¶¶ 5.1–28.

159. *Id.* ¶ 6.4.

160. *See infra* Appendix A.

161. Disclosure Code, *supra* note 145, ¶ 8.4.

162. *Id.* ¶ 8.2.

163. *Id.* ¶ 8.1. The disclosure of sensitive unused material is governed by detailed provisions in the Disclosure Code in Chapters 8 and 9. Because this article addresses the disclosure of non-sensitive materials, generally, those provisions will not be discussed at length.

whether to disclose it to the defense.<sup>164</sup> The disclosure officer must certify that “all relevant material has been identified, considered and revealed to the prosecutor.”<sup>165</sup>

*B. Prosecutorial Disclosure*

Upon receipt of the police schedules, the prosecutor must review them and, if there appears to be a mistake or omission, must seek additional disclosure from the police.<sup>166</sup> Disclosure to the defense, however, should not be delayed. If, following the attempt to get further detail from the police, “the prosecutor remains dissatisfied with the quality or content of the schedules, the matter must be raised with a senior officer and persisted with if necessary.”<sup>167</sup>

After review, the prosecutor must disclose to the accused any material “which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused” (also known as “the disclosure test”).<sup>168</sup> This is an objective test.<sup>169</sup> Under the Attorney General’s Guidelines, the prosecutor must disclose anything “that tends to show a fact inconsistent with the elements of the case that must be proved by the prosecution.” This includes material that may be used on cross-examination, that might support a motion to exclude evidence or a motion to dismiss, that might reveal that any public authority has acted incompatibly with the accused’s rights, or that suggests “an explanation or partial explanation of the accused’s actions.”<sup>170</sup> Specifically enumerated examples are any materials that: (1) cast doubt on the accuracy of any prosecution evidence; (2) may point to another person, whether charged or not (including a co-accused), as having involvement in the commission of the offence; (3) may cast doubt on the reliability of a confession; (4) might go to the reliability of a prosecution witness; (5) might support a defense that is either raised by the defense or apparent from the prosecution papers; (6) may have a bearing on the admissibility of any

164. *Id.* ¶¶ 7.2–5.

165. *Id.* ¶ 10.16. The certification set forth in the Disclosure Code reads as follows:

To the best of my knowledge and belief, all relevant material which has been retained and made available to me has been inspected, viewed or listened to and revealed to the prosecutor in accordance with the Criminal Procedure and Investigations Act 1996 as amended, the Code of Practice and the Attorney General’s Guidelines.

*Id.*

166. *Id.* ¶ 11.8. Section 11.6 also lists the documents a prosecutor should expect to receive from the police, including “all material that the disclosure officer believes satisfies the disclosure test and a brief explanation for that belief,” as well as the schedules, forms, and certification. *Id.* ¶ 11.6.

167. *Id.* ¶ 11.8. Records of any decisions, enquiries or requests and the date upon which they were made should be kept on a “disclosure record sheet.” *Id.* ¶¶ 11.13–14, Annex C.

168. *Id.* ¶ 11.3; Criminal Procedure and Investigations Act, 1996, c. 25, § 3(1)(a) (U.K.).

169. Redmayne, *supra* note 143, at 444.

170. Disclosure Code, *supra* note 145, ¶ 12.8; AG’s Guidelines, *supra* note 145, ¶¶ 10–14.

prosecution evidence; and (7) relate to the accused mental or physical health, intellectual capacity, or ill treatment.<sup>171</sup>

The prosecutor's disclosure decisions must be recorded on the schedule, which must then be signed, dated, and sent to the defense.<sup>172</sup>

On the other hand, if a prosecutor believes that disclosure will compromise national security or result in the destruction of evidence or harm to a victim or witness, she may apply to the court for public interest immunity.<sup>173</sup> Unlike the prosecution's disclosure duties, the principles relating to public interest immunity are governed largely by common law.<sup>174</sup> Information should be disclosed if it "may prove the defendant's innocence or avoid a miscarriage of justice,"<sup>175</sup> but in reality the courts employ a balancing test, weighing the public's interest in nondisclosure against the defendant's need for the material.<sup>176</sup> Depending on the nature of the evidence, the court will also decide whether the defense should be informed of the application and the type of material involved and given an opportunity to respond; whether the defense should be informed of the hearing but with the hearing conducted *ex parte*; or whether the defense should not be informed of the hearing at all.<sup>177</sup> The latter, entirely *ex parte*, procedure is rarely used.<sup>178</sup>

After the prosecution's primary, or initial, disclosure, the defense has an obligation to file a defense statement setting forth the nature of the defense, the matters on which they take issue with the prosecution, and the reasons they do so. Details of any particular defenses and points of law on which the defense will rely are also required. The defense must also give names, addresses, and dates of birth of any witnesses it intends to call and the names and addresses of any experts consulted, whether they will be called at trial or not. "[U]nless the contrary is proved, defense statements [are] deemed to have been given with the authority of the accused;" therefore, a negative inference may be drawn against the accused if the defense at trial includes something omitted or different from the contents of the defense

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171. Disclosure Code, *supra* note 145, ¶ 12.11. The prosecution is admonished to "borne in mind" that although material viewed in isolation might not be considered capable of undermining the prosecution's case, "several items together [can] have that effect." *Id.* ¶ 12.12.

172. *Id.* ¶¶ 12.18–.33, 12.36. In fact, the code goes so far as to prescribe specific initial abbreviations that should be used, e.g., D, I, CND.

173. Detailed guidance about the standards and procedures for consideration of public interest immunity applications are set forth in Chapter 13 of the Disclosure Code and by the House of Lords. Disclosure Code, *supra* note 145, at ch. 13; *R v. H & C*, [2004] UKHL 3, [2004] 2 A.C. 134 (H.L.) [148] (appeal taken from Eng.); *R v. Davis*, [1993] 1 W.L.R. 613 (Eng.). Again, the detailed procedures governing applications for public interest immunity are beyond the scope of this article and will be only briefly described.

174. *See R v. H & C*, [2004] UKHL 3, [2004] 2 A.C. 134 (H.L.) [148] (appeal taken from Eng.); *R v. Keane*, [1994] 1 W.L.R. 746 (Eng.).

175. *R v. Keane*, [1994] 1 W.L.R. 746 [751–52] (Eng.).

176. Redmayne, *supra* note 143, at 458.

177. Detailed standards and rules governing these procedures are set forth in Chapter 13 of the Disclosure Code. Disclosure Code, *supra* note 145, at ch. 13.

178. Redmayne, *supra* note 143, at 454–55.

statement.<sup>179</sup> The prosecutor has a continuing duty to provide unused evidence after the defense statement is filed. The more detailed the defense statement, the greater the prosecution's burden to come forward with unused material that might aid the defense.<sup>180</sup>

Thus, in several ways, the U.K. regime is likely to provide greater disclosure than the U.S. scheme: first, it makes the police investigation relatively neutral by requiring the police to record, retain, and reveal all relevant information; second, it structures the communications between police investigators and the prosecutor (who now knows what specific items they must obtain from the investigators before trial); and third, it provides the defense access to the schedules of nonsensitive relevant material. This is the system that gives prosecutors regular access to information that is in the hands of the police—information the *Kyles* Court assumed prosecutors already had.<sup>181</sup> And, in contrast to prevailing U.S. practices, the U.K. scheme does not rely extensively on the good faith or discretion of the police and prosecutors, problematic assumptions about their relationship, or naive and unrealistic estimations of their ability to switch hats between advocate and minister of justice to find and reveal potentially fatal weaknesses in their cases.<sup>182</sup>

#### IV. PROPOSED DISCLOSURE REGIME

The substance of a model *Brady* regime is set forth in Appendix B of this article. Whether it be formalized in a statute, court rule, or internal directive, the prosecutor's obligation to disclose favorable evidence will not be meaningfully effective until it is memorialized in a formal document of some kind. As demonstrated above, the common law development of this constitutional obligation has not been successful.<sup>183</sup>

179. *Id.* at 446. The Criminal Procedure and Investigations Act's provisions for the defense statement were expanded by the Criminal Justice Act 2003. For a thorough discussion of the problems and objections to the requirement of defense disclosure, see *id.* at 446–54.

180. Criminal Justice Act, 2003, c. 44, § 37 (U.K.). This gets rid of the primary/secondary disclosure distinction that was part of section 7 of the Criminal Procedure and Investigations Act. See Criminal Procedure and Investigations Act, 1996, c. 25, § 7 (U.K.); see also Redmayne, *supra* note 143, at 444–45.

181. See *supra* text accompanying notes 50–54

182. See *supra* Part III.A–B.

183. The debate about whether to formalize or codify various aspects of the common law is centuries old and has been expertly described elsewhere. See generally Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992). As to the prosecutor's disclosure obligations in general, the debate has largely been resolved in favor of codification. Thus, the prosecutor's limited obligation to disclose *inculpatory* information is codified in the Federal Rules of Criminal Procedure and in many state statutes. See *supra* note 69. The prosecutor's obligation to disclose exculpatory information is also generally set forth in the Federal Rules, and all states and thirty-seven of the ninety-four U.S. district courts have already codified it, albeit in a general way.

What we propose here is to make the existing statutory or rule-based provisions more detailed and explicit. This proposal is supported by the arguments in favor of codification generally—that it (1) makes the law more accessible, clearer, and more effective; (2) permits reform; and (3) provides uniformity. Opponents of codification generally argue that codification: (1) is unnecessary because the common law system is working; (2) prevents development of the law; and (3) politicizes the law. See Salken, *supra*, at 664–703. In short, it is clear that the existing *ad hoc* common law *Brady* regime is not



*A. A New Standard: Reasonably Helpful Information*

The proposed disclosure statute would broaden the prosecutor's obligation to disclose from the current "material favorable evidence" requirement to a disclosure of "reasonably helpful information." The proposed standard is consistent with current reform efforts. It will make the job of the police and prosecutors unquestionably easier, remove the distorting effect of cognitive bias and the schizophrenic demands of the current doctrine, and do away with the demands of 20/20 foresight. Police and prosecutors do not have to abandon their law enforcement roles, overcome their cognitive biases, or know the precise contours of the defense in order to determine what might be viewed by an objective observer as "helpful."

*B. Checklists*

A key provision of my proposal is the requirement that the police complete disclosure checklists of what the United Kingdom calls "unused material," and what we would call "favorable information." A copy of a proposed checklist is attached as Appendix C. Given modern technology, these standardized checklists could be maintained on computers or smart phones. Preferably, as recognized in nonlegal contexts, a third party, such as a superior officer, would be responsible for making sure these checklists are completed and for turning them over to the prosecutor in charge of the case.

This checklist regime would finally provide conformity between the law and reality by ensuring that, as *Kyles* assumes, prosecutors have a systematic way to discover exculpatory information in the hands of the police. In addition, it will go far to prevent undisclosed information from being hidden, only to be discovered serendipitously after conviction. Suppressed information will no longer be hidden from view, particularly if the checklists become part of the pretrial *Brady* conference recommended by the ABA.

The ABA and the participants at the Cardozo symposium represent a professional consensus that specific and detailed requirements—set forth in checklists—should be developed to ensure appropriate disclosure. Certainly, as recommended by the ABA, each jurisdiction could develop its own checklist. The proposed checklist in Appendix C is offered to assist this effort. It is based on the current state of knowledge about what sorts of suppressed information most frequently exist in wrongful conviction cases. There is no reason to ignore this knowledge; indeed, judging by recent reform efforts, there apparently is professional impatience to confront it. Moreover, there is a professional consensus that we cannot continue to pretend that the *Kyles* obligation can be satisfied by existing approaches.<sup>184</sup>

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working and is not likely to be developed or reformed effectively in the courts. Moreover, a balancing of the public's interests against the defendant's interest in fairness and accuracy is appropriately done by the legislature, rather than by the courts.

184. Although several jurisdictions now follow an "open file" disclosure regime, that kind of disclosure is not preferable to a checklist system for several reasons. First, "open file" disclosure still depends entirely on whether the police chose to disclose information to the prosecution in the first instance. It does not

### C. Timing

Absent local rules or judicial decisions, there is no uniformity as to when defendants receive exculpatory information, and there is currently no requirement that they even receive it before entering a guilty plea. The ABA's recommendation that the court convene a pretrial discovery conference specifically addressing the prosecutor's *Brady* obligation should also address the timing of the conference. In the absence of such a mandated conference, the proposed statute resolves the problem by requiring that exculpatory information be disclosed within fourteen days of the defendant's first appearance or within fourteen days of a request, whichever comes first, with a continuing disclosure obligation thereafter. Prosecutors would remain free to apply for an extension or protective order under the public interest exception.<sup>185</sup>

There are, of course, other possibilities. One possibility is to require disclosure "as soon as practicable." Many existing statutes do that, but it is really a requirement without teeth. Because disclosure of favorable information impacts a defendant's plea decisions and trial strategy, it is important that some specific deadline be imposed so that information will be disclosed early in the process. Courts that have addressed the timeliness question generally have reversed convictions where information was not disclosed at a time when it could be used effectively at trial or at a plea

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provide any mechanism for ensuring that disclosure. Panel Discussion, *Criminal Discovery in Practice*, 15 GA. ST. U. L. REV. 781, 786–87 (1999) (commenting that "open file" discovery may not include summaries of witness interviews or statements of witnesses whose safety needs to be protected). Second, "[t]o the extent that an 'open file' policy represents to a defendant that a prosecutor has disclosed everything in her file relevant to the case," it can mislead defense counsel into believing that no exculpatory information exists and will certainly lull counsel into "believing that he need take no further action to enforce discovery requirements." Gershman, *supra* note 43, at 544. Such evidence is commonly omitted from disclosure by even the most well-intentioned prosecutors using "open file" policies. However, Professor Gershman also sheds light on the potential for egregious misuse of "open file" policies in his documentation of one of the "most notorious perpetrators" of this type of misconduct, Carmen Marino, the former chief prosecutor in Cuyahoga County, Ohio. *Id.* at 547. Marino's unethical use of an "open file" policy consisted of the following arrangement: defense counsel was taken into the prosecutor's office for the purpose of allowing "defense counsel to look at the file"; however, defense counsel was not allowed to physically view police reports, which were read aloud to defense counsel by a prosecutor. *Id.* at 547–48. Subsequent legal proceedings years later revealed that "critical *Brady* evidence was hidden from the defense" through the use of this ploy "to lull the defense into believing it had received a complete accounting of the prosecutor's file." *Id.* at 548. And, as *Strickler v. Greene* demonstrates, through the pretense of transparency, prosecutors have the ability to withhold *Brady* evidence from the defense. *See* 527 U.S. 263 (1999). Even those prosecutors who boast that they disclose everything candidly acknowledge that much evidence is not disclosed under this policy. Among the evidence that is not ordinarily disclosed are a prosecutor's work product, summaries of interviews with witnesses, notes and communications with other law enforcement officials, information that is privileged or confidential, and information whose disclosure might threaten the safety of witnesses.

"Open file" discovery also may protect nondisclosure where a prosecutor claims to have inadvertently slipped up. And some prosecutors use an "open file" discovery policy to overwhelm the defense with massive amounts of documents, including potential *Brady* evidence, that are virtually impossible to read and digest in the limited time available. *See* Gershman, *supra* note 43, at 542–46.

185. *See infra* Part IV.D.

proceeding.<sup>186</sup> The fourteen-day requirement would be most likely to result in disclosure at a time when defense counsel can make use of the information.

*D. Public Interest Immunity*

Prosecutors know that other agencies withhold *Brady* evidence. Governmental agencies involved in an investigation may decide not to disclose *Brady* evidence to the prosecutor for several reasons, including a fear that disclosure may undermine the safety of witnesses, compromise the integrity of the case, or damage other ongoing investigations.

Under the proposed statute, the prosecution may apply for a protective order limiting, deferring, or denying discovery if the prosecution can establish by clear and convincing evidence that disclosure as contemplated will create an unacceptable risk of (1) harm to a witness, (2) destruction of evidence, or (3) harm to an ongoing investigation.<sup>187</sup> The application shall be on notice to the defense. The category of information for which an exception is sought must be given, although the specific nature of the information need not be revealed.

*E. The Burden of Proof*

As has been demonstrated, one aspect of *Brady* that has contributed to its ineffectiveness is the defense's crippling burden of proving materiality. Under *Brady*, the defense must show that there is a reasonable probability that the result would have been different had the evidence been disclosed. We have already addressed the problem of imposing an outcome-determinative test as a standard for judging a pretrial disclosure decision. Assuming, however, that suppressed evidence does not surface until after a conviction, how should appellate courts evaluate the fairness of the resulting conviction?

The proposed statute would shift the burden of proving prejudice to the prosecution in some cases, where it rests with respect to all other constitutional violations.<sup>188</sup> Specifically, with respect to the items required to be disclosed on Checklist A,<sup>189</sup> the disclosability of which the prosecution would have notice, the prosecution would be required to show that nondisclosure was not material. With respect to other items not required by Checklist A, the defense would continue to bear the burden of proving materiality.

This modification of the prejudice requirement is supported by, albeit an extension of, existing Supreme Court doctrine. As long ago as its decision in *United States v.*

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186. See *Miller v. United States*, 14 A.3d 1094, 1107–11 (D.C. Cir. 2011) (discussing timeliness issue and reversing based on delayed disclosure); *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001).

187. See *infra* Appendix B.

188. See *Chapman v. California*, 386 U.S. 18 (1967). For a list of constitutional errors that have been subjected to the constitutional harmless error standard of harmless beyond a reasonable doubt, see *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991).

189. See *infra* Appendix C.

*Agurs*, the Court explicitly stated that “when the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.”<sup>190</sup> The checklist is a “request-equivalent.” For the same reasons that a specific discovery request heightens the prosecutor’s burden, so should the checklist. Like a specific request, the checklist makes the prosecution’s compliance much easier: it tells the prosecutor precisely what to look for, rather than requiring her to comb through her files and figure out on her own what might be disclosable. Like the request, because most prosecutors who do not know what the defense’s strategy is, the checklist puts the prosecutor on notice that certain information is important to the defense, so it is fair to require the prosecution to prove that nondisclosure was harmless. Finally, as the government suggested in *Bagley*, a more lenient materiality standard in a case involving a specific defense request is appropriate because

an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.<sup>191</sup>

These factors argue in favor of a more lenient standard where material requested in the checklist is not disclosed. By the same token, as to favorable information that has not been requested or listed on Checklist A,<sup>192</sup> the burden of proving materiality should remain on the defense.

#### *F. Defense Disclosure*

The proposed statute does not reciprocally expand the defense’s disclosure obligations. That is, beyond what already exists in state and federal statutes, there is no requirement that the defense reveal its theory of defense or its witnesses, or otherwise share information with the prosecution. This is unlike the regime in the United Kingdom, where the defense has an obligation to file a defense statement that identifies the defense’s theory and the ways in which the defense takes issue with the prosecution’s contentions. In response, the prosecution must disclose any helpful information that has not already been disclosed. Of course, the already existing U.S. defense disclosure obligations concerning alibi and similar ambush-type defenses will remain in place.

The statute does not expand the defense’s obligation because defense disclosure has virtually no role to play in protecting the innocent and very little to do with *Brady*’s fundamental fairness concerns. *Brady* was intended to level the playing field by requiring that the prosecution reveal the results of its superior investigative resources to the defense. While it is possible that defense disclosure will assist the

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190. 427 U.S. 97, 106 (1976); *see also* *People v. Vilardi*, 76 N.Y.2d 67 (1990) (articulating a higher standard of materiality for specifically requested evidence under the New York State Constitution).

191. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

192. *See infra* Appendix C.

prosecutors in doing so, the case law reveals that the exculpatory nature of information routinely withheld by prosecutors is obvious, with or without any disclosure by the defense. However, since this symposium's proposed alternative process involves increased disclosure obligations by the defense, one option would be to permit the filing of a defense statement that would then broaden the prosecution's disclosure obligation in response. As in the United Kingdom, disclosure by the defense could broaden the prosecutor's disclosure obligation, but it is not a prerequisite to it. And, as in the United Kingdom, once the defense statement is filed, the failure to disclose information helpful to that defense would almost invariably require reversal.

## V. CONCLUSION

The common law development of the *Brady* doctrine has not been successful in protecting a defendant's right to fundamental fairness, and case law demonstrates that it certainly has not resulted in meaningful protection for the innocent. It is time to acknowledge what we already know about the relationship between wrongful convictions and the suppression of exculpatory evidence. Professional consensus supports the codification of specific disclosure rules and requirements, such as those set forth in the appendices attached: a broader disclosure obligation with no regard to materiality, specific disclosure checklists and compliance protocols, a modified materiality showing, and clearer and more effective time limits. At this stage of scholarly, judicial, and professional awareness and development, a failure to design and enforce such a clear and effective disclosure regime amounts to willful blindness, and will perpetuate the current lack of faith in the morality of the criminal process and its ability to protect the innocent.

**APPENDIX A**

**UNUSED MATERIAL THAT MAY BE CREATED OR USED DURING AN INVESTIGATION**

<b>Crime Reporting and Suspect Identification</b>		<b>Administration</b>
<p><b>Form MG6C</b>                      999 voice tape                      Exhibits not referred to in statements                      Post arrest photographs                      Details of other suspects arrested, interviewed, or questioned but not charged                      Audio/video tapes of interviews of witnesses                      Potential witnesses' details where no MG11 given                      CCTV or other videos                      Media releases by police                      Fingerprint forms                      Witness album documentation                      ID procedure forms (except participant lists)                      Crime reports                      Incident log of messages                      Pocket books                      Custody records                      Letter of complaint of crime                      First description of all suspects however and wherever recorded                      Material in police possession from third party                      Plans or video of crime scene                      Details of whether any witness has sought or received a reward+</p>	<p><b>Form MG6D</b>                      CHIS report                      Offender profiles                      Port warnings                      Wanted/missing circulations                      Crimestoppers                      Force intelligence bureau material                      Sensitive material in police possession from Social Services or local authority</p>	<p><b>Form MG6B</b>                      Police misconduct material (disciplinary findings/convictions, etc.)</p> <p><b>Form MG6C</b>                      Road traffic crash reports                      Vulnerable victim or witness profile                      Message Switching System messages+                      Record of property recovered from crime scenes                      Record of searches                      Custody record                      Post charge photograph                      Lay visitors report                      Holmes actions, messages and docs+                      Family liaison logs+                      Property recovered from crime scenes forms+</p>

<b>Investigation</b>	<b>Forensic and Medical Records</b>	<b>Third party</b>
<p><b>Form MG6C</b>  Scientific or SOCO findings not used as evidence  Draft statements or preparatory notes  DNA or other forensic material not used as evidence  MG11s from unwilling or unhelpful witnesses  Prompt notes for interviews  Medical Examiner reports for suspect or witnesses  Records of information provided, e.g., in conversation  House to house enquiries+  Audiotape or written note of interview with witnesses notified by the accused</p> <p><b>Form MG6D</b>  Operational briefing/debriefing sheets  Policy files  Information in support of search or arrest warrants  RIPA authorities/documentation  Observations/surveillance logs</p>	<p><b>Form MG6C</b>  SOCO/IDO work sheets  File records  Pathologists' records  Dental records  Forensic scientist's records lab forms  Hospital records relating to the condition which is the subject of the offence charged+</p>	<p><b>Form MG6</b>  Medical and dental records  Media material  Special procedure applications  Records held by other agencies</p> <p><b>Form MG6D</b>  Records/material held by Social Services or local authority</p>

+Enter on MG6C unless would reveal sensitive material in which case list on MG6D or consider editing.  
Edit sensitive entries from copies to be disclosed to defence, e.g., address telephone numbers.



## **APPENDIX B – MODEL DISCLOSURE PROVISIONS**

The following provisions supplement existing disclosure obligations of the police and prosecution.

### **I. Required Disclosure**

Within fourteen days of a defendant’s request, and subject only to the public interest immunity exception set forth in Part III, below, the prosecutor shall make the following disclosure to the defense and to the court:

- A. Any and all information that might reasonably be helpful to the defense, in any form, that tends to (a) exculpate the defendant; (b) adversely impact the credibility of government witnesses or evidence; (c) mitigate the offense; or (d) mitigate punishment.
- B. Checklist A, as indicated.
- C. Such disclosure shall be accompanied by a written certification that the prosecutor has exercised due diligence in locating all information favorable to the defendant, that the prosecutor has disclosed such information, and that the prosecutor acknowledges his continuing obligation to disclose such information immediately upon such information becoming known.
- D. If the prosecutor reasonably believes that the disclosure of certain information will lead to the destruction of evidence or harm to any individual, that information should be listed on a separate Checklist, titled Checklist B.

### **II. Failure to Disclose Listed Information**

Where information of the type listed on Checklist A is not revealed to the defense but is discovered and forms the basis of a defense request for post-conviction relief, the prosecution shall be required to prove that the failure to disclose that information was harmless beyond a reasonable doubt. Where information not required to be disclosed on Checklist A is not revealed to the defense but is discovered and forms the basis of a defense request for post-conviction relief, the defendant shall be required to prove that the failure to disclose was material. As used in this statute, “material” means there is a reasonable probability that the result would have been different had the information been disclosed.

### **III. Public Interest Immunity**

An application may be made to the court for a protective order where the prosecutor can show, by clear and convincing evidence, that disclosure of the information set forth in Section II, above, will result in:

- (1) physical injury to any individual;
- (2) the destruction or disappearance of relevant evidence; or
- (3) irreparable damage to an ongoing investigation.

### **IV. Sanctions**

Failure to comply with any of the obligations set forth in this statute may result in dismissal, preclusion, default, or the imposition of other sanctions as deemed appropriate by the court.

**APPENDIX C**

**CHECKLIST A: REQUIRED DISCLOSURE**

**As to Witnesses, generally**

Relationship to defendant  
Past criminal record  
Prison records  
Suspected criminal activity  
Prior inconsistent statements  
Prior conduct that suggests a motive to lie  
Promises of leniency, written or unwritten  
Reasonable expectations of leniency  
Written agreements  
Any of the witnesses originally suspects?  
Reward offered?

**Identification Witnesses**

Any witness who identified the defendant?  
What form of identification procedure?  
Any previous descriptions?  
Any witness who failed to identify the defendant?  
Any witness who identified someone [other than the defendant]?  
Any witness who expressed uncertainty in identifying the defendant?  
Any witness who changed his or her mind about identification?

**Forensic**

Was a weapon recovered?  
Any forensic testing?  
Were the results conclusive?  
Medical evidence?  
Psychiatric reports

**Informant**

Tips  
Promises of immunity  
Prior criminal records  
Prior inconsistent statements  
Information about mental or physical impairment  
Inconsistent or contradictory scientific tests  
Pending charges  
Monetary inducements  
Proffers  
Failure to institute civil proceedings

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**Statements of eyewitnesses**

Any and all statements of identifying witnesses

Any information relating to identification of other suspects

Prior inconsistent statements