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Recommended Citation
Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, No. 99-16 Boston University School of Law Working Paper Series, Public Law & Legal Theory (1999).
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WORKING PAPER NO. 99-16

THE PROSECUTOR'S ETHICAL DUTY TO SEEK EXCULPATORY EVIDENCE IN POLICE HANDS: LESSONS FROM ENGLAND

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THIS PAPER IS A DRAFT OF AN ARTICLE THAT WILL BE PUBLISHED AS PART OF A SYMPOSIUM ON ETHICS IN CRIMINAL ADVOCACY IN VOLUME 68, ISSUE 5 (APRIL 2000) OF THE **FORDHAM LAW REVIEW**. THE JOINT COPYRIGHT OF THIS ARTICLE IS HELD BY PROFESSOR STANLEY Z. FISHER AND THE **FORDHAM LAW REVIEW**.

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THE PROSECUTOR'S ETHICAL DUTY TO SEEK EXCULPATORY EVIDENCE IN POLICE HANDS: LESSONS FROM ENGLAND

Stanley Z. Fisher[*]

INTRODUCTION

IN *Kyles v. Whitley*,[1] a divided Supreme Court reversed defendant's capital murder conviction because prosecutors, who had responded to a pretrial defense motion for disclosure by saying that there was "no exculpatory evidence of any nature,"[2] had in fact failed to disclose numerous pieces of exculpatory evidence to the defense. The Court found that the undisclosed evidence might have bolstered the defendant's claim that he was innocent, and that the true perpetrator was an uncharged informant named Beanie.[3] In its brief,

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[*] Professor of Law, Boston University School of Law. I am grateful to Mike McConville, Chairman, School of Law at the University of Warwick, England, and to his staff for graciously hosting my research visit there in the Spring of 1999. Professor McConville and Roger Leng of that school were both generous with their time, contacts and expertise. I am also indebted to the Crown Prosecutors, police officials, defense solicitors, and others in England who responded to my requests for information with remarkable patience and kindness. Finally, I appreciate the skillful research assistance I received from Colin Kisor, J. Peyton Worley, and Jeffrey Rupp, guidance on source materials from colleagues Robert Bone and Susan Koniak, and helpful editorial suggestions from Eric Blumenson, Dan Givelber, Kevin McMunigal, and Harry Subin.

1. 514 U.S. 419 (1995).

2. *Id.* at 428 (quoting prosecutor).

3. Non-disclosed items known to the police included: initial eyewitness statements taken by police (arguably closer to fitting Beanie); police records establishing Beanie's initial call to the police; his inconsistent statements to the police, and his suggestion that the police search defendant's rubbish; evidence linking Beanie to other crimes committed at the same grocery store and to an unrelated murder; and a computer printout of the license numbers of the cars police found in the parking lot on the night of the murder (which did not include defendant's car, although it was the police theory

the State of Louisiana argued that some of the exculpatory evidence was not disclosed even to the prosecutor until after trial, and that the state "should not be held accountable . . . for evidence known only to police investigators and not to the prosecutor."[4] Until *Kyles*, the Supreme Court never had cause to decide this claim,[5] which the Court rejected:

> [T]he 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. 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

that the killer had left his car in the lot after driving off with the victim's car and the jury had been shown a grainy enlargement of a crime scene photograph that supposedly had defendant's car in the background). *See id.* at 428-30. Kyles was retried three times after the Supreme Court reversed his conviction, resulting in a hung jury each time. He was released in 1998 after 14 years in prison, coming once within 30 hours of execution. *See* Pamela Coyle, *Tried and Tried Again: Defense Lawyers Say the D.A. Went Too Far Prosecuting a Louisiana Man Five Times for Murder*, 84 A.B.A. J., Apr. 1998, at 38-39.

4. *Kyles*, 514 U.S. at 438. In oral argument, the state renounced this argument, conceding that the state is "held to a disclosure standard based on what all State officers at the time knew." *Id.* at n.11.

5. Even before *Kyles*, courts had generally held the prosecutor responsible under *Brady* for disclosing material information known only to the police. *See, e.g.*, Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964) ("The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused."); Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 Yale L. & Pol'y Rev. 331, 347 (1998) ("[F]ederal discovery obligations extend to those government agencies that are so closely 'aligned' with the prosecution of a specific matter that justice requires their records be subject to the respective discovery obligations."); Robert Hochman, Comment, Brady v. Maryland *and the Search for Truth in Criminal Trials*, 63 U. Chi. L. Rev. 1673, 1699 (1996) (distinguishing between prosecutors' "classic *Brady*" duty to disclose material exculpatory evidence that they possess or of which they know, and their "search *Brady*" duty, requiring prosecutors to make reasonable efforts to locate and disclose such evidence that is not known personally to them).

importance is inescapable.[6]

The Supreme Court again applied the *Kyles* doctrine in 1999. Like Curtis Kyles, Tommy David Strickler brought federal habeas proceedings to attack a capital conviction and death sentence on *Brady* grounds.[7] The trial prosecutor gave defense counsel "open file" discovery, but his files did not contain certain exculpatory materials found in the police files after conviction.[8] These materials might have been used to impeach the testimony of a key prosecution eyewitness, Anne Stoltzfus. In her trial testimony, Stoltzfus claimed to have identified Strickler's photograph "with absolute certainty."[9] She also confidently and in great detail described Strickler's initial, aggressive contacts with the victim.

However, undisclosed police notes of interviews with Stoltzfus, and her written messages to the police, showed that she initially could identify neither the victim, nor Strickler, and that her memory improved only after several additional conversations with the police and with the victim's boyfriend.[10] The trial prosecutor asserted, and the defense denied, that some of these exculpatory documents were in the prosecution files examined by the defense.[11] But the prosecutor conceded that he had never seen

6. *Kyles*, 514 U.S. at 437-38 (citations omitted).

7. *See* Strickler v. Greene, 119 S. Ct. 1936, 1946-47 (1999).

8. In federal habeas proceedings, the district court issued a sealed, *ex parte* order granting petitioner's counsel the right to examine and copy all of the police and prosecution files in the case. The Supreme Court noted, without deciding, that the district court might have lacked authority to grant such sweeping discovery without a showing of good cause. *See id.* at 1950; *cf.* State v. Landano, 637 A.2d 1270, 1279 (N.J. Super. Ct. App. Div. 1994) (indicating that a federal district court in habeas action granted petitioner's *ex parte* application for a temporary restraining order, ordering federal marshals to seize files maintained by several New Jersey police departments as well as state and county prosecution agencies revealing critical exculpatory evidence that, despite numerous earlier requests, had never been disclosed). Landano's murder conviction was reversed, and he was ultimately freed. *See* Susan Sachs, *2d Trial in Killing of Officer Ends With Acquittal*, N.Y. Times, July 28, 1998, at B1.

9. *Strickler*, 119 S. Ct. at 1943 (quoting case record).

10. *See id.* at 1944-45 & n.9.

11. *See id.* at 1945.

some of the documents until long after the trial.[12] Relying on *Kyles*, the Supreme Court cited the individual prosecutor's "duty to learn of any favorable evidence known to the others acting on the government's behalf in [the] case, including the police."[13]

In *Kyles*, the Court justified this conclusion by appeals to precedent, administrative feasibility, and policy:

> [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.' Giglio v. United States, 405 U.S. 150, 154 (1972). . . . [A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.[14]

The Court's last point, that excusing a prosecutor's failure to disclose information known to the police would make them the "final arbiters" of the state's disclosure obligations, makes sense. Neither the dissenters in *Kyles* nor courts generally have disputed this proposition. The Court's doctrinal and administrative rationales, however, are less satisfying. They either ignore or pay insufficient attention to the actual relationship between police and

12. *See id.*

13. *See id.* at 1948 (citing Kyles v. Whitley, 514 U.S. 419, 437 (1995)). After a lengthy analysis of the evidence produced at trial, the Court upheld Strickler's death sentence on grounds that the suppressed evidence was not "material." *Id.* at 1952-55. Although there was a "reasonable *possibility*" that Strickler would not have been sentenced to death if the suppressed material had been disclosed, he had failed to meet *Brady's* stricter standard of materiality: a "reasonable *probability*" of a different result. *Id.* at 1953. In a separate opinion, Justice Souter argued for changing the *Brady* materiality standard from a "reasonable probability" to a "significant possibility." *Id.* at 1956-57 (Souter, J., dissenting).

14. *Kyles*, 514 U.S. at 438.

prosecutors.

Doctrinally, the Court relied on *Giglio v. United States*,[15] which holds only that one prosecutor should be held accountable for exculpatory evidence in the possession of another prosecutor in the same office:

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.[16]

The *Kyles* court failed to acknowledge the distinction between holding prosecutors strictly responsible for the conduct of other prosecutors (in the same office), and for the conduct of police, who are not normally employed by or directly accountable to the prosecutor.[17] Thus, *Giglio* hardly supports an extension of prosecutorial responsibility to include undisclosed evidence in the hands of the police.

The *Kyles* Court also makes a crucial but dubious empirical claim: 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

15. 405 U.S. 150 (1972).

16. *Id.* at 154 (citations omitted). As authority for holding the prosecution responsible for a promise made by one of its assistants, the Court cited Restatement (Second) of Agency § 272 (1958), and American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial, Standard 2.1(d) (1970). According to the ABA Standards, a prosecutor's obligation extends to material in possession or control of persons who have "participated in the investigation or evaluation of the case and who either regularly report or, with reference to the particular case, have reported to the prosecutor's office." Standards for Criminal Justice, Discovery and Procedure Before Trial, Standard 11-2.1(d) (2d ed. 1980).

17. *See* Stanley Z. Fisher, "*Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 N. Eng. L. Rev. 1, 53 (1993) [hereinafter Fisher, *Just the Facts*]; Donald M. McIntyre, *Impediments to Effective Police Prosecutor Relationships*, 13 Am. Crim. L. Rev. 201, 223-24 (1975).

information" from the police to his office.[18] According to the Court's reasoning, because the prosecutor has the *ability* to learn of exculpatory evidence in the hands of police, she bears the *responsibility* under *Brady* to ensure disclosure to the defense. Do prosecutors actually have this ability? The Court offers no support for its optimistic assertion. On the contrary, state and local police agencies generally operate independently of prosecutors, and answer to different constituencies.[19] As a result, prosecutorial access to information known to the police is a matter of persuasion and negotiation, rather than authority. The relationship is governed by informal practices about which little is known.

If, in fact, prosecutors lack the power to ensure police transmission of exculpatory evidence to them, then the Court's decision in *Kyles* places an unrealistic burden on the prosecutor " to insure communication of all relevant information [known

18. *See Kyles*, 514 U.S. at 438 (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)).

19. *See* Fisher, *Just the Facts*, *supra* note 17, at 53. The situation might be somewhat different in the federal jurisdiction. For instance, in *United States v. Osorio*, 929 F.2d 753 (1st Cir. 1991), despite a court order to disclose a key witness's prior criminal conduct, the prosecutor failed to reveal extensive activity known to FBI agents involved in the case. The prosecutor maintained that the information had been disclosed as soon as it was received from the FBI. *See id.* at 760. Denying defendant relief for lack of prejudice, the Court nonetheless stated:

> [T]he prosecutor is duty bound to demand compliance with disclosure responsibilities by all relevant dimensions of the government. Ultimately, regardless of whether the prosecutor is able to frame and enforce directives to the investigative agencies to respond candidly and fully to disclosure orders, responsibility for failure to meet disclosure obligations will be assessed by the courts against the prosecutor and his office.

Id. at 762; *see also* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 Fordham L. Rev. 723, 736 (1999) (" [I]nvestigative agencies have 'a considerable degree of independence' from prosecutors: 'the relationship between federal investigative agencies and federal prosecutors is coordinate, not hierarchical.'" (quoting Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. Rev. 757, 780 (1999))).

to the police] on each case . . . ."[20] Even more troublesome, the Court simply glosses over an important underlying problem. As *Kyles*, *Strickler*, and other disturbing cases[21] illustrate, the defendant's right to be informed of exculpatory evidence depends largely upon the prosecutor's access to information in police hands.[22] But the prosecutor's access in turn depends upon police cooperation in recording, preserving, and revealing exculpatory evidence to the prosecutor. If that cooperation is not forthcoming, the prosecutor's ability to comply with *Brady* is fatally compromised.

In a previous article, I argued that police

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20. *Kyles*, 514 U.S. at 438 (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). For an argument that the prosecutor's constitutional duty extends only to favorable evidence of which she knew or *should have known*, see Hochman, *supra* note 5, at 1699 (1996). In this helpful student Comment, Hochman distinguishes between two duties of the prosecutor under *Brady*: the "classic *Brady*" duty to disclose material exculpatory evidence that she possesses or of which she knows, and the "search *Brady*" duty, requiring prosecutors to make reasonable efforts to locate and disclose such evidence that is not known personally to them. *See id.* According to Hochman, the "classic *Brady*" duty also binds non-prosecutor state agents who fail to disclose that material exculpatory evidence exists. *See id.* at 1697-99, 1702-03. Thus, in *Kyles*, the Court should have reversed because the police, rather than the prosecutor, suppressed the exculpatory evidence. Although the result to the defendant is the same under either analysis, Hochman argues that doctrinal clarity is advanced by attributing *Brady* obligations directly to other state agents in addition to the prosecutor. Hochman is correct that non-prosecutor state agents, including the police, are constitutionally answerable for their own conduct in suppressing evidence to which the defendant has a right under *Brady*. *See infra* notes 265-72 and accompanying text.

21. In *United States v. Bagley*, 473 U.S. 667 (1985), A.T.F. investigators failed to inform the Assistant U.S. Attorney who prosecuted the case that the suppressed compensation agreements existed. *See id.* at 671 & n.4. Defendants in a number of other cases have been convicted and sentenced to death or long prison terms, only later to discover that the police had suppressed crucial exculpatory evidence. Two more egregious examples are *Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991), and *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988). For a detailed discussion of *Jones*, see Fisher, *Just the Facts*, *supra* note 17, at 2-4, 36-38, 40-42.

22. *But see* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 Hastings L.J. 957, 1002-03 (1989) (arguing that much *Brady* material will be known to the prosecutor independently regardless of police cooperation).

reports in this country differ "from those produced under a truly neutral system of investigation, such as reportedly exists in France and Germany, where the police are required to investigate and record exculpatory as well as inculpatory facts."[23] While American police departments pay lip service to the goal of reporting "all relevant evidence" in criminal investigations, in practice police reports are "artifacts of the adversary process," which tend to include evidence of guilt and omit exculpatory facts.[24] Courts have been unwilling to buttress *Brady* rights by requiring the police, either generally or in particular cases, to investigate, record, or reveal exculpatory evidence to prosecutors.[25] In addition, prosecutors normally lack the power (and perhaps the motivation) to insist upon access to exculpatory evidence known to the police.[26] As a result, I concluded, we suffer a systematic loss and suppression of exculpatory evidence at the stage of police investigation and reporting. As another writer has stated, this "fundamentally impairs the functioning of the fact finding process and its ability to determine guilt or innocence correctly."[27] By way of a remedy, I proposed, *inter alia*, that "rules of procedure and ethics should require prosecutors to familiarize themselves with police investigative and record-keeping procedures, to press the police to report specified categories of potentially exculpatory facts,[28] and to make good faith efforts to ensure

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23. Fisher, *Just the Facts*, *supra* note 17, at 57 (citing John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 Yale L.J. 1549, 1554, 1562-63 & n.51 (1978)); *see* Strafprozeßordnung [StPO] §§ 136(II), 160(II) (German Code of Criminal Procedure).

24. *See* Fisher, *Just the Facts*, *supra* note 17, at 17-31, 57.

25. *See id.* at 40-48.

26. *See id.* at 51-54

27. Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond* Brady, 53 N.Y.U. L. Rev. 835, 835 (1978).

28. Suggested categories included "the identities of percipient witnesses, their state of sobriety, discrepancies in witness descriptions of the perpetrator, discrepancies between such descriptions and the defendant's appearance, any alibi offered by the defendant, and the identity of any alibi witnesses." Fisher, *Just the Facts*, *supra* note 17, at 49-50.

their access to all relevant records."[29]

In this Article I revisit, in light of recent developments, the prosecutor's responsibility to disclose exculpatory evidence known to the police. In Part I, I describe a recent English[30] statute that establishes a detailed legislative framework regulating prosecutorial access to relevant evidence gathered by the police. The rigorous demands that English law makes upon police and prosecutors to ensure prosecution access to police investigative files contrasts strongly with our own *laissez faire* approach. This has led me to reexamine my own previous recommendations. Although an English-style legislative solution would be the most direct and effective remedy, I doubt that the political will to pass such legislation exists. Recognizing the likelihood of continuing legislative (and judicial) abstention, we must call prosecutors to greater account. Accordingly, in Part II of this Article, I propose amendments to the ABA Model Rules of Professional Conduct and the ABA Standards for the Prosecution Function. These amendments aim to reinforce the prosecutor's responsibilities under *Brady* and *Kyles v. Whitley* to obtain access to relevant information known to the police.

I. ENGLISH LAW: THE CRIMINAL PROCEDURE AND INVESTIGATION ACT, 1996

The complex evolution of English criminal disclosure law[31] culminated in England's Criminal

29. *Id.* at 55. I also proposed that defense attorneys should attempt to document police record-keeping practices, draft discovery requests to include informal investigative documents such as field notes, and consider suing the police for equitable relief. *See id.* at 56.

30. Although I refer in this Article to "English" law, the law described actually applies to both England and Wales. By "police" I mean also to include criminal investigators acting for other law enforcement agencies.

31. My account of English law and practice draws upon the literature cited below, and on field interviews conducted in April 1999 with English prosecutors, defense lawyers, police, academic experts, and others knowledgeable about the history and implementation of the disclosure law. My informants included: high, middle, and low-level staff of the Crown Prosecution Service in London, Coventry, and Abingdon; criminal defense solicitors in London and Birmingham; police

officials in London and at the West Mercia Constabulary Headquarters in Hindlip, Worcester; senior staff at *JUSTICE* headquarters in London and at the Criminal Cases Review Commission in Birmingham. The prosecutors and defense lawyers I spoke with were all solicitors; regrettably, I had no opportunity to interview any barristers. I also had the invaluable benefit of information and advice from expert faculty of the University of Warwick Law School. In footnote references I have identified most informants by their position rather than by name.

I have relied principally on the following published sources. For general works on English criminal procedure, see Andrew Ashworth, The Criminal Process: An Evaluative Study (2d ed. 1998); Frank Belloni & Jacqueline Hodgson, Criminal Injustice: An Evaluation of the Criminal Justice Process in Britain (2000); Blackstone's Criminal Practice 1999 (Peter Murphy ed., 9th ed. 1999); Justice in Error (Clive Walker & Keir Starmer eds., 1993); Mike McConville et al., The Case for the Prosecution (1991); John Hatchard, *Criminal Procedure in England and Wales*, *in* Comparative Criminal Procedure, ch. 4 (John Hatchard et al. eds., 1996); Graham Hughes, *English Criminal Justice: Is it Better Than Ours?*, 26 Ariz. L Rev. 507 (1984).

On the law of pretrial disclosure, see David Corker, Disclosure in Criminal Proceedings (1996); Roger Leng & Richard Taylor, Blackstone's Guide to the Criminal Procedure and Investigations Act 1996 (1996); John Niblett, Disclosure in Criminal Proceedings (1997); Anthony Edwards, *The Criminal Procedure and Investigations Act 1996: The Procedural Aspects*, 1997 Crim. L. Rev. 321; Ben Fitzpatrick, *Disclosure: Principles, Processes and Politics*, *in* Miscarriages of Justice: A Review of Justice in Error 151 (Clive Walker & Keir Starmer eds., 1999); Roger Leng, *Defence Strategies for Information Deficit: Negotiating the CPIA*, 1 Int'l. J. Evidence & Proof 215 (1997) [hereinafter Leng, *Defence Strategies*]; Patrick O'Connor, *Prosecution Disclosure: Principle, Practice and Justice*, *in* Justice in Error, *supra*, at 101; British Academy of Forensic Sciences, *Disclosure Under the Criminal Procedure and Investigations Act 1996* (unpublished papers presented at Seminar held at Gray's Inn, Dec. 1, 1999, chaired by Lord Mackay of Clashfern) (on file with author); Home Office, Disclosure: A Consultation Document (1995) (unpublished, on file with author); JUSTICE, Disclosure: A Consultation Paper, The JUSTICE Response (1995) (unpublished, on file with author).

I refer in this Article to the impact of the Police and Criminal Evidence Act 1984 ("PACE") on pretrial disclosure of exculpatory evidence, but I do not discuss PACE in detail. For scholarship on PACE, see generally David Brown, Detention at the Police Station Under the Police and Criminal Investigations Act 1984 (Home Office Research Study No. 104, 1989); David Brown, Investigating Burglary: The Effects of PACE (Home Office Research Study No. 123, 1991); David Brown, Pace Ten Years on: A Review of the Research (Home Office Research Study No. 155, 1997) [hereinafter Brown, PACE Ten Years On]; Stephen Moston & Geoffrey M. Stephenson, The Questioning and Interviewing of Suspects Outside the Police

Procedure and Investigation Act, 1996 ("CPIA" or "the Act")[32] and a subsidiary Police Code of Practice ("the Code").[33] The Act made major changes in the law governing the prosecution's duty to disclose exculpatory evidence to the defense.[34] Although I will describe these developments in English disclosure law, I do so only in order to give context to a related, but distinct, feature of the Act that is of prime interest in this Article: the Act's comprehensive regulation of prosecution access to information in police files. The Act provides that:

1. the police must list on schedules all existing items of relevant evidence, including exculpatory evidence, and their location;
2. the police must give copies of the schedules to the prosecution;[35]
3. the police must give the prosecutor access to all investigatory materials in their possession; and
4. record-keeping obligations must be assigned to specific police officers or employees, who must certify their compliance in writing to the prosecutor.

In the following sections I will describe the background to the Act, its requirements regarding the disclosure of exculpatory evidence in serious criminal cases, and the duties of police to

Station (Royal Comm'n on Crim. Justice, Research Study No. 22, 1993); Michael Zander, The Police and Criminal Evidence Act 1984 (rev'd 2d ed. 1990); Clive Coleman et al., *Police Investigative Procedures: Researching the Impact of PACE*, *in* Justice in Error, *supra*, at 17; Symposium, *The Police and Criminal Evidence Act 1984*, 1985 Crim. L. Rev. 535; Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 Hastings L.J. 1 (1986).

32. Criminal Procedure and Investigation Act, 1996, ch. 25 (Eng.) [hereinafter CPIA].

33. Criminal Procedure and Investigations Act 1996, s.23(1): Code of Practice (effective Apr. 1, 1997), *reprinted in* Blackstone's Criminal Practice 1999, *supra* note 31, app. 6 [hereinafter CPIA Code of Practice]. In this Article I refer to the Act and Code of Practice together as "the Act."

34. As discussed *infra*, these changes were motivated by perceived abuses of the defendant's right, under prior law, to broad, "open file" discovery. *See infra* notes 51-60 and accompanying text.

35. Except for "sensitive" items, copies also are given to the defense. *See infra* notes 83-90 and accompanying text.

investigate, record, retain and reveal such evidence to the prosecutor. I will then discuss issues that have arisen regarding implementation of the Act. Readers who would like background information about the English system of criminal prosecution may refer to the brief discussion of this subject in Appendix A to this paper.[36]

A. *The Evolution of Pre-1996 English Disclosure Law*

The complex history of English disclosure law has been detailed elsewhere.[37] Until enactment of the CPIA in 1996, England had no formal system of discovery in criminal proceedings.[38] However, the accused's right to advance notice of relevant evidence in possession of the prosecution was considered a fundamental right.[39] On the other hand, before 1996 the accused owed only a very limited duty to disclose his defense to the prosecution.[40] This was radically changed by the new Act.

English law distinguishes between evidence that the prosecution intends to produce at trial to prove its case, and other relevant "unused material" in its possession. As to the former, English practice for at least the past century has required advance disclosure of the prosecution case to the defense.[41] The pre-Act law governing disclosure of unused evidence developed as

36. *See infra* Appendix A (Organization of Criminal Courts, Prosecution and Police, and Police Record-Keeping, in England).

37. *See generally* Niblett, *supra* note 31 (detailing the history of English disclosure law); O'Connor, *supra* note 31, at 101-27 (same).

38. *See* Niblett, *supra* note 31, at 3.

39. "[I]n our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial." R. v. Brown [1995] 1 Crim. App. 191, 198 (opinion of Steyn, L.J.) (noting in dicta that there is no prosecution duty to disclose information tending to discredit defense witnesses); *see also* Corker, *supra* note 31, at 7-9, 21-39 (discussing the development of disclosure law).

40. Prior to the Act, the defense was required to disclose only alibi defenses and intention to present expert evidence. *See infra* notes 86-88 and accompanying text.

41. *See* Corker, *supra* note 31, ch. 4; Niblett, *supra* note 31, at 34.

follows. Following several miscarriages of justice in the 1970s involving fabrication of evidence and/or non-disclosure of exculpatory evidence,[42] the Attorney General in 1981 promulgated the Guidelines for the Disclosure of "Unused Material" to the Defence.[43] The Guidelines declared that, in cases to be tried on indictment, prosecutors have a duty before trial to disclose "unused material" to the defense. "Unused material" had to be disclosed "if it ha[d] some bearing on the offence(s) charged and the surrounding circumstances of the case."[44] The disclosure obligation was subject to specifically defined discretionary exceptions but, in case of doubt, a presumption in favor of disclosure applied.[45]

The Guidelines were the first statement of nationally uniform disclosure principles, but were not legally binding.[46] The courts, however, came to regard the Guidelines as reflecting minimum common law requirements.[47] Furthermore, in the fifteen years between promulgation of the Guidelines and passage of the 1996 Act, the courts expanded the prosecution's disclosure obligations in two major respects: first, by eliminating the prosecution's unilateral discretion, asserted under the Guidelines, to withhold disclosure in particular cases; and second, by broadening the

42. *See* Corker, *supra* note 31, at 35; Niblett, *supra* note 31, ch. 3; O'Connor, *supra* note 31, at 102-06; *infra* notes 61-63 and accompanying text.

43. *See* The Attorney-General's Guidelines for the Disclosure of "Unused Material" to the Defence (1981), [1982] 74 Crim. App. 302, *reprinted in* Niblett, *supra* note 31, app. 1 [hereinafter Guidelines]. The Guidelines were promulgated immediately following issuance of the Philips Commission report, which was critical of prosecution disclosure practices. *See* Corker, *supra* note 31, at 28. For discussion of the events leading up to issuance of the Guidelines, *see* Niblett, *supra* note 31, ch. 6.

44. Guidelines, *supra* note 43, § 2. Disclosure was to be accomplished by providing copies of documents shorter than 50 pages, and permitting inspection of longer ones. *See id.* §§ 4-5.

45. *See id.* §§ 6, 9.

46. *See* Corker, *supra* note 31, at 34.

47. *See* Royal Commission on Criminal Justice, Report 91 n.20 (London: HMSO, 1993) [hereinafter Runciman Comm'n Report] (stating that the guidelines "to all intents and purposes have the force of law").

scope of the "unused material" that must be disclosed. Both developments significantly influenced the content of the 1996 Act. In a third important step, the Crown Prosecution Service issued record-keeping guidelines to the police.

The Guidelines initially authorized the prosecutor unilaterally to withhold otherwise disclosable material from the defense in a number of specifically defined circumstances. The Court of Appeal, however, in reversing the notorious wrongful conviction in *Regina v. Ward*,[48] eliminated the prosecutor's unilateral discretion. Applying the civil law doctrine of "public interest immunity" ("PII"), the Court instead required the prosecutor in each case to obtain court approval to withhold sensitive items of disclosable material from the defense.[49] The 1996 Act incorporated the regime of judicial control over non-disclosure based upon PII.[50]

The 1989 *Guinness Ruling*[51] broadened the scope of "unused material" that must be disclosed to the defense. The court made clear that "the

48. Regina v. Ward [1993] 1 W.L.R. 619, 692 (Eng. C.A.). Judith Ward was released after serving 18 years in prison for causing several fatal explosions. Her successful appeal revealed massive suppression of exculpatory material by government officials. *See* Niblett, *supra* note 31, at 1-3, 74-77, 115-16.

49. *See* Niblett, *supra* note 31, chs. 9, 10; *see also* Rowe & Davis v. United Kingdom (Eur. Comm'n H.R., Oct. 20, 1998), *reprinted in* 1999 Crim. L. Rev. 410, 411 (finding it a violation of Article 6 of the European Convention on Human Rights for prosecutor to decide nondisclosure of allegedly sensitive materials without opportunity for trial court review). *Ward* also required the prosecution to notify the defense of its application for PII, but the Court laid down exceptions to the notice requirement, which remain in force after adoption of the CPIA 1996. *See* Corker, *supra* note 31, at 115-19; Niblett, *supra* note 31, at 78-79.

50. *See infra* notes 83-90 and accompanying text.

51. R. v. Saunders & Others (unreported, Central Criminal Court, Aug. 29, 1989) ("Guinness 1"). The opinion is a trial judge's opinion, which is neither "reported" nor published. The history of the *Saunders* litigation is referred to in *R. v. Saunders*, [1996] 1 Crim. App. 463. *See also R. v. Saunders*, 1990 Crim. L. Rev. 597 (briefly summarizing the history of the case). Published mentions of the "unreported" opinion of the trial judge (Henry) may also be found in Niblett, *supra* note 31, at 3, 67; Fitzpatrick, *supra* note 31, at 154-55 & nn.12-18; and O'Connor, *supra* note 31, at 108.

Guidelines were not confined to statements, but included any document or information conveyed orally which had a bearing on the offence charged or surrounding circumstances. In short [subject to the PII exception], *virtually everything gathered or created by the investigator was* prima facie *disclosable.*" [52]

Seeking to comply with the *Guinness Ruling*, the Crown Prosecution Service in 1992 issued a three-page memorandum, known as the "Guinness Advice,"[53] to chiefs of police throughout the country. The Advice made clear that the disclosure duties of the "prosecution" extend to police officers and forensic scientists[54] and charged these parties with an obligation to preserve potentially disclosable material and make it available to the prosecution. Specifically, it provided that "[i]n the course of any enquiry . . . *police officers should maintain a schedule of all material coming into their possession and should copy that schedule to the CPS with the case papers.*" [55] The Advice listed a number of categories of material that should be retained and included in the schedule, including notes of interviews with

52. Niblett, *supra* note 31, at 71 (emphasis added). Although the scope of disclosable material was marginally narrowed in 1994 to material that was "relevant or possibly relevant to an issue in the case," it remained extremely broad. Regina v. Keane, [1994] 1 W.L.R. 746, 752. The breadth of the prosecutor's disclosure duty is reflected in the Code of Conduct for barristers, requiring prosecutors to "ensure that *all relevant evidence* is either presented by the prosecution or made available to the defence." Code of Conduct of the Bar of England and Wales, Standard 11.2 (emphasis added).

53. Crown Prosecution Service, *Guinness Advice* (1992), *reprinted in* O'Connor, *supra* note 31, at 123 [hereinafter *Guinness Advice*].

54. *Guinness Advice*, *supra* note 53, para. 3. The courts also defined "the prosecution" broadly to include prosecution experts for purposes of the disclosure obligation. *See* Corker, *supra* note 31, at 38. Although several notorious English miscarriage cases were attributable to the suppression of forensic evidence, "neither the [CPIA 1996] nor the [Practice] Code addresses the duty of scientists to disclose [exculpatory] information, either to the police and prosecutors or to the defence." Mike Redmayne, *Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996*, 60 Mod. L. Rev. 79, 82-83 (1997).

55. *See Guinness Advice*, *supra* note 53, para. 5 (emphasis added).

actual or potential witnesses, suspects, or defendants, statements taken from potential witnesses "whether or not they assist the prosecution case," documents containing a description of the alleged criminal by a potential witness, crime reports, custody records, communications with forensic witnesses, and materials casting doubt upon the reliability or consistency of potential witnesses, or upon the reliability of a confession.[56] Relevant information received orally must be recorded and included on the schedule.[57] The recording and scheduling duties imposed on police by this document were carried forward into the CPIA and the Code of Practice.[58] Furthermore, the defense became entitled under the Act to receive copies of the police schedules listing relevant, non-sensitive materials gathered in the investigation.[59]

As a result of these developments, by the mid-1990s the defendant charged with a serious crime in England was entitled to virtually "open file" discovery. He had a right to copy or inspect the evidence supporting the prosecution's case, as well as any relevant "unused material" that might "possibly" be relevant to an issue in the case, or which might realistically provide a lead to such evidence. The sole exception to this right was through judicial grants of public interest immunity. But even in such cases, the police were required to record and reveal the information to the prosecutor.

B. *The Legislative and Political Background to the CPIA*

Law enforcement dissatisfaction with such broad defense access to unused material was a major reason for the passage of the 1996 Act. Passed by a conservative government, the Act's primary goal and effect was to restrict defense access to

56. *Id.* para. 8.
57. *See id.* para. 9.
58. *See* CPIA, *supra* note 32, § 23(1)(b); CPIA Code of Practice, *supra* note 33, §§ 5.1-5.5, 6.2.
59. *See* CPIA, *supra* note 32, § 2A(3); CPIA Code of Practice, *supra* note 33, § 6.3.

information in police and prosecution files. At the same time, by formalizing and expanding police duties to investigate and record potentially exculpatory evidence, and to reveal it to prosecutors, the Act reinforced the *prosecutor's* access to all relevant evidence.

The 1996 Criminal Procedure and Investigations Act was one of several major pieces of law reform legislation enacted in England since the mid-1980s. The immediate impetus for many of the reforms was a series of notorious miscarriages of justice that attracted public attention in Great Britain during the past few decades.[60] Some arose out of prosecution for IRA bombings in the 1970s;[61] others were ordinary criminal cases.[62] A number of official commissions were appointed to investigate particular miscarriages and/or to consider the need for systemic reforms.[63] Many of their reform proposals were enacted into legislation, the most important of which for our purposes was the Police and Evidence Act, 1984 ("PACE") and Codes of Practice.[64] PACE reformed police procedures for

60. *See infra* notes 69-71 and accompanying text.

61. For a summary of the history of recent miscarriage cases in the United Kingdom, and subsequent law reform measures, see Ashworth, *supra* note 31, at 11-18; Belloni & Hodgson, *supra* note 31, at 1-21; Justice in Error, *supra* note 31, at 6-13. The role of non-disclosure of exculpatory evidence as grounds for reversing some of these convictions, and others, is discussed in Niblett, *supra* note 31, at 17-21.

62. *See* Niblett, *supra* note 31, at 21-31.

63. *See, e.g.*, Lord Devlin, Report to the Secretary of State for the Home Department of the Departmental Committee on the Evidence of Identification in Criminal Cases (London: HMSO, 1976) (reviewing wrongful convictions and discussing procedures relating to identification evidence); Runciman Comm'n Report, *supra* note 47 (same).

64. *See generally* Zander, *supra* note 31 (outlining changes made under the Act). PACE was enacted following the report of the Philips Commission, which was appointed in the wake of a miscarriage of justice in the *Confait* case, [1975] 62 Crim. App. 53. *See* Justice in Error, *supra* note 31, at 7. There are five PACE Codes of Practice: Code A (stop and search); Code B (search and seizure); Code C (detention, treatment and questioning of suspects); Code D (identification); and Code E (tape recording of interviews with suspects). *See* Zander, *supra* note 32, at 155.

Another important reform stemming from the 1981 Philips Commission Report was the Prosecution of Offences Act 1985, which established the Crown Prosecution Service. *See* Francis Bennion, *The New Prosecution Arrangements: The Crown*

search and seizure, arrest, detention, questioning, and charge.[65]

Despite their origins in public inquiries into convictions of innocent defendants, many of these reforms served the "law and order" political agenda of the conservative governments then in power.[66] However, these legislative and other reforms also led to the adoption of strict record-keeping requirements for police investigators. These requirements—particularly under PACE—were designed to prevent the sort of fabrication or non-disclosure of evidence that had characterized some of the most notorious miscarriage cases. Even before enactment of the CPIA, these investigative records were made available to prosecutors and, often, to the accused as well.[67]

In 1991, the Court of Appeal quashed the IRA pub-

Prosecution Service, 1986 Crim. L. Rev. 3, 9; A. F. Wilcox, *Royal Commission on Criminal Procedure: The Proposed Prosecution Process*, 1981 Crim. L. Rev. 482, 483. Regarding other criminal justice reforms enacted in England in the past decade, see *supra* notes 42-58 and accompanying text.

65. PACE section 59 also established a duty solicitor scheme, providing a mechanism to implement the right of detained suspects to consult a solicitor at the police station. *See* Andrew Saunders & Lee Bridges, *The Right to Legal Advice*, *in* Justice in Error, *supra* note 31, at 37, 46-47; Zander, *supra* note 31, at 107-10.

66. *See, e.g.*, Lee Bridges & Mike McConville, *Keeping Faith With Their Own Convictions: The Royal Commission on Criminal Justice*, 57 Mod. L. Rev. 75, 76 (1994) (discussing conservative political influences on the 1993 Runciman Commission Report); *see also infra* notes 69-74 and accompanying text. For example, PACE expanded police powers to stop, search, and detain suspects. *See* Lee Bridges & Tony Bunyon, *Britain's New Urban Policing Strategy—the Police and Criminal Evidence Bill in Context*, 10 J.L. & Soc'y 85, 85-94 (1983); Coleman et al., *supra* note 31, at 18-21. Also, the 1994 Criminal Justice and Public Order Act restricted the accused's right of silence by allowing comment on his exercise of the right to remain silent during investigation and at trial. *See* Criminal Justice and Public Order Act, 1994, ch. 34(5) (Eng.). These changes were adopted despite the Royal Commission's explicit rejection of them. *See* Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. Crim. L. & Criminology 402, 404, 426-27 (1994). These restrictions on the right to silence paved the way for similar provisions in the CPIA. *See infra* notes 85-88 and accompanying text (CPIA sections 5(5) and 11 require the defendant in Crown Court cases to give a defense statement, and allow comment at trial on testimony inconsistent with it).

67. *See supra* notes 42-59 and accompanying text.

bombing convictions in the Birmingham Six case.[68] On the same day, the government announced appointment of a Royal Commission to study the need for reforms in the criminal justice system. The Runciman Commission's Report,[69] issued in 1993, influenced the 1996 Act's provisions.[70] Although the Commission was established in response to the problem of wrongful convictions, its technical mandate,[71] and some of its recommendations, gave greater emphasis to values of crime control. The Commission was directed, *inter alia*,

> to consider whether changes are needed in (i) the conduct of police investigations and their supervision by senior police officers . . . ; (ii) the role of the prosecutor in supervising the gathering of evidence and deciding whether to proceed with a case, and the arrangements for the disclosure of material, including unused material, to the defence . . . .[72]

Both supporters and critics of the existing law of pretrial disclosure presented testimony before the Commission, which accepted as valid two criticisms of the status quo.[73] First, the

68. *See* R. v. McIlkenny & Others, [1992] 2 All E.R. 417, 432 (Eng. C.A.). This followed reversal of murder convictions in another IRA pub-bombing case, that of the "Guildford Four." *See Unreliability of Police Evidence Quashes Convictions: Law Report*, Times (London), October 20, 1989.

69. *See* Runciman Comm'n Report, *supra* note 47.

70. Other reform legislation was also inspired by the Commission's Report, including the Criminal Justice and Public Order Act, 1994, *supra* note 68, and the Criminal Appeal Act, 1995. *See* Criminal Appeal Act, ch. 35, 1995 (Eng.) (establishing the Criminal Cases Review Commission, an independent body to review claims of wrongful convictions). The most recent addition to this series of English criminal justice reform legislation is the Human Rights Act, 1998. *See* Sybil D. Sharpe, *Article 6 and the Disclosure of Evidence in Criminal Trials*, 1999 Crim. L. Rev. 273, 273 [hereinafter Sharpe, *Article 6*].

71. Specifically, it was asked "to examine the effectiveness of the criminal justice system . . . in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources . . . ." Runciman Comm'n Report, *supra* note 47, at 1; *see* Bridges & McConville, *supra* note 66, *passim*; Sybil Sharpe, *Disclosure, Immunity and Fair Trials*, 63 J. Crim. L. 67, 67-68 (1999) [hereinafter Sharpe, *Disclosure*].

72. *See* Runciman Comm'n Report, *supra* note 47, at 1.

73. Liberal critics disputed both findings, as well as a third claim pressed by the government, that broad pretrial

Commission found that the defense could unnecessarily burden the police and prosecution by requesting large amounts of material that was of no genuine importance to the defense. Given the sheer volume of potentially relevant material gathered in an investigation, compliance with such "fishing expeditions" might not be feasible.[74] Therefore, strategic defense requests might force the prosecution to drop charges rather than bear the costs of compliance. Second, the Commission found that by pressing requests for unnecessary but potentially sensitive material, the defense could force the prosecution to drop charges rather than risk the harms resulting from disclosure.[75] Implicit in this criticism was dissatisfaction with the existing safeguards for denying disclosure based upon public interest immunity.[76] Based on these findings, the Commission recommended, and Parliament eventually approved, a new two-stage disclosure scheme that applies, effectively, to all criminal cases except for uncontested cases in the magistrates' courts.[77] The Criminal Procedure and Investigations Act 1996 and subsidiary Code of Practice also established, in detail, the duties of police[78] to gather and transmit potentially exculpatory evidence to the prosecutor.

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disclosure led to false "ambush" defenses at trial and unmerited acquittals. *See* Leng & Taylor, *supra* note 31, at 8-10. Ambush defenses were discussed in the Runciman Commission Report, *supra* note 47, at 98. *See also* Home Office, Disclosure: A Consultation Document 15 (1995) (unpublished, on file with author) (arguing that defense disclosure is necessary to prevent ambush defenses); JUSTICE, Disclosure: A Consultation Paper, The JUSTICE Response 18 (1995) (unpublished, on file with author) (arguing that concerns about ambush defenses are unfounded).

74. "Even in some straightforward cases the amount of material collected during the course of the investigation can be voluminous. In major inquiries, even with computerised logs . . . it is scarcely possible to be sure that all the material that has been generated has been listed." Runciman Comm'n Report, *supra* note 47, at 93.

75. *See id.* 93-94; Redmayne, *supra* note 54, at 81.

76. *See* Sharpe, *Disclosure*, *supra* note 71, at 68.

77. *See* CPIA, *supra* note 32, § 3; *see also* Niblett, *supra* note 31, at 230; Sharpe, *Article 6*, *supra* note 70, at 274.

78. The Act also applies to criminal investigations conducted by officials other than the police. *See* CPIA, *supra* note 32, § 1(4).

The Code of Practice did not take effect until April 1, 1997;[79] by the time of my visit to England in the Spring of 1999, it had been in place for only two years. No systematic studies of the new law's operation had been reported.[80] Although my field interviews were limited in number, scope, and geography,[81] they provide some insight into the issues that can arise in a system taking the English approach.

C. *The Criminal Procedure and Investigations Act 1996*

This section will briefly describe how the Act changes the English law of pretrial discovery. It will then describe the duties of police to investigate, record, retain, and reveal exculpatory evidence to the prosecutor, both as prescribed by the Act and as they appear to work in practice.

1. Disclosure Under the CPIA 1996

The Act does not alter the prosecutor's duty to disclose to the defense inculpatory material that forms part of the prosecution's case (the "used" material).[82] However, it replaces the prosecutor's common law duty to disclose all of the unused material with a two-stage reciprocal discovery scheme. In the first stage, *primary disclosure*, the prosecution must disclose "prosecution

79. Different parts of the Act itself went into effect on different dates. *See* Leng & Taylor, *supra* note 31, at 6. Before the law went into effect, nationwide training programs were held, including joint training for prosecutors and police officers, designed collaboratively by both groups.

80. Informal surveys of experience under the Act had been conducted among barristers. *See* British Academy of Forensic Sciences, Disclosure Under the Criminal Procedure and Investigations Act 1996 (unpublished papers presented at seminar chaired by Lord Mackay of Clashfern held at Gray's Inn, Dec. 1, 1999) (on file with author); interview with Superintendent R.K. Golding, Police Representative, Trial Issues Group, CPS Headquarters, in London, U.K. (Apr. 14, 1999).

81. *See supra* note 31.

82. *See supra* notes 39-41 and accompanying text. The Code presupposes that the police will turn over to the prosecutor a file containing the material for the prosecution case. *See* CPIA Code of Practice, *supra* note 33, §§ 7.1, 7.3.

material"[83] not previously disclosed, which in the prosecutor's opinion "might undermine the case for the prosecution."[84] The defendant is then required—on pain of sanctions[85]—to disclose his defense to the charge.[86] Defense disclosure is

83. "Prosecution material" is defined in section 3 of the Act as including information and objects that are in the prosecutor's possession or that he has inspected in connection with the case. *See* CPIA, *supra* note 32, § 3. For an argument that this definition gives the police effective control over what is disclosed to the defense, see Leng, *Defence Strategies*, *supra* note 31, at 219.

84. CPIA, *supra* note 32, § 3(1)(a). The test for primary disclosure is not further defined by the Act. CPS training materials interpret the test to require disclosure of "any material which is capable of having an adverse effect upon the strength of the prosecution case." Crown Prosecution Serv., Disclosure Under the Criminal Procedure & Investigations Act 1996, at 7 (unpublished Briefing Paper to explain how unused material is collected, scheduled, and disclosed at the Crown Court) (on file with the author), and of "anything that is inconsistent with an essential part of the prosecution case or could weaken it in a significant way . . . ." Crown Prosecution Serv., Criminal Procedure and Investigations Act 1996, Joint Operational Instructions: Disclosure of Unused Material § 3.19 (unpublished, March 24, 1997) (on file with author) [hereinafter Joint Operational Instructions].

85. The Act permits adverse comment and/or inferences should the defendant fail to give a timely defense statement, or give inconsistent defenses, or present a different defense at trial. *See* CPIA, *supra* note 32, § 11. Other possible sanctions against the defendant are contained in the Criminal Justice and Public Order Act 1994, which provides sanctions relative to the defendant's silence or statements during police questioning. *See* Peter Mirfield, *Two Side-Effects of Sections 34 to 37 of the Criminal Justice and Public Order Act 1994*, 1995 Crim. L. Rev. 612, 612-14; Rosemary Pattenden, *Inferences from Silence*, 1995 Crim. L. Rev. 602, 607-10. The CPIA, which makes clear that failure by police to abide by their duties will neither result in civil or criminal liability nor in *per se* loss of the case, *see* CPIA, *supra* note 32, §§ 26(2)-(4), has been criticized for including sanctions for noncompliance only against the defense. *See* Leng & Taylor, *supra* note 31, at 24-25, 39-42. In Parliamentary debate, the government had argued in favor of relying on the Bar's Code of Conduct and the Code for Crown Prosecutors to ensure that correct ethical standards would be applied. *See* Sharpe, *Disclosure*, *supra* note 71, at 79-80.

86. Before the Act, the defendant was obliged to disclose only alibi defenses and his intention to present expert evidence. *See* Criminal Justice Act, 1967, ch. 80, § 11 (Eng.). Expanded defense disclosure under the CPIA was designed to narrow the issues for trial, to avoid costly "fishing expeditions" by the defense and last minute "ambush" defenses, and to allow the government to confine further disclosure to material actually relevant to contested issues.

compulsory in cases tried on indictment, and optional in cases tried summarily; in both situations the right to secondary disclosure is conditioned upon prior defense disclosure.[87] After the defendant has made disclosure, the prosecutor must make *secondary disclosure* to the defense of material that "might be reasonably expected to assist the accused's defence" as disclosed by the defense statement.[88] At both the primary and secondary disclosure stages, the prosecutor applies the applicable tests to both "non-sensitive" and "sensitive" materials.[89] Regarding the latter, the Act preserves the judicially administered exception to disclosure based on the common law doctrine of public interest immunity.[90]

See Runciman Comm'n Report, *supra* note 47, at 96. Critics attacked the requirement of broadened defense disclosure as shifting the burden of proof and undermining the presumption of innocence. *See* Redmayne, *supra* note 54, at 84-86.

87. *See* CPIA, *supra* note 32, §§ 5-6. Defense disclosure is made by giving a statement to the court and prosecutor setting forth: (a) in general terms the nature of the accused's defense; (b) the matters on which he takes issue with the prosecution; and (c) for each matter, the reason why he takes issue with the prosecution. *See* CPIA, *supra* note 32, § 5(6); Niblett, *supra* note 31, at 236-38.

88. CPIA, *supra* note 32, § 7(2)(a). Examples given by the CPS of such material include relevant material that might: (a) assist the defense to cross-examine prosecution witnesses, as to credit and/or to substance; (b) enable the defense to call evidence or advance a line of enquiry or argument; or (c) explain or mitigate the defendant's actions. *See* Joint Operational Instructions, *supra* note 84, at § 3.40. For criticism of the secondary disclosure test, see Leng & Taylor, *supra* note 31, at 19-20, and Niblett, *supra* note 31, at 239-41.

89. *See supra* notes 49-59 and accompanying text.

90. *See* CPIA, *supra* note 32, at §§ 3(6), 7(5), 21(2); CPIA Code of Practice, *supra* note 33, §§ 6.1, 6.12; *supra* notes 49-50 and accompanying text. The Act arguably extends the Public Interest Immunity exception beyond the narrow bounds previously enforced in criminal cases.

Thus, in especially sensitive circumstances, the prosecutor can apply for pubic interest immunity from disclosure without notice to the defense. Under the Act, however, the prosecutor need only obtain court approval for non-disclosure of material that, in the prosecutor's view, satisfies the test for primary or secondary disclosure. *See* Sharpe, *Disclosure*, *supra* note 71, at 67, 69-70 (noting that one aim and effect of Act was to exempt much sensitive material from judicial consideration); *see also* Leng, *Defence Strategies*, *supra* note 31, at 222 (recognizing that Code § 6.12, giving "examples" of material

The new law radically restricts defense access to the unused material possessed by the prosecution. The defendant's initial access depends entirely upon prosecutorial screening of police files under a subjective test.[91] Secondary access also depends upon prosecutorial screening, this time under an objective test that is subject, on application by the defense, to judicial review.[92] Such secondary access, however, is conditioned upon the defendant's disclosure of his defense.[93]

From my inquiries it appears that the Act's essential premise— that police and prosecutors can be relied upon to screen the unused material for exculpatory evidence— remains deeply controversial.[94] To critics of the Act, the substitution of prosecutorial screening of unused materials for defense screening gives the responsibility to locate exculpatory evidence to those least capable, and least motivated, to find it.[95] For this reason, liberal critics contend

that may be considered sensitive, broadens the concept of public interest beyond that previously reflected in the criminal case law).

91. Section 3 of the Act requires the prosecutor to disclose material "which *in the prosecutor's opinion* might undermine the case for the prosecution." CPIA, *supra* note 32, § 3(1)(a) (emphasis added). This subjective test is "designed to rule out the possibility of judicial review," whereas the accused may "challenge prosecution disclosure (or the lack of it) after secondary disclosure (s. 8)." Leng & Taylor, *supra* note 31, at 13.

92. *See* Leng & Taylor, *supra* note 31, at 13. CPIA section 8 (and court rules) permits a defendant who has given a defense statement, and who has reasonable cause to believe that prosecution material exists that meets the test for secondary disclosure, to seek a court order against the prosecutor. *See* Niblett, *supra* note 31, at 240-41. On the limitations of judicial review under the Act as an effective remedy for incomplete prosecution disclosure, see Leng, *Defence Strategies*, *supra* note 31, at 221-23.

93. *See supra* note 86.

94. *See, e.g.*, Leng, *Defence Strategies*, *supra* note 31, at 216-18 (discussing the revolutionary nature of the changes in disclosure law). Controversy also surrounds the Act's provision for non-disclosure of potentially exculpatory evidence based upon public interest immunity. *See id.* at 221-23. Also, considerable uncertainty exists regarding defense access to materials in the possession of third parties, including private entities such as hospitals, and public agencies such as social service agencies.

95. *See, e.g.*, Sharpe, *Disclosure*, *supra* note 71, at 79-80. Professor Sharpe further explains the potential problem:

that the Act's pendulum has swung too far in favor of the government. They complain that the Act gives the police primary control over disclosure, that the police are neither able nor motivated to identify potentially exculpatory material, and that prosecutors are too overworked to monitor the police role.[96] They also contend that the tests for primary and secondary disclosure are defective,[97] that the exceptions to disclosure based on public interest immunity are too broad, and that the procedural safeguards against improper grants of immunity are inadequate. Consequently, critics predict that the Act's regime will produce a new round of miscarriages of

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> A fundamental concern underlying the CPIA is the significant onus placed upon the police to discern, record, retain and reveal to the prosecutor any information that "may be relevant" to the investigation. . . . Not only does this assume a sound working knowledge of evidentiary principles on the part of the police, it leads to an inverted "bottom up" decision-making structure with low-ranking officers having the greatest amount of discretion. It is only after police determinations have been made, that prosecutorial discretion in determining whether the material might undermine the case for the prosecution, or reasonably assist the accused's defence, comes into play.

Id. at 79.

96. *See* Fitzpatrick, *supra* note 31, at 164-67; Leng, *Defence Strategies*, *supra* note 31, at 225; Sharpe, *Disclosure*, at 71, 79-80; British Academy of Forensic Sciences, Disclosure Under the Criminal Procedure and Investigations Act 1996 (unpublished papers presented at Seminar chaired by Lord Mackay of Clashfern at Gray's Inn, Dec. 1, 1999) (on file with author); interview with defense solicitor in London, U.K. (Apr. 14, 1999).

97. The primary disclosure test has been criticized as overly vague, unworkable, and essentially indistinguishable from the test for secondary disclosure. *See* Leng & Taylor, *supra* note 31, at 12-15; Sharpe, *Disclosure*, *supra* note 71, at 71-73. Also, because the test is subjective, and therefore may be insulated from court review, prosecutors have little incentive to construe it broadly. *See* Redmayne, *supra* note 54, at 81. The Runciman Commission had recommended much broader primary disclosure of:

> all material relevant to the offence or to the offender or to the surrounding circumstances of the case, whether or not the prosecution intend to rely upon that material. . . . In addition, the prosecution should inform the defence at this stage of the existence of any other material obtained during the course of the inquiry into the offence in question.

Runciman Comm'n Report, *supra* note 47, at 95-96.

justice like those that previously led the courts to give defense counsel direct access to the police files.[98] Police and prosecutors, in contrast, generally approve the balance struck in the Act between protection of innocent defendants and efficient prosecution of the guilty. They blame problems in operation of the Act on the failure of other actors in the system, including judges, to follow its dictates.[99] They have also protested the costly burden of paperwork required by PACE and the CPIA.[100]

From an American observer's point of view, however, another aspect of the English system is noteworthy: in serious, contested cases, the Act gives prosecutors access to police-prepared schedules that list all relevant material gathered in the investigation. Except for separate schedules of "sensitive" materials, the defense also receives copies of these schedules.[101] In deciding disclosure issues, the prosecutor has the right to inspect all of the materials listed in

98. *See* interviews with defense solicitors in Birmingham, U.K. (Apr. 13 and Apr. 21, 1999); *supra* notes 42-49 and accompanying text.

99. Police complain about the lack of compliance by defense lawyers who fail to provide detailed defense statements, and by judges who, without requiring such statements, order the prosecution to give the defense blanket access to police files. *See* interview with defense solicitor in London, U.K. (Apr. 14, 1999); interview with Principal Crown Prosecutor, Casework Services Division, CPS Headquarters, London, in London, U.K. (Apr. 14, 1999); interview with Superintendent R.K. Golding, Police Representative, Trial Issues Group, CPS Headquarters, London, in London, U.K. (Apr. 14, 1999). Prosecutors blame the police for inadequately screening the unused material for exculpatory material. As a result, judges distrust the adequacy of police screening, and pressure prosecutors to allow the defense direct access to police files, in order to do the screening themselves.

100. *See* interviews with staff at West Mercia Constabulary Headquarters, Training and Development, in Hindlip, Worcester, U.K. (Apr. 15, 1999); *see also* Alan Mackie et al., *Preparing the Prosecution Case*, 1999 Crim. L. Rev. 460, 462 (reporting that police in 1993 asserted they were being "strangled by paperwork" as the result of PACE and file-keeping requirements).

101. Of course, access to the schedules is not the same as access to items listed on the schedule. The defense may only examine the actual items themselves by consent of the prosecution, or, after disclosure of the defense statement, by court order under CPIA section 8. *See infra* text accompanying notes 160-173.

the schedules. These formal mechanisms for revealing the fruits of police investigation, both inculpatory and exculpatory, to the prosecutor, contrast starkly with the informal, low-visibility and unstructured links between police and prosecution that characterize American practice.

2. Duties of the Police

The prosecutor's disclosure duties under the Act apply to material in the prosecutor's possession, or which has been revealed to him by police investigators.[102] The CPIA Code of Practice[103] describes the police duties to ensure that the prosecutor becomes aware of all relevant fruits of the investigation. These duties consist of general responsibilities, the duty to investigate exculpatory as well as inculpatory leads, and the duties to record, retain, and reveal relevant information to the prosecutor. We shall discuss these duties in turn, both as they are defined by law and as they appear to work in practice.

a. *General Responsibilities*

In every criminal investigation the chief of police must designate an officer to function as the disclosure officer.[104] The officer in charge of an investigation must ensure that proper procedures are in place for recording and retaining investigative material,[105] and that all relevant material is made available to the disclosure officer.[106] The disclosure officer is responsible for examining investigative material retained by the police, revealing it to the prosecutor, and formally certifying that he has done this. In routine cases, the investigator and disclosure officer might often be the same person.

102. *See* CPIA, *supra* note 32, § 3.2.
103. *See* CPIA Code of Practice, *supra* note 33.
104. *See id.* §§ 3.1-3.6; Leng & Taylor, *supra* note 31, at 42-43. Civilian employees of the department may also serve in this capacity. The chief must also designate officers to serve as the officer in charge of the investigation, and as the investigator. *See* CPIA Code of Practice, *supra* note 34, §§ 3.1-3.3.
105. *See* CPIA Code of Practice, *supra* note 34, § 2.1.
106. *See id.* § 3.3.

In a major inquiry, where many officers might be brought in to the investigation, a separate person will usually be appointed disclosure officer, and all the investigating team members will funnel information to him.[107] In some forces, once the investigation is complete and a charge filed, the investigators will hand over responsibility for disclosure to an "administrative support unit" within the force.[108]

b. *Duty to Investigate Exculpatory as well as Inculpatory Leads*

Miscarriages of justice can result from one-sided investigations because they ignore evidence that might contradict belief in the prime suspect's guilt.[109] To avoid this risk, section 23(1)(a) of the Act provides, for the first time, that police must take "all reasonable steps . . . for the purposes of the investigation,"[110] and the Code requires investigators to "pursue all reasonable lines of inquiry, whether these point towards or away from the suspect."[111]

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107. *See id.* § 3.1-3.3; interview with Crown Prosecutor, in Coventry, U.K. (Apr. 6, 1999).

108. These units, also known as Criminal Justice Support Units ("CJSU"), were created to relieve uniformed officers of the administrative burdens of final file preparation. They may be staffed by civilians. *See* Michael Maguire & Clive Norris, The Conduct and Supervision of Criminal Investigations 36 (Royal Comm'n on Crim. Justice, Research Study No. 5, 1992); *see also* John Baldwin & Adrian Hunt, *Prosecutors Advising in Police Stations*, 1998 Crim. L. Rev. 521, 531-32 (discussing the difficulties faced by administrative support units); interviews with staff at West Mercia Constabulary Headquarters, Training and Development, in Hindlip, Worcester, U.K. (Apr. 15, 1999).

109. *See* Barrie Irving & Colin Dunnighan, Human Factors in the Quality Control of CID Investigations 12 (Royal Comm'n on Crim. Justice, Research Study No. 21, 1993) (describing four stages of police investigation: first, police gather evidence to define one or more prime suspects; second, police identify and arrest suspects; third, police establish a case against the suspect sufficient to meet the test of prosecution; fourth, if police fail at step three, they repeat it; if they are partially successful, they try to find more evidence).

110. CPIA, *supra* note 32, § 23(1)(a).

111. CPIA Code of Practice, *supra* note 33, § 3.4 ("What is reasonable in each case will depend on the particular circumstances."). This requirement implements recommendations of the Royal Commission. *See* Runciman Comm'n Report, *supra* note 47, ch. 2, para. 13 (stating that even if a

The practical impact of this new duty remains to be seen. According to Roger Leng, this requirement, added late to the Bill, might be seen "as a cynical attempt to appease the opposition whilst falling short of enforceability by the courts."[112] Several informants described this provision as unenforceable, and therefore unlikely to affect police behavior.[113] However, as Mr. Leng notes, a court might exclude evidence[114] or stay proceedings[115] if police disregard the duty. Also, the defense might raise questions before the jury as to why the police did not explore alternative hypotheses. My interviews with police suggest that the fear of adverse consequences at trial might motivate police in serious cases to comply with the duty, as in the following case.

A woman was charged with the stabbing murder of

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suspect has already confessed, police should interview "as many witnesses to the offence as practicable, including any whom the suspect suggests may be able to exonerate him or her"); *cf.* Standards Relating to the Administration of Criminal Justice Standard 3-3.11(c) (3d. ed. 1992) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused."); Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond* Brady, *supra* note 27, at 842-48 (discussing police duty to investigate under the Sixth Amendment). In the United States, a defendant may elicit evidence at trial to establish the inadequacy of the police investigation in failing to pursue exculpatory leads. *See* Commonwealth v. Reynolds, 708 N.E.2d 658, 662 (Mass. 1999).

112. Leng, *Defence Strategies*, *supra* note 31, at 224.

113. *See* interviews with Crown Prosecutor, in Coventry, U.K. (Apr. 6, 1999); interview with Principal Crown Prosecutor, Casework Services Division, CPS Headquarters, in London, U.K. (Apr. 14, 1999).

114. Section 78 of PACE authorizes courts to refuse to admit prosecution evidence if, "having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." Police and Criminal Evidence Act, 1984, ch. 78 (Eng.). The defense might argue for exclusion, Leng suggests, "where the accused's ability to answer [the prosecution] evidence is substantially prejudiced as a result of the failure of the police to follow up available lines of inquiry favouring the accused." Leng, *Defence Strategies*, *supra* note 31, at 229.

115. Courts have the power to stay the proceedings if, as the result of government abuse of the process, the accused cannot receive a fair trial. *See* Leng, *Defence Strategies*, *supra* note 31, at 229-30.

the man who was driving the car in which she was a passenger. She claimed that a car with two men had pursued the victim's car, and one of the pursuers fought with and stabbed the victim. She described the route and the two men. Because witnesses saw the victim's car en route with no car in pursuit, the police doubted the woman's story. But the police published her description of the two men, appealing for public help. Members of the public phoned in the names of 70 suspects fitting the descriptions. Because the police feared cross examination at trial regarding why they did not pursue this "reasonable line of inquiry," the police investigated all 70, and excluded them all.[116] The police might have investigated the defendant's claim even if they had no duty to do so under the Act, but the existence of the duty might give more strength to a defense argument at trial that the investigation was defective.

The requirement that police "pursue all reasonable lines of inquiry" also invites the defense proactively to request that the police investigate particular alternative hypotheses.[117] In cases in which the police believe the grounds for such a request are baseless, they might be placed in a dilemma: whether to spend scarce investigative resources or risk embarrassment at trial for refusing to take "reasonable" investigative steps.[118] This requirement may therefore lend itself to strategic manipulation by the defense. On the other hand, by giving the defense a modest call on finite investigative

116. The police also recorded the statement of another witness, who at the time of the "pursuit" heard two cars race past his window, which faced a road near, but not on, the route that the defendant had described. This was disclosed to the defense which, without notice, argued at trial that the defendant and victim had followed this other route. *See* interview with Head of Major Crimes Unit, West Mercia Police H.Q., in Worcester, U.K. (Apr. 26, 1999).

117. A defense lawyer predicted that defense solicitors in child abuse prosecutions, who lack the ability to compel production of child welfare agency records, will request the police to "do their job" by reviewing the records for exculpatory material. *See* interview with defense solicitor in London, U.K. (Apr. 12, 1999).

118. *See* interview with Head of Major Crimes Unit, West Mercia Police H.Q., in Worcester, U.K. (Apr. 26, 1999).

resources largely controlled by the state, the Act may enhance the likelihood of a more balanced, impartial investigation. Also, to forestall abuse, the prosecution may look to the trial judge to exclude questions or arguments referring to police failure to take "unreasonable" investigative steps.[119]

c. *Duty to Record Potentially Exculpatory Information*

Since 1992, administrative guidelines issued by the Crown Prosecution Service have required the police to maintain schedules of all investigative materials coming into their possession and provide copies of the schedules to the CPS.[120] The guidelines listed a number of categories of material that should be retained and included in the schedules, including notes of interviews with actual or potential witnesses, suspects, or defendants, statements taken from potential witnesses "whether or not they assist the prosecution case," documents containing a description of the alleged criminal by a potential witness, crime reports, custody records, communications with forensic witnesses, and materials casting doubt upon the reliability or consistency of potential witnesses, or upon the reliability of a confession.[121] Relevant information received orally had to be recorded and included on the schedule.[122]

The 1996 Act gave legislative force to this previous duty established by the guidelines: police must record, retain, and reveal to the prosecutor in schedule form, all "material"[123]

119. *See* Donald A. Dripps, *Relevant But Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to Put on a Defense*, 69 S. Cal. L. Rev. 1389, 1399 (1996) (arguing that a judge's power to exclude prejudicial exculpatory evidence safeguards state interest in accurate fact-finding against the danger of irrational acquittals).

120. *See Guinness Advice*, *supra* note 53, at 124-25. The Guinness Advice is also discussed *supra* at notes 54-58 and accompanying text.

121. *See Guinness Advice*, *supra* note 53, at 125.

122. *See id.* at 126.

123. "Material" includes both information and objects. *See* CPIA Code of Practice, *supra* note 33, § 2.1.

that "may be relevant to the investigation."[124] The Act futher defines "material" as 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 . . . ."[125] When relevant, police must also record negative information, such as a witness's failure to observe an alleged occurrence.[126]

The importance of the recording requirement cannot be overstated: unless exculpatory evidence is recorded, it may be lost forever to a suspect who later seeks to establish his innocence. Opinions differ on the extent to which the police actually comply with this duty under the Act; it is easy, after all, *not* to write something down. Until credible studies are conducted of investigation under the Act, the extent of compliance cannot be known. However, certain observations of the English experience can be made.

First, the recording duty conflicts with a strong police tendency *not* to write down information that the police do not want disclosed.[127] This tension is most likely to arise in cases involving sensitive information, such as the existence of an informant. The Act requires police to reveal the existence of relevant, sensitive, unused material to the prosecutor, who, if the material is otherwise disclosable, must apply for court authorization to withhold it from the defense.[128]

Second, in complex criminal investigations involving the use of HOLMES,[129] comprehensive records of relevant information are made and preserved. This illustrates the incidental

124. *Id.* §§ 4.1-4.4; Leng & Taylor, *supra* note 31, at 43-44. Recording may be in writing or electronic form, and must be done contemporaneously, *i.e.*, "at the time it is obtained or as soon as practicable after that time." CPIA Code of Practice, *supra* note 33, §§ 4.1, 4.4.

125. CPIA Code of Practice, *supra* note 33, § 2.1.

126. *See id.* § 4.3.

127. *See* interview with senior Crown Prosecutor, in Abingdon, U.K. (Apr. 18, 1999).

128. *See* CPIA, *supra* note 32, § 3(6).

129. "HOLMES" records are described in Appendix A, *infra* notes 354-67 and accompanying text.

benefit to defendants of a system adopted in order to enhance investigative efficiency by requiring records to be made of "everything" learned in an investigation.

Third, several of my informants believed that the Act had made police more conscious of their duty to record and reveal exculpatory evidence.[130] They believed that training programs, reinforced by the threat of disciplinary sanctions, are causing police to internalize the norms established by the Act. My visit to a regional police training facility[131] illustrated this process. Because it struck me as remarkable compared to the training that I suspect occurs in most American police academies, I describe it in some detail.

I attended a regularly scheduled class on the CPIA for eight probationary police constables who had served as police officers for eighteen months.[132] All of the officers had experience investigating and preparing files in their own criminal cases. In addition, each had at some time been assigned to a special administrative

130. As one experienced Crown Prosecutor said, the Act "concentrates the police mind on unused material." As a result, the police record more than they did previously, and some of what they record favors the defense. *See* interview with senior Crown Prosecutor, in Abingdon, U.K (Apr. 18, 1999).

However, police often report "negative" evidence in ambiguous terms that conceal its true import. For example, in a burglary case police testified that "fingerprint checks at point of entry were negative." Both prosecutors and defense counsel thought that this meant that police had found no prints. In fact, prints had been found, but they turned out not to belong to the defendant, nor to any other known person. (The defendant's prints were on the items taken in the burglary, but he claimed he had found the items on the street.) When this fact came out after trial, the CPS did not oppose defendant's appeal of his conviction. According to my informant, the police must be trained to report more specifically what they mean by a "negative" investigative result. *See* interview with Principal Crown Prosecutor, Casework Services Division, CPS Headquarters, in London, U.K. (Apr. 14, 1999).

131. The training occurred at West Mercia Constabulary Headquarters. The West Mercia region is made up of rural areas and small towns, and encompasses Shropshire, Worcestershire, and Herefordshire. The region's largest city has a population of 200,000.

132. New police constables spend their first two years of service as probationers.

unit in her force, whose task was to prepare case files and evidence for submission to the CPS.[133] After I was given an opportunity to introduce myself to the class and explain my interest, the instructor led a discussion on the group's understanding of the Act and their experiences under it.

Discussion focused on the duty to pursue, record, and retain "negative" evidence. Several participants related instances in which they had encountered and recorded such evidence. One told of a case in which "every witness gave a different account." Accordingly, he submitted their statements to the prosecutor, along with comments on their unreliability. Another told of a "violent disorder" case in which two lineups were held but the suspect was not identified; he had recorded this.[134] A third told how, in an assault case, bloody boots were seized, bagged incorrectly in plastic, and not promptly sent for blood analysis. As a result, they were useless as evidence. The officer recorded the "whole shambles" about the boots in the file. While none of these police actions in themselves is remarkable, it is significant that the participants saw their actions as examples of compliance with their duty to record, retain, and reveal information that undermines the prosecution

133. These are known as Criminal Justice Support Units ("CJSUs") or Administrative Support Units ("ASUs"). In forces where they exist, the CJSUs assume the functions of the disclosure officer once the investigation has been completed and the charge filed. These units were created to relieve uniformed officers of the administrative burdens of final file preparation. *See* interviews with various staff at West Mercia Constabulary Headquarters, Training and Development, in Hindlip, Worcester, U.K. (Apr. 15, 1999); *see also* Baldwin & Hunt, *supra* note 108, at 531-32 (discussing difficulties encountered by the ASUs); Maguire & Norris, *supra* note 108, at 36 (same).

134. I do not know why this officer, who was apparently conducting the investigation, was also involved in the identification procedures. *See supra* notes 64-67 and accompanying text (PACE requires independent identification officer to administer identification procedures and record results). Also, because PACE entitles the defense lawyer to be present at the lineup, the lawyer would know of the non-identification; therefore, police recording of the fact would not greatly benefit the defense. I am grateful to Roger Leng for bringing the last point to my attention.

case.

At some point in the discussion, the instructor played devil's advocate: "You have 52 cards. Two are the wrong color. What do you do with the two? You have a statement that helps the defense. You have seen the victim. You know that the defendant is guilty. Why not tear up the statement?" The group's responses included comments like, "Because it's a legal document, you can't;" "It wouldn't be fair;" "It's not our job to be judge and jury; at the end of the day, we never know who did it;" "If you start with a minor breach of the rules, where do you stop?" Some brought up the possible sanctions for failure to comply with the Act's commands.[135] Accusing them of talking like boy scouts and girl scouts, the instructor asked whether they had not seen more experienced officers "bend" the rules. A couple reported that other officers sometimes bent PACE rules restricting the power to stop and search suspects, but none reported seeing the CPIA rules "bent."

The class then watched a videotape of a simulated crime. A young man snatched the victim's purse as she was standing on the street, and ran. The victim and an eyewitness described the perpetrator to an officer at the scene. A suspect who fit the descriptions was questioned, and his photograph was identified both by the victim and the eyewitness. The victim telephoned the police on the next day and retracted her identification—it "happened so fast," she "couldn't be sure." Must her retraction be reduced to writing? Yes. Why? It is relevant information, which must be scheduled, supplied to the prosecutor, and flagged as meeting the test of "primary disclosure"—*i.e.*, it undermines the case for the prosecution.[136]

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135. The sanctions raised in class discussion included losing the chance to convict a guilty accused, internal discipline, and criminal liability. In fact, the Act insulates police from civil or criminal liability simply for violating their duties under the Code. *See* CPIA, *supra* note 32, § 26(2). Training materials mention the following possible consequences for failures to comply: release of the accused from the duty to make defense disclosure, acquittal of the accused, reversal of a conviction, awarding of costs against the prosecution, and disciplinary proceedings. *See* Joint Operational Instructions, *supra* note 84, § 1.24.

136. *See* CPIA Code of Practice, *supra* note 33, § 7.3

After primary disclosure is made to the defense, the video continues with the defendant submitting a "defence statement" claiming alibi: he was in a certain café with a friend at the time of the incident. The defense statement also blames the crime on youths from a certain housing project. The police interview the proprietor of a shop adjacent to the scene of the crime who confirms that youths from that project had been hanging around his shop shortly before the crime. Must the police record and reveal that statement to the prosecutor? Yes, because it is relevant (though "negative") material. Also, because it "might be reasonably expected to assist the [accused's defence]"[137] as disclosed by the defense statement, it should be flagged to the prosecutor as meeting the test of secondary disclosure. Further investigation destroys the defendant's alibi: the owner of the café where the defendant claims to have been tells the police that the café was closed for renovations on the day of the crime.

The value of training such as I observed is difficult to determine, but there is good reason to doubt its efficacy. As Mike McConville and colleagues have shown, the police possess overwhelming power to magnify and create inculpatory facts, and to suppress exculpatory facts.[138] Many reasons exist for them to do so in the service of their own institutional goals and

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(requiring police to give the prosecutor a copy of "any material casting doubt on the reliability of a witness").

137. *See* CPIA Code of Practice, *supra* note 33, § 8.2.

138. In the words of Mike McConville:

> Of course it is commonly thought that evidence is 'discovered' by the police and that such discoveries are the mark of a good investigator. . . . [I]n a very real sense, the police construct evidence . . . . The police have, at a most fundamental level, the ability to select facts, to reject facts, to not seek facts, to evaluate facts and to generate facts. Facts, in this sense, are not objective entities which exist independently of the social actors but are *created* by them.

McConville et al., *supra* note 31, at 56. Through case file reviews and interviews with officials, the authors studied the processing of over 1000 cases by the police, prosecutors, and courts. *See id.* at 1. The authors argue that "the creation of evidence in one way or another is not a deviant police act but a standard form of production. The processes of production . . . are all-pervasive." *Id.* at 87.

constraints.[139] For example, resource limitations commonly create pressure for speedy closure of investigations.[140] Also, police are vulnerable to "confirmatory bias," the well-known general tendency to "seek out or selectively attend to information which confirms what they believe or 'know' to be the case," while ignoring or dismissing information that contradicts their theory.[141] Also, especially in high profile cases, investigators may be motivated to build a case against a suspect. As one experienced defense lawyer said, "I trust the constable on the street to write things down. But in a big case, involving the CID, trying to build a case against a suspect, that's who I don't trust."[142]

All of these tendencies are supported by the culture of policing, which discourages "rocking the boat" by "question[ing] the quality or propriety of other officers' conduct, decision-

139. The police "create" facts to justify case decisions that foster police goals such as maintenance of public order and police authority, satisfaction of the wishes of influential segments of community, and insulation of the police from criticism. *See id.* at 25-29, 65, 97-98.

140. "Records . . . are always directed towards *closure*. The privileged status accorded police accounts generally ensures that closure takes place by suppressing and delegitimating alternative accounts." *Id.* at 81; *see also* Roger Ede & Eric Shepherd, Active Defence: A Lawyer's Guide to Police and Defence Investigation and Prosecution and Defence Disclosure in Criminal Cases 64-65 (1998) (discussing police bias toward "attaching criminality to an individual" whom police believe has committed a crime).

141*. See* Ede & Shepherd, *supra* note 140, at 64; Randy Borum et al., *Improving Clinical Judgment and Decision Making in Forensic Evaluation*, 21 J. Psychiatry & L. 35, 47-48 (1993). McConville and his colleagues describe how this occurs in practice:

> In constructing cases to fit the decisions the police wish to make, the police adopt an adversarial role. Their job is to build the strongest possible case against the defendant. Naturally they do not choose to help defendants, by drawing out their legal defences or emotional problems for instance, but they are not required to by any law or set of guidelines.

McConville et al, *supra* note 31, at 181; *see also id.* at 77 (noting that in police interrogation, "[w]here the suspect asserts innocence or introduces evidence which would support a defence, this is generally ignored").

142. Interview with defense lawyer, in Birmingham, U.K. (Apr. 13, 1999). "CID" refers to the detective unit.

making, actions and attitudes."[143] In an attempt to counter the tendency to build one-sided cases against presumptively guilty suspects, since early 1993 all police in England have been trained in the "PEACE" model of investigative interviewing.[144] Adopted jointly by the Home Office and the Association of Chief Police Officers, PEACE obligates police, when taking statements, "to confront contradictions or anomalies and, where these cannot be resolved, to include these in the document—not to edit them out."[145] Unfortunately, despite extensive PEACE training, officers' "witness interviewing remains the Achilles' heel of police investigations."[146] Empirically, Roger Ede and Eric Shepherd note that "[r]esearch, particularly that based upon recordings of officers interviewing witnesses, shows that witness interviewing and its product—witness statements—leave a lot to be desired."[147] Among the reasons for this conclusion, the authors mention the disinclination of police to take full notes or use tape recording. This enables police to prevent later scrutiny of manipulative interviewing techniques designed to produce "good statements," *i.e.*, statements that are plausible, consistent, and inculpatory.[148]

While these reports are discouraging, it does not

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143. Ede & Shepherd, *supra* note 140, at 67. Opinions differ as to whether, or to what extent, the culture of policing in England has changed since the introduction of PACE in 1984. One police official reported that officers who did not like the new rules left the police, and those that stayed learned to accept and obey the new rules. *See* interview with training instructor at West Mercia Constabulary Headquarters, Training and Development, in Hindlip, Worcester, U.K. (Apr. 15, 1999).

144. "PEACE" is an acronym standing for different stages of the interview process. *See* Ede & Shepherd, *supra* note 140, at 40. The training consists of a five-day course. *See id.* at 60. For further details regarding the requirements of PEACE, see *id.* at 40-50; *see also id.* at 59 (citing Police Staff College, Bramshill, *A Guide to Interviewing* (1996), as a source of PEACE guidelines).

145. Ede & Shepherd, *supra* note 140, at 79.

146. *Id.*

147. *Id.*

148. *See id.* at 79-82. The authors also criticize police practices in obtaining descriptions of suspects from witnesses, and in failing to take statements from witnesses whose information would not support the police theory of the case. *See id*. at 83-86.

necessarily follow that training in PEACE guidelines and CPIA requirements is not worth the cost. The crucial questions are whether it is possible to heighten police sensitivity to the risk of wrongful convictions and to the value of recording negative information, and whether sufficient incentives can be created to induce police to follow such recording requirements. The answers to these difficult questions do not exist.[149] It does appear, however, that training both in the classroom and in the field strongly reinforces the Act's detailed normative framework for the recording of exculpatory evidence.[150] To my knowledge, neither such a detailed framework nor any comparable training effort exists in the United States.[151]

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149. McConville and his colleagues are highly skeptical of the proposition that a change in the law can bring about change in police investigating and reporting practices. *See* McConville et al., *supra* note 31, at 198-208; *see also* Russell Hogg, *The Politics of Criminal Investigation*, *in* Social Theory and Legal Politics 120, 126 (Gary Wickham ed., 1987) (denying that law "can direct police work in any meaningful sense"). If, however, one can alter police goals, their conduct in recording and reporting investigations will follow. *See* Brown, PACE Ten Years On, *supra* note 31, at 243-56 (concluding from studies of the impact of PACE that new legal rules can alter existing police practices provided they are clear, accompanied by adequate training, backed up by effective sanctions and supervision, and that the public is aware of its rights); Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. Davis L. Rev. 389, 429-30 (1999) (advocating use of training and mentoring programs to change police attitudes toward acceptability of lying); *see also* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. Ill. L. Rev. 363, 392-400 (arguing that entity liability of police departments promotes systemic deterrence, achieved through training and internal discipline).

150. Verbal expressions of opinion by probationers in a training class, in the presence of a stranger like myself, are obviously not reliable predictors of behavior on the job. Nonetheless, I was impressed with the honesty, sincerity, and maturity of the group members. Granted, they were an unrepresentative group on a number of counts. They had operated under the CPIA since entering the force; officers with longer service might have had more resistant attitudes. Also, police working in urban environments, where drugs, gangs, and more serious crimes are prevalent, could be expected to view the Act differently than the rural and small-town police I met. This distinction might also apply to detectives (CID), as opposed to constables.

151. I am aware of no empirical study of police training in

d. *The Police Duty to Retain Exculpatory Evidence*

Police must retain recorded information that "may be relevant to the investigation,"[152] including the following categories of potentially relevant material:[153] police reports, police notebook entries, custody records, information from tapes or telephone messages containing descriptions of an offence or offender, witness statements—both the final versions and any draft versions "where their content differs from the final version"—records of interviews with actual or potential witnesses and suspects, communications between police and experts, "any material casting doubt on the reliability of a confession . . . [or] a witness," and any other material that might undermine the case for the prosecution.[154] In the words of one police official, "we must keep everything," including "jottings before an interview and after an interview."[155] The Code also specifies the length of time for which material must be retained; for incarcerated convicts, the material must be kept until the person is released from custody.[156]

As a practical matter, the need to save "everything" relevant to the investigation of Crown Court cases, and of contested magistrates' court cases, imposes a demanding and potentially costly standard.[157] Courts can dismiss prosecutions if police failure to retain potentially relevant

the United States that considers training in the duty to record exculpatory evidence. *But see* Fisher, *Just the Facts*, *supra* note 17, at 26-27 & n.132 (reviewing training materials from six police departments in several states that suggest that police are formally instructed to record "all relevant evidence" in their reports, but given a stronger, implicit message to record only inculpatory evidence).

152. CPIA Code of Practice, *supra* note 33, § 5.1.

153. *See id.* § 5.4.

154. *See id.* §§ 5.1-5.4; Leng & Taylor, *supra* note 31, at 43-45.

155. Interviews with staff at West Mercia Constabulary Headquarters, Training and Development, in Hindlip, Worcester, U.K. (Apr. 15, 1999).

156. *See* CPIA Code of Practice, *supra* note 33, § 5.8

157. Among other things, conformance with the requirement could require, over time, the building and maintenance of costly storage facilities. I heard conflicting accounts as to whether this was a serious problem for the police.

material prejudices the defendant's ability to get a fair trial. For example, courts have dismissed cases for "abuse of process" because video recordings from cameras monitoring downtown street activity were taped over or lost before the trials of defendants charged with crimes on adjacent streets.[158]

e. *The Duty to Reveal Information to the Prosecutor*

(i) The Legal Framework

After a suspect has been charged, the police must transmit to the prosecutor a file containing the evidence in support of the prosecution case.[159] At the same time, they must reveal to the prosecutor all additional "unused material" that may be relevant to the investigation.[160] This is done in the following manner: In all Crown Court cases, and in contested magistrates' court cases, the disclosure officer must prepare a schedule describing each item of relevant material retained by the police.[161] Separate schedules are prepared for "sensitive" materials[162] that may be privileged from disclosure, and "non-sensitive" materials.[163] The scheduled items must be numbered consecutively and described in sufficient detail to enable the prosecutor to decide whether she needs to inspect the material before determining whether or not it should be disclosed to the

158. *See* interview with Crown Prosecutor, in Coventry, U.K. (Apr. 6, 1999).
159. *See supra* Part I.C.2.
160. *See* CPIA Code of Practice, *supra* note 33, §§ 7.1-7.5. Like the prosecutor's disclosure duties, the police duties are continuing. *See* CPIA, *supra* note 32, § 9; CPIA Code of Practice, *supra* note 33, §§ 8.1-8.3.
161. *See* CPIA Code of Practice, *supra* note 33, §§ 6.6-6.8, 7.1-7.5. The forms and schedules by which the police transmit mandated information to the CPS are uniform for all of England and Wales. *See supra* notes 51-59 and accompanying text. The schedules indicate the location of each listed item. *See infra* Appendix C (sample forms for sensitive and non-sensitive material).
162. *See* Schedule of Sensitive Material (Form MG 6D), *reproduced in* Appendix C, *infra*.
163. *See* Schedule of Non-Sensitive Unused Material (Form MG 6C), *reproduced in* Appendix C, *infra*.

defense.[164] As to items listed in the schedule of sensitive material, the disclosure officer must also state the reasons why in the public interest the material should not be disclosed.[165]

In addition to providing the prosecutor with schedules of unused sensitive and non-sensitive materials, the police are required to give her copies of particular materials.[166] These materials include: records of the first description of a suspect given to police by a potential witness, information given by the accused providing an "explanation for the offence," any material casting doubt on the reliability of a confession or witness, and other materials that the investigator believes are subject to primary disclosure because they might undermine the case for the prosecution.[167] On a special form, the disclosure officer must alert the prosecutor to those items that he believes might satisfy the tests for primary and secondary disclosure, and give reasons for his beliefs.[168] The prosecutor may also ask the police to submit specified retained material to her for inspection, in order to decide whether such material should be disclosed to the defense.

After reviewing and approving the schedules prepared by the police, the prosecutor must sign and forward the schedule of non-sensitive materials to the defense, together with copies of any materials the prosecutor chooses to provide as primary disclosure.[169] In order to receive secondary disclosure, the defendant must then

164. *See* CPIA Code of Practice, *supra* note 33, § 6.9.

165. *See id.* § 6.12. The Code gives examples of material that might, depending on the circumstances, be too sensitive to disclose. Examples range from material relating to national security or received from foreign sources or intelligence agencies to material "given in confidence" or which reveals "directly or indirectly, techniques and methods relied upon by a police officer in the course of a criminal investigation." *Id.*

166. *See id.* § 7.3.

167. *See id.*

168. *See id.* § 7.2.

169. In practice, the defense receives the schedules, in accordance with the apparent legislative intent, but the statutory language is not crystal clear. *See* CPIA, *supra* note 32, § 4; Leng & Taylor, *supra* note 31, at 36.

submit a defense statement, which the prosecutor must forward to the police disclosure officer.[170] The disclosure officer must then review the retained material in police files and "draw the attention of the prosecutor to any material which might reasonably be expected to assist the defence disclosed by the accused; and he must reveal it to him."[171] Both when the disclosure officer initially sends the schedules of unused material to the prosecutor, and after he reviews the files again in light of the defense statement, he must certify in writing to the prosecutor that "to the best of his knowledge and belief, all material which has been retained and made available to him has been revealed to the prosecutor."[172]

(ii)Implementation of the Act

Most informants, including every prosecutor I interviewed, criticized the police for failing to perform their duties properly.[173] The police responsibilities, which are at the heart of the disclosure scheme, involve four major tasks: (1) describing scheduled materials in sufficient detail; (2) providing the prosecutor with copies of certain materials; (3) accurately distinguishing between sensitive and non-sensitive materials; and (4) identifying material that should be disclosed to the defense. In practice, reportedly, the police often fall short in each task: police descriptions on the schedules tend to be general and uninformative; required copies of records such as first descriptions and

170. *See* Joint Operational Instructions, *supra* note 84, § 3.35.

171. CPIA Code of Practice, *supra* note 33, § 8.2.

172. *Id.* § 9.1. Police are also required to check whether certain prosecution witnesses have previous convictions, and reveal them to the prosecutor. But whether such convictions should be disclosed is a decision in each case for the prosecutor, applying the tests for primary and secondary disclosure. *See* Joint Operational Instructions, *supra* note 84, Annex B (entitled "Previous convictions and cautions of prosecution witnesses").

173. For critical accounts of the Act in operation, as well as criticisms of the Act as impracticably "perfectionist," see British Academy of Forensic Sciences, Disclosure Under the Criminal Procedure and Investigations Act 1996, *supra* note 31, *passim*.

suspects' explanations are not provided;[174] non-sensitive materials, if favorable to the defense, are often scheduled as sensitive;[175] sensitive materials are not properly scheduled; and materials that should be identified as subject to primary or secondary disclosure are not so identified.

A prosecutor described the following illustrative case to me.[176] A "serial wife abuser" was charged with multiple counts of assault, false imprisonment, and witness intimidation, all allegedly committed against his wife. Form MG 6C, the Schedule of Non-Sensitive Unused Material,[177] contained only the following entries:

Item No.	Description	Location
1	Officer's PNB [police notebook]	With Officers
2	Crime File[178]	--
3	Person in Custody Sheet	M3 Cell Block
4	Fingerprints and Photo	Llyod House

The accompanying file contained no copies of any of the listed material, nor any indication of what information was contained in the police notebook or other scheduled materials. Form MG 6E, the Disclosure Officer's Report to the prosecutor that must list the scheduled items that appear to

174. *See* Ede & Shepherd, *supra* note 140, at 92-93 (noting that police keep CPS "in the dark" by failing to disclose questionnaires completed in house-to-house inquiries, computer printouts of police communications, full crime reports, full transcripts of witness and suspect interviews, and other original materials).

175. In one case, for example, a tape recording of the defendant's telephone call requesting an ambulance for the victim suggested, by the tone of his voice, that he was not the assailant. The police listed the tape on the "sensitive" schedule. *See* interview with Principal Crown Prosecutor, Casework Services Division, CPS Headquarters, in London, U.K. (Apr. 14, 1999).

176. *See* interview with Crown Prosecutor, in Coventry, U.K. (Apr. 6, 1999).

177. See this form *infra* Appendix C, showing information supplied in a different case.

178. This refers to the police file containing all investigative materials in the case.

undermine the prosecution case or to assist the defense, as well as copies of materials that are required to be supplied to the prosecutor in every case, was left blank. However, on a "Confidential Information" form,[179] the police recited background information indicating a long history in which defendant's wife would accuse the defendant of abuse, then retract, claiming that she had started the fight or making some other excuse. The police believed that the defendant's wife was frightened of the defendant. This history should have been included on either the schedule of non-sensitive, or of sensitive, unused material, but was not. On receipt of the file, the Crown Prosecutor asked the police to submit all of the unused material in the case. When I spoke with her, she was waiting for the files, which she expected would include copies of all records pertaining to domestic violence in the family, including social welfare and medical records.

Other practitioners confirmed as typical the pattern illustrated by the above case. According to most informants, the police rarely flag unused material as meeting the test of primary or secondary disclosure. Thus, the principals of two large firms of solicitors, who defend many serious criminal cases, each told me that they had *never* received any material in the primary disclosure stage.[180] One of them reported that, when he gives the prosecution a defense statement, he normally gets nothing in secondary disclosure unless he "pushes."[181]

Because the police fail to describe the scheduled materials in sufficient detail to allow prosecutors to decide whether the material merits disclosure, and do not normally supply copies of the scheduled materials, the burden remains on the prosecutor to ask the police for more detailed scheduling of and/or access to the underlying materials. Whether the Crown Prosecutor will take this initiative in a

179. Form MG 6, *reproduced in* Appendix C, *infra*.

180. *See* interviews with defense solicitors, in London, U.K. (Apr. 12, 1999); interviews with defense solicitors, in Birmingham, U.K. (Apr. 13, 1999).

181. According to this solicitor, he could count instances of secondary disclosure "on the fingers of one hand." Interview with defense solicitor in Birmingham, U.K (Apr. 13, 1999).

particular case, or instead, relying on the police response, will simply sign the form letter stating that no material subject to primary or secondary disclosure exists, depends upon the prosecutor's conscientiousness and workload,[182] as well as the nature and seriousness of the case.

In many cases the thoroughness of disclosure review also depends on the skill and persistence of the defense lawyer in demanding access to particular materials, or alternatively, the prosecutor's assurance that she has personally reviewed the unused materials and determined that they do not satisfy the criteria for disclosure. Faced with such demands, prosecutors might request more complete and detailed schedules. In a case in which HOLMES[183] was used, these would consist of computer-generated printouts listing all investigative actions, documents, and other data. Prosecutors might themselves inspect the underlying documents, or might instruct the police to give the defense lawyer full access to the police file, minus any potentially sensitive materials. In some locales, judges will prevail upon the Crown to give the defense such access, even— in flagrant disregard of the Act— when the defense has not

182. Interviews with two Crown Prosecutors in the same office revealed markedly different approaches to their duties under the Act. One of the prosecutors said that he would never sign such a disclosure form without requesting and studying all of the scheduled materials, such as property slips, crime reports, custody records, command and control logs, and PACE premises search logs. If the last item lists eight officers who were present at the search, he will ensure that he has statements from all eight. If any are missing, he will ask for statements to be taken from the rest, and read those. The other prosecutor said that he relies entirely upon his (para-legal) case worker to review the material, and will sign the disclosure form unless the worker brings something to his attention indicating he should not. *See* interview with Senior and Subordinate Crown Prosecutors, in Abingdon, U.K. (Apr. 13, 1999). All of my informants agreed that some prosecutors routinely sign off on disclosure forms prepared by the police.

In a few locations chief prosecutors have announced a policy of refusing to accept police schedules that are insufficiently detailed. *See* interview with Principal Crown Prosecutor, Casework Services Division, CPS Headquarters, in London, U.K. (Apr. 14, 1999).

183. *See infra* Appendix A, notes 361-65 and accompanying text.

supplied a defense statement.[184] The willingness of some prosecutors and judges to allow the defense direct access to the unused materials despite the requirements imposed by the new law reflects a belief that the prosecutor lacks the time, and the police lack the ability and/or the motivation, to properly identify exculpatory material.

D. *Conclusion*

Despite the controversies surrounding the adoption and implementation of the 1996 Act, there seems to be general agreement on three important propositions: first, that in contested cases the police should be required to record, retain, and reveal to the prosecutor all of the relevant material gathered in the investigation; second, that formal processes are needed to structure the communications between police investigators and the prosecutor, including a strong prosecutorial role in police training; and third, that the defense should have access at least to schedules of the non-sensitive relevant material. Despite the failure of English police in practice to provide sufficiently detailed and complete schedules and copies of unused materials in the first instance, the schedules function, at least in routine, serious,[185] contested cases, to alert both the prosecution and the defense to the

184. This appears to occur commonly in London, for example, at the hands of judges who may be ignorant of, or indifferent to, the Act's requirements. *See* interview with defense solicitor, in London, U.K. (Apr. 12, 1999).

185. Although roughly the same police and prosecution responsibilities regarding exculpatory evidence apply to contested summary and Crown Court proceedings, important implementation differences exist as between summary prosecutions and Crown Court proceedings. According to all of my informants, the Act is not generally followed in cases litigated in the magistrates' court: the police often do not submit schedules of unused material, and prosecutors are more likely to sign off on police schedules without pressing the police for more detailed descriptions or reviewing the listed material to see whether it is disclosable. Also, defendants in magistrates' court proceedings rarely submit defense statements, and therefore rarely ask the court to order disclosure under section 8 of the Act. *See* interview with Crown Prosecutor, in Coventry, U.K. (Apr. 6, 1999); interview with two defense solicitors, in Birmingham, U.K. (Apr. 13, 1999 and Apr. 21, 1999 respectively).

existence and location of basic materials known to the police. It then falls to the defense lawyer, with the aid of the court if necessary,[186] to press the prosecutor to review the materials or to allow the defense to do so. Thus the English system establishes a framework to give prosecutors regular access to a comprehensive record of the police investigation. This is precisely the sort of access that the U.S. Supreme Court in *Kyles* assumed was available to prosecutors in this country.[187]

II. LESSONS OF THE ENGLISH EXPERIENCE FOR THE UNITED STATES: THE PROSECUTOR'S ETHICAL DUTY TO SEEK EXCULPATORY EVIDENCE KNOWN TO THE POLICE

Although many features of the English experience should be of interest to Americans,[188] I shall concentrate on two that I find most instructive as they might relate to implementation of the prosecutor's *Brady* duties: government regulation

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186. This can be accomplished informally, or by means of a formal application under Section 8 of the Act. *See* CPIA, *supra* note 32, § 8.

187. *See supra* notes 1-4 and accompanying text.

188. The English have adopted several safeguards that might be worth emulating, such as the use of independent "identification officers," *see infra* notes 351-55 and accompanying text, the requirement that interrogations be recorded, *see supra* notes 152-56 and accompanying text, and the Criminal Case Review Commission, *see supra* note 70. These reforms resulted from "post-mortem" inquiries, established in response to notorious miscarriages of justice. *See also* Fred Kaufman, Commission on Proceedings Involving Guy Paul Morin (Queen's Printer for Ontario, Canada, 1998), *available in* <http://www.attorneygeneral.jus.gov.on.ca/html/MORIN/morin.htm> (visited Mar. 2, 2000) (official commission of inquiry into wrongful murder conviction and incarceration of young man later cleared by DNA evidence). The English experience also shows that reform commissions can operate as double-edged swords: an inquiry established in response to public concern over conviction of the factually innocent may be "captured" by conservatives, producing reforms designed to facilitate conviction of the factually guilty. *Cf.* Craig M. Bradley, *The Failure of the Criminal Procedure Revolution: A Response*, 47 J. Legal Educ. 129, 133 (1997) (acknowledging that national codification of criminal procedure regulations in the United States would risk "letting political considerations unacceptably diminish the rights of criminal suspects," but still preferring the relative clarity of comprehensive procedural codes to the confusion and inconsistency of constantly shifting case law).

of police record-keeping, and measures ensuring the prosecutor's access to investigative police files. As to the former, even before enactment of the CPIA in 1996, the English imposed a set of elaborate record-keeping requirements on the police.[189] Requirements meant to enhance the objectivity and reliability of investigative records, such as those governing police notebooks, the role of PACE custody officers and identification officers, and policy books, serve to increase the transparency of police investigation to external review.[190] Other devices, such as the use of HOLMES to investigate selected major crimes, were designed to achieve efficient crime detection, but have the same incidental effect. The 1996 Act gave legislative force to the previously established duty of police to record and retain relevant investigative material.

Regarding prosecutorial access to police files, PACE, the CPIA, and the Practice Codes established under both statutes give prosecutors detailed guidance regarding the specific items that they must obtain from investigators before trial, and in what form.[191] These requirements track corresponding police duties to record and reveal such items to prosecutors.

Thus, the English have established a comprehensive regulatory framework for police record-keeping and revelation of case information to the prosecutor. They have also devoted significant resources to enforcing this regime, including such measures as promulgation of appropriate forms and schedules, training of police and prosecutors,[192] and the designation of

189. These requirements were imposed under PACE and the Guinness Advice. *See supra* notes 51-59, 64-68 and accompanying text; *infra* Appendix A.

190. While scholars disagree on the effectiveness of the PACE record-keeping reforms, most agree that they have at least partially achieved their aim. *See supra* notes 64-66 and accompanying text. But some argue that the PACE "safeguards" simply mask and legitimate the exercise of broad police discretion. *See* Bridges & Bunyon, *supra* note 66, at 91-94; McConville et al., *supra* note 31, at 118-23.

191. *See supra* notes 69-101 and accompanying text.

192. Initial training of police and prosecutors, for which substantial written materials were prepared, was carried out before the CPIA was implemented. *See* interview with Principal

particular police personnel to perform record-keeping duties as custody officers,[193] identification officers,[194] and disclosure officers.[195]

Like England, the United States requires prosecutors to disclose exculpatory evidence known to the police.[196] However, the two countries take radically different approaches to implementing the prosecutor's duty. In the United States, the absence of legislative or other regulation of police record-keeping and transmission of information to prosecutors is starkly apparent. American legislatures have traditionally taken a "hands-off" approach to the regulation of police practices.[197] Furthermore, it appears that Americans have not committed significant resources to the task of training police to record and reveal exculpatory evidence to prosecutors.

Crown Prosecutor, Casework Services Division, CPS Headquarters, in London, U.K. (Apr. 14, 1999).

193. *See infra* Appendix A, notes 339-45 and accompanying text.

194. *See infra* Appendix A, notes 350-52 and accompanying text.

195. *See supra* notes 104-08 and accompanying text.

196. *See supra* note 165 and accompanying text. In the United States this is constitutionally required by *Kyles*, *see supra* notes 1-4 and accompanying text; *see also* U.S. Dep't of Justice, 9A Department of Justice Manual, Criminal Div., § 9-90.210, at 9-1943.3 (1997) (discussing prosecutor's duty, under case law, to search for *Brady* information in the files of "aligned agencies," defined as agencies "actively involved in the investigation or the prosecution of a particular case"); Fredman, *supra* note 5, at 348 ("[A]ll information within a particular prosecutor's office falls within the ambit of *Brady*."); Hochman, *supra* note 5, at 1677-79 (discussing prosecutor's duty to gather exculpatory evidence held by persons outside the prosecutor's office); Lis Wiehl, *Keeping Files on the File Keepers: When Prosecutors are Forced to Turn Over the Personnel Files of Federal Agents to Defense Lawyers*, 72 Wash. L. Rev. 73, 75-77 (1997) (discussing duty of prosecutors to search personnel files of federal agents who will testify for impeachment material).

197. The Warren Court decisions protecting the rights of criminal defendants vis-a-vis the police and the courts can be seen as filling a vacuum created by legislative abstention. *But see* Bradley, *supra* note 188, at 129-30 (arguing that Congress has power to, and should, enact a national code of criminal procedure governing the conduct of all federal and state law enforcement agents). Professor Bradley's proposal has not been warmly received by scholarly commentators. *See id.* at 130-31 (citing negative reviews of his proposed reform).

Instead, we have relied on self-regulation by law enforcement agencies and the efforts of prosecutors. For reasons discussed elsewhere,[198] I suspect that neither resort has been, nor promises to be,[199] effective in ensuring regular prosecutorial access to exculpatory evidence known to the police. Yet, without such access, prosecutors cannot meet their constitutional obligations to the defendant.

Congress could address this problem by adopting an English-style legislative remedy, binding on state and local prosecutors and law enforcement agencies. As compared to reforming the rules of professional responsibility, legislation would have advantages of greater uniformity, comprehensiveness, and enforceability. Congress

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198. *See generally* Fisher, *Just the Facts*, *supra* note 17, at 26-31 (offering several justifications for self-regulation).

199. Barring increased external pressures, it is doubtful that police agencies will have incentive to overhaul their own practices. However, the predictable increased use of computer-assisted record keeping should at least reduce the cost-disincentives of more comprehensive recording and transmission of information from police to prosecutors. *See, e.g.*, James W. Stevens, *Computer Technology*, *in* The Encyclopedia of Police Science 73-75 (William G. Bailey ed., 1989) (predicting expanded use of "direct-field entry reporting systems for completing police reports and for speeding information transfer into the police communications process"); Seanna Browder, *Now, The Cops are Strapping on Computers*, Bus. Wk., July 13, 1998, at 7, 7, *available in* 1998 WL 8133191 (reporting field-testing in three cities of lightweight wearable computers for use in police investigation; computers are equipped with digital cameras and laser range finders for recording crime-scene data); Seaskate, Inc., The Evolution and Development of Police Technology: A Technical Report Prepared for the National Committee on Criminal Justice Technology 4 (Nat'l Inst. of Justice, 1998), *available in* <http:www.NLECTC.org> (quoting a police chief as saying, "My vision is that when an officer comes through the academy, we give him his weapon, we give him his radio, and we give him his laptop computer.").

Presumably, large-scale investigations in the United States, such as the World Trade Center and Oklahoma Bombing cases, are conducted using computerized programs similar to the English HOLMES system. *See infra* Appendix A, notes 356-66 and accompanying text; *see also* Seaskate, Inc., *supra*, at 63 (describing use of "records management systems" that allow information to be fed into a "relational database," which can be "manipulated and retrieved based on the criteria of the detective"). I am not familiar with the extent of such techniques in this country, nor with the treatment of such databases in criminal discovery.

would have the power to adopt such legislation, based upon its power to enforce the prosecutor's Due Process duty under *Brady*. Alternatively, Congress could use incentives, such as federal funding for local law enforcement, to encourage the states to adopt such legislation.[200] However, despite the rising number of well publicized miscarriages of justice,[201] neither Congress nor state legislatures are likely to impose English-style record-keeping practices on state and local law enforcement agencies. As Donald Dripps has persuasively argued, no sufficiently powerful constituency exists to persuade legislators to invest scarce political and economic resources in such a cause.[202]

It is also unlikely that courts will take up the slack. Like the Supreme Court in *Kyles*,[203] courts generally recognize the prosecutor's dependence upon law enforcement to comply with *Brady*. Accordingly, they have been willing to hold law enforcement officers liable under the Federal Civil Rights Act for suppressing exculpatory evidence.[204] But courts have been reluctant to grant equitable relief compelling police to investigate, record, and reveal exculpatory

200. I thank Professor Kevin McMunigal for his contributions to my thinking on these points.

201. *See, e.g.*, Ken Armstrong & Steve Mills, Chicago Trib., Nov. 14, 16-18, 1999 (five-part series on faulty justice in Illinois capital cases from 1977 to 1999); Ken Armstrong & Maurice Possley, Chicago Trib., Jan. 8-12, 1999 (five-part series on prosecutorial misconduct and miscarriages of justice in the United States); Alan Berlow, *The Wrong Man*, Atlantic Monthly, Nov. 1999, at 66, 66 (reporting on "horrifyingly likely" prospect that innocent people will be executed in America); Matt Lait & Scott Glover, *Rampart Case Takes on Momentum of Its Own*, L.A. Times, Dec. 31, 1999, at A1 (describing how over a dozen police officers have been suspended in scandal involving, inter alia, framing innocent suspects); Bill Moushey, *Win at all Costs: Government Misconduct in the Name of Expedient Justice*, Pitt. Post-Gazette, Nov. 22, 24 and 29, 1997, and Dec. 1, 6, 7, 8 and 13, 1998 (series on abuses by federal prosecutors).

202. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 Syracuse L. Rev. 1079, 1089-92 (1993).

203. *See supra* text accompanying notes 1-4.

204. *See infra* text accompanying notes 265-272.

evidence to prosecutors.[205] Also, court rules governing pretrial discovery reflect judicial reluctance to prescribe police record-keeping procedures: the rules commonly require prosecutors to disclose exculpatory evidence,[206] but

205. This was demonstrated in *Palmer v. City of Chicago*, 562 F. Supp. 1067, 1077 (N.D. Ill. 1983), *rev'd*, 755 F.2d 560 (7th Cir. 1985), a class action suit seeking, *inter alia*, an order prohibiting the Chicago Police Department from keeping clandestine "street files" separate from the investigative files that the Department turned over to the State's Attorney's Office. *See* Fisher, *Just the Facts*, *supra* note 17, at 36-38, 42-44 (discussing the case in greater depth). The district court granted the plaintiffs sweeping relief, ordering the police department to: (1) conduct impartial investigations, take complete notes, and pursue exculpatory evidence; (2) preserve all handwritten and other notes as well as other investigative documents in a single file with a checklist of the contents; (3) respond to subpoenas and discovery motions by transmitting copies of the checklist to the prosecutor; and (4) train its detectives in the new procedures. The Seventh Circuit Court of Appeals invalidated almost all of the lower court's order, including those parts ordering police and prosecutors to "restructure their internal procedures for the recording, maintaining and production of investigative files." *Palmer*, 755 F.2d at 576. According to the circuit court, Supreme Court precedents (*Brady* and *Younger*) defining the government's due process obligation to gather and preserve potentially exculpatory evidence limited the courts' power to prescribe more comprehensive prophylactic procedures. *See id.* at 574-77.

206. Writings about *Brady* issues have tended to focus on the prosecutor's constitutional and ethical duties, while paying little attention to her corollary duties under state discovery rules. Yet, a review of state pretrial discovery rules and statutes reveals that 43 jurisdictions explicitly require the prosecutor to disclose exculpatory evidence (variously defined) to the defense before trial. *See* Ala. R. Crim. P. 16.1(a) (within fourteen days of defendant's request); Alaska R. Crim. P. 16 (upon defendant's motion); Ariz. R. Crim. P. 15.1(a) (within ten days from arraignment); Ark. R. Crim. P. 17.1 (upon timely request); Cal. R. Glenn Super. Ct. 12.7 (within 14 days from information); Colo. R. Crim. P. 16(b)(1) (within 20 days of first appearance); Conn. Gen. Stat. Ann. § 54-86a(a) (West 1994) (upon defendant's motion); Del. R. Com. Pl. Ct. R. Crim. P. 16(a)(1)(A) (upon defendant's request); Fla. R. Crim. P. 3.220(b)(1) (within 15 days of serving notice of discovery); Haw. R. Penal P. 16(e)(1) (within in 10 days from arraignment); Idaho Ct. R. 16(a) (as soon as practicable); Ill. S. Ct. R. 412(a) (as soon as practical after defendant's motion); Ind. Marion Super. Ct. Crim. R. 7(1)(a) (20 days from initial hearing); Iowa Code Ann. § 813.2, Rule 13 (West 1999) (pretrial request by defendant); Ky. R. Jefferson Cir. Ct. 603(A) (within 10 days before pretrial conference); La. Code Crim. Proc. Ann. art. 718 (West 1981) (pretrial); Me. R. Crim. P. 16 (within 10 days from

stop short of requiring the police to record such evidence and reveal it to the prosecutor. This is true even of very expansive disclosure schemes, such as the one recently adopted in local rules by the United States District Court for the District of Massachusetts.[207]

The Massachusetts rules impose far-reaching, detailed duties on prosecutors to disclose potentially exculpatory information to the defense.[208] Reflecting the *Kyles* holding that

arraignment on certain offenses); Md. R. Crim. Causes 4-263(b) (defendant's request); Mass. R. Crim. P. 14(a)(1) (pretrial motion); Mich. Ct. R. 6.201(F) (within seven days of defendant's request); Minn. R. Crim. P. 9.01 (at defendant's request before omnibus hearing); Mo. R. Crim. P. 25.03(B) (written request by defendant); Mont. Code Ann. § 46-15-322(1) (1998) (defendant's request); Neb. Rev. Stat. § 29-1912 (1995) (same); Nev. Rev. Stat. § 174.235(1) (1997) (same); N.H. Super. Ct. R. 98 (within 30 days from a not-guilty plea); N.M. R. Dist. Ct. R. Crim. P. 5-501(A) (within ten days from arraignment); N.Y. Crim. Proc. Law § 240.20(1) (McKinney 1993) (upon defendant's demand); N.C. Gen. Stat. § 15A-903(a) (1973) (defendant's motion); N.D. R. Crim. P. 16 (defendant's written request); Ohio R. Crim. P. 16(A) (defendant's request); Okla. Stat. Ann. tit. 22, § 2002(A)(1) (West 1994) (same); Or. Rev. Stat. § 135.815 (1990) (same); Pa. R. Crim. P. 305(A) (same); R.I. Sup. Ct. R. Crim. P. 16(a) (same); S.C. R. Crim. P. 5(a)(1)(A) (same); S.D. Codified Laws § 23A-13-1 (Michie 1978) (defendant's written request); Tex. Crim. P. Code Ann. § 39.14(a) (West 2000) (defendant's motion showing good cause); Utah R. Crim. P. 16(a) (upon request, but as soon as practical following the filing of charges and before the defendant is required to plead); Vt. R. Crim. P. 16(1) (as soon as possible, after a plea of not guilty); Wash. St. Super. Ct. Crim. R. 4.7(1) (no later than the omnibus hearing); W. Va. R. Crim. P. 16(a) (defendant's request); Wis. Stat. Ann. § 971.23(1) (West 1998) (within a reasonable time before trial).

207. *See* D. Mass. Local R. Concerning Crim. Cases 116.1-116.9 (adopted Sept. 8, 1998, effective Dec. 1, 1998); *see* Report of the Judicial Members of the Committee Established to Review and Recommend Revisions of the Local Rules of the United States District Court for the District of Massachusetts Concerning Criminal Cases (1998) [hereinafter Mass. Rules Committee Report]. The full texts of the adopted rules and the report are accessible at <http://www.bostonbar.org/dd/crimrules/report.htm> (last visited Mar. 3, 2000). *See Will Revolutionary Discovery Shot be Heard 'Round the World?*, 12 BNA Crim. Prac. Rep. 483, 43-44 (1998); *infra* text accompanying notes 208-213.

208. Although the Federal Rules of Criminal Procedure do not address the prosecutor's *Brady* duty to disclose exculpatory evidence to the defendant before trial, some federal district courts outside of Massachusetts also regulate such disclosure in local rules. *See, e.g.*, D.N.H. Local R. 16.1(c); D.N.M. Local Crim. R. 16.1; N.D.N.Y. R. 16.1(c); E.D.N.C. Local R.

prosecutors are responsible for disclosing *Brady* material known to law enforcement agents "acting on the government's behalf in the case,"[209] the Local Rules require the prosecutor to inform "all . . . law enforcement agencies formally participating in the criminal investigation . . . of the discovery obligations set forth [in the Rules] and obtain any information subject to disclosure from each such agency."[210] Although the Rules expressly require criminal investigators to *preserve* relevant materials and documents made or possessed by them,[211] they do not expressly require them to assist prosecutors in implementing *Brady* by *recording*[212] or *revealing* these items to the

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Prac. P. 43.01; D. Vt. Local R. P. 16.1(a); N.D. W. Va. Local R. 4.08.

209. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

210. D. Mass. Local R. Concerning Crim. Cases 116.8. Rule 116.1(A)(1) subjects to automatic discovery "all discoverable material and information in the possession, custody, or control of the government . . . the existence of which is known, or by the exercise of due diligence may become known, to the [prosecutor] . . . ." *Id.*

211. Local Rule 116.9(A) provides:

> All contemporaneous notes, memoranda, statements, reports, surveillance logs, tape recordings, and other documents memorializing matters relevant to the charges contained in the indictment made by or in the custody of any law enforcement officer whose agency at the time was formally participating in an investigation intended, in whole or in part, to result in a federal indictment shall be preserved until the entry of judgment unless otherwise ordered by Court.

Id. Rule 116.9(A). The Rule does not require the preservation of rough drafts of reports after a subsequent draft of a final report is prepared; however, the rough contemporaneous notes upon which the drafts were based must be retained. *See id.* Rule 116.9(A)-(B).

212. The Rules indirectly require that some information known to non-prosecutor government officials be recorded in tangible form. For example, the government must produce "a statement" whether promises of rewards or inducement have been given to government witnesses, *see id.* Rule 116.2(B)(1)(c), and a "written description" of criminal cases pending against government witnesses, *see id.* Rule 116.2(B)(1)(e), and of the failure of percipient witnesses to make a positive identification of the defendant in an identification procedure, *see id.* Rule 116.2(B)(1)(f). In addition, other rules, which require production of "exculpatory information," probably intend that disclosure take documentary form. This would implicitly require either the investigators or the prosecutor to reduce to writing otherwise non-recorded exculpatory information that must be disclosed, such as information that "tends to cast doubt on

prosecutor. This failure, which is typical of court rules and standards, should probably be understood as expressing judicial reluctance to intrude on the executive domain, rather than a doubt that courts have power to impose such duties on the police.[213]

Whether viewed as regrettable default or principled abstention, the consequence of judicial (combined with legislative) inaction is plain: prosecutors have the sole responsibility for obtaining access to *Brady* material held by law enforcement agents. In light of the severe practical limits on a prosecutor's ability to control law enforcement agencies, this might be viewed as unrealistic. On the other hand, as an executive agent sharing crime control goals and responsibilities with law enforcement agencies, the prosecutor is better positioned to elicit their cooperation than either defense counsel or the court. If, because of legislative abstention, prosecutors' efforts prove unavailing, they are better situated than any other constituency to lobby the legislature to intervene.[214]

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the credibility or accuracy of any witness," *id.* Rule 116.2(B)(2)(a), or inconsistent oral statements. *See id.* Rule 116.2(B)(2)(b).

213. Courts have power to compel production of evidence by persons who are not parties, their attorneys, or witnesses in the case. *See* Fed. R. Crim. P. 17(c); *see also* Fed. R. Civ. P. 65(d) (allowing courts to issue orders and injunctions binding "parties, . . . their . . . agents, . . . employees . . . and . . . those persons in active concert or participation with them who receive actual notice of the order"). Courts are also willing to order police to *preserve* relevant evidence in their possession. *See* D. Mass. Local R. Concerning Crim. Cases 116.9(A); *see also* Palmer v. City of Chicago, 755 F.2d 560, 572-73 (7th Cir. 1985) (upholding district court order to police to preserve "street files" for the plaintiff sub-class composed of convicted felons); United States v. Feola, 651 F. Supp. 1068, 1136 (S.D.N.Y. 1987) (ordering preservation of "all tape recordings or handwritten or typed notes of interviews or communications made in connection with this case" by all state and federal law enforcement personnel). Although an order to preserve existing evidence is less intrusive and less costly to implement than one requiring affirmative actions, such as recording or transmitting evidence, the difference seems to be one of degree rather than one of kind.

214. *See* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev. 223, 281-82 (1993)

What steps might be taken to bring prosecutorial practice into line with the Supreme Court's expectations announced in *Kyles*? The foregoing account of the English system suggests changes in our ethical rules and standards to address this situation.

A. *The Place of Ethical Norms in Regulating the Prosecutor's Duty to Disclose Exculpatory Evidence*

The American prosecutor's duty to disclose exculpatory evidence is expressed in a tangled web of regulation, consisting of overlapping layers of constitutional and sub-constitutional norms.[215] The former are essentially defined by *Brady*'s due process jurisprudence, which aspires to national uniformity.[216] The latter, which vary by state and, sometimes, by county or district within the same state, are embodied in rules of pretrial discovery and professional responsibility. The ethical norms include not only disciplinary rules, but also— in standards and commentaries— expressions of general principles and guides to particular best practices.[217]

The disclosure requirements imposed by these various sources can differ in scope and timing. For example, a prosecutor's failure to disclose exculpatory evidence in a particular case might satisfy her obligations under the Due Process Clause, yet violate her duty under broader ethics provisions and discovery rules.[218] The difference

(discussing political influence of prosecutor organizations).

215. *See, e.g,* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 St. Thomas L. Rev. 69, 72 (1995) (describing how federal prosecutors are bound by federal rules and statutes, the Due Process Clause, codes of professional responsibility, rules promulgated on an ad hoc, case-by-case basis, and internal guidelines adopted by the Department of Justice).

216. Disclosure duties in some states are also governed by more protective state constitutional provisions. *See, e.g.*, Bennett L. Gershman, *State Constitutionalization of Criminal Procedure and the Prosecutor's Disclosure Obligations*, 18 Westchester B.J. 101, 107-09 (1991) (describing the New York Court of Appeals's reliance on a more protective state constitution).

217. *See generally* Zacharias, *supra* note 214 (discussing the modern trend of specificity in the regulation of lawyers).

218. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (holding that *Brady* " requires less of the prosecution than the ABA

derives from the fact that *Brady* serves a limited purpose of guaranteeing a fair trial, and so requires disclosure only of "material" evidence, defined in terms of its likely effect on the trial outcome.[219] However, under ethics provisions and rules of pretrial discovery in some jurisdictions, even non-material evidence must be disclosed if it "tends to negate [defendant's] guilt" or "mitigate the degree of the offense."[220] Also,

Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate"); McMunigal, *supra* note 22, at 1025 n.206 (noting that Model Code DR 7-103(B) and Model Rule 3.8(d) are "more expansive than the original formulation of the *Brady* rule, since neither contains a 'materiality' limitation or a requirement that the material be requested by the defense").

219. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (defining "material" evidence retrospectively as existing "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"). This outcome-determinative standard, drawn from *Strickland v. Washington*, 466 U.S. 668 (1984), is especially difficult to apply before trial, when the prosecutor will not know what evidence will be presented. For a careful discussion of this aspect of *Bagley*, see McMunigal, *supra* note 22, at 1008-11. At least one federal district court has proposed a broader prospective test of "materiality." *See infra* note 298 and accompanying text.

220. This language comes from the Model Code's DR 7-103(B) and EC 7-13. *See* Model Code of Professional Responsibility DR 7-103(B), EC 7-13 (1983). Later ABA codes and standards contain similar language. *See* Model Rules of Professional Conduct Rule 3.8(d) (1998); Standards Relating to the Administration of Criminal Justice Standard 3-3.11(a) (3d ed. 1992) (reproduced *infra* appendix B); Standards for Criminal Justice Discovery and Trial by Jury Standard 11-2.1(a)(viii) (3d ed. 1996). For an analysis of the evolving language used in the successive ABA ethical rules to define the prosecutor's disclosure duty, and of the general ethical prohibitions that might apply to suppression of exculpatory evidence, see Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 709-14 (1987); *see also* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 879-82 (1997) (tracing the history of the ABA professional responsibility rules on exculpatory evidence to Canon 5 of the ABA Canons of Professional Ethics originally adopted in 1908).

Pretrial discovery rules in 17 states also incorporate the "tends to negate" standard. *See* Alaska R. Crim. P. 16(b)(3); Ariz. R. Crim. P. 15.1(a)(7); Ark. R. Crim. P. 17.1(d); Colo. R. Crim. P. 16(a)(2); Fla. R. Crim. P. 3.220(b)(1)(A)(i); Haw. R. Penal P. 16(b)(1)(vii); Idaho Crim. R. 16(a); Ill. S. Ct. R. 412(c); Ind. Marion Super. Ct. Rule 7(2)(b); Ky. R.

pretrial discovery rules might require earlier, and broader, disclosure of exculpatory evidence than either constitutional[221] or ethical norms require. Whereas the latter two sets of norms protect interests in a fair and accurate process, discovery rules serve the courts' additional interest in efficient case processing and the avoidance of delay.

Given the complexity resulting from multiple, conflicting sources of law, ethical rules should accurately inform prosecutors of their disclosure duties. After *Kyles*, however, the relevant ABA rules and standards express these duties in misleadingly narrow language. They fail to inform prosecutors of their duty to learn of and disclose exculpatory evidence known to law enforcement agents. Also, they offer no guidance as to the

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Jefferson Cir. Ct. 603(f); Md. Rule 4-263(a)(1); Minn. R. Crim. P. 9.01; Mo. R. Crim. P. 25.03(A)(9); Mont. Code Ann. § 46-15-322(1)(e) (1999); Utah R. Crim. P. 16(a)(4); Vt. R. Crim. P. 16(b)(2); Wash. St. Super. Ct. Crim. R. 4.7(a)(3).

221. *See supra* notes 207-19 and accompanying text. In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court rejected the claim that *Brady* created a broad constitutional right to pretrial discovery. *See id.* at 675 n.7. Rather, the Court regarded *Brady* as a "trial right," satisfied so long as disclosure is made in time for effective defense use at that stage. *See id.* at 678. Accordingly, most courts have been reluctant to enforce *Brady's* constitutional mandate as part of pretrial discovery. *See* Charles H. Whitebread & Christopher Slobogin, Criminal Procedure 598 (1993); Wayne. R. LaFave & Jerold H. Israel, Criminal Procedure § 19.5(e) (1985). The timing of *Brady* disclosure is especially problematic when *Brady* material is protected from early disclosure by the Jencks Act. *Compare* United States v. Beckford, 962 F. Supp. 780, 791-94 (E.D. Va. 1997) (discussing split in federal circuits, and choosing case-by-case balancing test over competing tests under which either *Brady* or *Jencks* trumps the other), *with* United States v. Presser, 844 F.2d 1275, 1285-86 (6th Cir. 1988) (finding mid-trial disclosure adequate to protect defendant's *Brady* right). *But see* United States v. Snell, 899 F. Supp. 17, 21 n.9 (D. Mass. 1995) (criticizing *Presser*).

The conception of *Brady* as a trial right has led to disagreement about whether *Brady* material must be disclosed prior to the entry of a guilty plea. *See* Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 Stan. L. Rev. 567, 573 & n.43 (1999) (noting that most, but not all, lower courts require disclosure of *Brady* material before entry of plea and citing cases); McMunigal, *supra* note 22, at 958, 1019 (arguing that *Brady*'s "due process" requirement also applies in pre- and post-trial stages).

appropriate steps prosecutors might take to comply with that duty.

B. *Recognizing an Ethical Duty to Learn of Exculpatory Evidence Known to the Police*

The Supreme Court held in *Kyles* that prosecutors have a constitutional duty to disclose not only "material" exculpatory evidence known to them, but also evidence known to "others acting on the government's behalf in the case, including the police."[222] In addition, as *Kyles* recognized, the latter duty necessarily implies a third duty: to learn of "any favorable evidence known to . . . the police."[223] Of these three duties, only the first is currently expressed as an ethical duty. ABA Model Rule 3.8(d), the sole disciplinary rule addressed to the *Brady* obligation, simply requires disclosure of exculpatory evidence or information "known to the prosecutor."[224] The ABA Standards for the Prosecution Function state a similarly narrow approach by forbidding only "intentional" failure to disclose.[225] Thus, neither the Model Rule nor the Standard alerts prosecutors to their additional obligations to learn of and disclose exculpatory evidence known to other members of the prosecution team, including law enforcement agents. One must look to the ABA Discovery Standards for an expression of the prosecutor's duty to disclose material possessed by investigators,[226] and to make "reasonable efforts"

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222. *Kyles*, 514 U.S. at 437.

223. *Id.*

224. Rule 3.8 states in relevant part that:

> The prosecutor in a criminal case shall:
>
> . . . .
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . . .

Model Rules of Professional Conduct Rule 3.8.

225. Standards Relating to the Administration of Criminal Justice Standard 3-3.11 (reproduced *infra* Appendix B).

226. *See* Standards for Criminal Justice Discovery and Trial by Jury Standard 11-4.3(a) (3d ed. 1996). Drawn from former

to ensure that investigators provide relevant material and information to prosecutors.[227] But the Discovery Standards do not purport to define the prosecutor's ethical responsibilities, and have no impact except in jurisdictions that have modeled their discovery rules after them.[228] Even in those jurisdictions, prosecutors are likely to look for

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ABA Discovery Standard 11-2.1(d) (2d ed. 1980), Standard 11-4.3(a) extends the disclosure obligations of both prosecutors and defense attorneys to "material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office." *Id.* In conjunction with Discovery Standard 11-2.1(a)(viii), it applies to exculpatory evidence within the prosecutor's possession or control. *See id.*

227. ABA Discovery Standard 11-4.3, entitled "Obligation to obtain discoverable material," states: "(b) The prosecutor should make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the prosecutor's office." *Id.* Standard 11-4.3(b). Standard 11-4.3(b) replaced former Discovery Standard 11-2.2(c) (1986), which required prosecutors to "ensure that a flow of information is maintained between the various investigative personnel and the prosecutor's office sufficient to place within the prosecutor's possession or control all material and information relevant to the accused and the offense charged."

228. Several states have adopted the language of Standard 11-4.3(a) in discovery rules. *See, e.g.*, Alaska R. Crim. P. 16 (any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office); Colo. R. Crim. P. Rule 16(a)(3) (same); Idaho Crim. R. 16(a) (same); Md. Rule 4-262(c) (same); Mont. Code Ann. § 46-15-322(4) (1999) (any others who have participated in the investigation or evaluation of the case). Some state court rules word the requirement slightly differently. *See, e.g.*, Ariz. R. Crim. P. 15.1(d) (material and information in the possession or control of members of the prosecutor's staff and of any other persons who have participated in the investigation or evaluation of the case and who are under the prosecutor's control). Other states use more general language. *See, e.g.*, Ind. Marion Super. Ct. R. 7(2)(a) ("The State shall disclose the following material and information within its possession or control: . . . ."). Virginia expressly limits the obligation to certain information *known* by the prosecutor to be "within the possession, custody, or control of the Commonwealth." Va. R. Sup. Ct. 3A:11(b)(2); *see also* Ky. R. Jefferson Cir. Ct. 603(B) (similar).

A few states have incorporated the language of former Standard 11-2.2(c) into their court rules. *See, e.g.*, Colo. R. Crim. P. 16(b)(4); Ill. S. Ct. R. 412(f); *see also* Ark. R. Crim. P. 17.1 (commentary); Ariz. R. Crim. P. 15.1(d) (commentary); Vt. R. Crim. P. 16 (Reporter's Notes).

ethical training and guidance to the Rules and Standards directly addressing prosecutorial ethics, rather than to the Discovery Standards.

The ABA should consider amending Model Rule 3.8, and Prosecution Function Standards 3-2.7 and 3-3.11, to specify the prosecutor's ethical obligation to learn of exculpatory evidence known to law enforcement investigators. The Rules should also guide prosecutors on how to implement this responsibility.[229] This could be done by specifying in greater detail the prosecutor's duty to familiarize herself with existing police record-keeping practices, to promote uniform record-keeping and reporting by investigative agencies within her jurisdiction, and to train police in the importance of recording specific types of potentially exculpatory evidence, and revealing it to her office. These changes could be accomplished by adding the following sub-paragraphs to Model Rule 3.8, and to Prosecution Function Standards 3-2.7 and 3-3.11:[230]

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.

. . . .

229. On the need to provide "affirmative ethical guidance" to prosecutors, in addition to prohibiting misconduct, see Little, *supra* note 19, at 742-44.

230. For the full text of these provisions see *infra* Appendix B.

> [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.*

C. *Discussion*

1. *Justification for the Proposed Amendments*

The proposed amendments address the prosecutor's duty to bridge the gap between what she knows and what she must know in order to comply with *Kyles*. The collective impact of several factors makes it important to express this duty as an ethical responsibility. These factors include: (1) the de facto monopoly enjoyed by police and prosecutors over early access to the raw "facts" of the case, including potentially exculpatory facts, and the corresponding disadvantage to the defense; (2) the absence of strong incentives for police to record and reveal exculpatory evidence to prosecutors,[231] or for prosecutors to ensure that

231. Kevin McMunigal has described the conflicting incentives affecting police decisions to conceal or reveal exculpatory evidence to the prosecutor. *See* McMunigal, *supra* note 22, at 1003-04. He points out that although a rule mandating prosecutorial disclosure to the defense creates disincentives for police revelation to the prosecutor, counter-incentives favoring revelation exist. These counter-incentives include the desire of police to avoid convicting the wrong person, their interest in alerting the prosecutor to evidence of which

they do so;[232] (3) the risk that government failure to disclose exculpatory evidence will lead to conviction of the innocent;[233] and (4) the prosecutor's heightened "ministerial" duty to ensure disclosure, arising from the absence of effective adversary safeguards that might otherwise allow her to rely upon defense counsel to achieve this goal.[234] Regardless of how any particular jurisdiction defines the prosecutor's duty to disclose information to the defense, the prosecutor's need to become aware of all potentially exculpatory evidence known to law enforcement agents remains constant.

The proposed amendments to Model Rule 3.8 and Prosecution Standard 3-3.11 articulate the prosecutor's ethical duty. Proposed Rule 3.8(c-1), requiring prosecutors to make "reasonable

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the defense might learn independently, and the risk and consequences of later detection of police concealment. *See id.* However, there is reason to doubt the influence of these "counter-incentives" during the routine processes of police investigation and interviewing, when police decide what information to gather, record, and retain. *See* Fisher, *Just the Facts*, *supra* note 17, at 8-9 (arguing that pressures to conserve scarce resources, protect themselves from embarrassment and civil liability, and ensure conviction of presumptively guilty suspects lead police to ignore or suppress exculpatory evidence); *supra* notes 137-142 and accompanying text (stating reasons why police fail to gather and preserve exculpatory facts).

232. *See* Fisher, *Just the Facts*, *supra* note 17, at 51-52; Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 443-45 (1992) [hereinafter Gershman, *New Prosecutors*] (noting the "failure of professional disciplinary organizations to deal with [prosecutorial] misconduct"); Rosen, *supra* note 220, at 697 (observing that disciplinary sanctions for violating *Brady* are rarely sought or imposed on prosecutors).

233. *See* Gershman, *New Prosecutors*, *supra* note 232, at 451-53 (citing convictions of innocent persons in cases involving prosecutorial suppression of exculpatory evidence); *supra* note 201.

234. *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, 971 (1996) (citing prosecutor's "ministerial" role during the investigative stage, in which prosecutors should "[a]ctively seek all evidence, whether the evidence is favorable or unfavorable to any specific individual"); *see also* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197, 220-27 (1988) (arguing that absence of adversary safeguards triggers heightened duty of prosecutorial "neutrality").

efforts" to acquire exculpatory materials from the police, would expose prosecutors to disciplinary sanctions for failing to heed the Rule. Although the prospect of disciplinary enforcement is remote,[235] the proposed amendment would likely affect prosecutorial behavior in other ways. As Roberta Flowers has written, the greatest benefit of more specific ethics regulations "is not in their enforceability by disciplinary bodies, but in their impact on a prosecutor's self reflection."[236]

The language proposed in Rule 3.8(c-1) and Standard 3-3.11(a-1) partially revives a notion expressed in the 1981 Proposed Final Draft of the Prosecution Standards. Draft Rule 3.8(d) would have obligated the prosecutor to "make reasonable efforts to seek all evidence, whether or not favorable to the defendant."[237] Because that proposal did not limit the prosecutor's search obligation to materials known to the police, it was objected to because requiring the prosecutor "to conduct an investigation for and on behalf of the defendant," was viewed as unsupported by case authority and unenforceable.[238] Not surprisingly, the proposal was abandoned in the final version of the Rule. The proposed amendment is more modest, insofar as it extends the prosecutor's search duty only to material and information known to the police.[239] In this respect, it evokes the English

235. *See* Gershman, *New Prosecutors*, *supra* note 232, at 444-45; Rosen, *supra* note 220, at 697.

236. Flowers, *supra* note 234, at 964; *see also id.* at 964 n.322 (discussing the benefit of professional codes "in narrowing attorneys' capacity for self-delusion about the propriety of a given action" (quoting Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 Tex. L. Rev. 689, 709 (1981))); Zacharias, *supra* note 214, at 227-37 (explaining that codes serve purposes in addition to defining punishable conduct).

237. Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards 248 (1997) (quoting 1981 draft of the rule

238. Summary of comments on Rule 3.8 received by Kutak Commission, prepared for meeting on April 16-17 (Mar. 12, 1982) (sent to the author by Peter Geraghty, Director, ETHICSearch, ABA, Center for Professional Responsibility) (unpublished, on file with author).

239. This limitation is implied by the amendment. It could be made explicit by inserting after "all material and information" the words "known to them or in their

practice of ensuring prosecutorial access to both the "used" and "unused" materials.[240] It also uses the broader term "material," rather than "evidence," to encompass tangible items that may or may not be admissible in evidence.[241]

The proposed language obliges the prosecutor to seek from investigators only those materials that favor the defense. In view of the unsatisfactory English experience of relying on the police to screen for exculpatory evidence,[242] an argument exists for amending both Rule 3.8 and Standard 3-3.11 in broader terms. These "broader terms" would require the prosecutor to seek from the police all "material and information relevant to the defendant and the offense charged,"[243] as well as screening the material personally for disclosable items. In many routine proceedings, this would be entirely feasible. However, in cases involving voluminous materials, the prosecutor might be forced to rely on law enforcement agents to select the disclosable information. For this reason, the proposed language narrowly defines the materials that the prosecutor should seek to obtain. But the Commentary should inform prosecutors that it is desirable, when feasible, to review all relevant materials in law enforcement possession.

2. Relation to Other Rules and Standards

Proposed Model Rule 3.8(c-1) is modeled upon Rule 3.8(e), which requires prosecutors to "exercise reasonable care to prevent investigators, law

possession."

240. *See supra* notes 41-59 and accompanying text.

241. *See* Standards for Criminal Justice Discovery and Trial by Jury Standard 11-2.1(a)(viii), 11-4.3(b) (3d ed. 1996) (employing the terms "information" and "material").

242. *See supra* Part I.A.

243. *See* Standards for Criminal Justice Discovery and Trial by Jury Standard 11-4.3(b); *see also* Standards Relating to the Administration of Criminal Justice Standard 3-3.11 cmt. (3d ed. 1992) ("The duty of the prosecutor is to acquire *all the relevant evidence* without regard to its impact on the success of the prosecution." (emphasis added)); Flowers, *supra* note 234, at 971 (citing prosecutor's "ministerial" role during the investigative stage, in which prosecutors should "[a]ctively seek all evidence, whether the evidence is favorable or unfavorable to any specific individual").

enforcement personnel [and other persons] . . . associated with the prosecutor in a criminal case from making an extra judicial statement that the prosecutor would be prohibited from making under Rule 3.6."[244] Both provisions essentially require the prosecutor to "police the police," a duty related in turn to Rule 8.4(a), which holds a lawyer responsible for violations of the Rules though the acts of another.[245] When prosecutors refrain from vigorously seeking potentially disclosable evidence known to law enforcement agents, they risk violating the spirit, if not the letter, of Rule 8.4(a).

The proposed amendment to ABA Standard 3-3.11 goes beyond the existing text of that Standard in two ways. Unlike sub-paragraph 3.11(b), which enjoins the prosecutor to "make a reasonably diligent effort to comply with a legally proper discovery request,"[246] the duty described in proposed sub-paragraph 3.11(a-1) neither depends upon a request from the defense, nor itself imposes any duty to disclose. Also, because the proposed amendment would create an affirmative duty to seek all exculpatory evidence known to law enforcement investigators, it differs from existing sub-paragraph 3.11(c), which merely forbids intentionally avoiding "pursuit of [exculpatory] evidence . . . ."[247]

The proposed amendments to Standard 3-2.7 would inform prosecutors of steps they should take to obtain all exculpatory material in police possession. In order to fulfill this obligation prosecutors must be well informed about the mechanics of police investigation and record keeping in both routine and specialized police

244. *See* Model Rules of Professional Conduct Rule 3.8 (1999) (reproduced *infra*, Appendix B).

245. *See* Geoffrey C. Hazard & W. William Hodes, 1 The Law of Lawyering 699 (1998); *see also* Model Rules of Professional Conduct Rule 5.3 (describing a lawyer's responsibility for conduct of non-lawyers "employed or retained by or associated with a lawyer"). This provision does not make prosecutors responsible for the conduct of police investigators when, as is customary, the police operate independently of the prosecutor's office.

246. *See* Standards Relating to the Administration of Criminal Justice Standard 3-3.11(b).

247. *See id.* Standard 3-3.11.

investigation. In most jurisdictions, a number of relatively autonomous investigative agencies operate at different levels of local, state, and federal government.[248] These agencies are subject to various internal regulations affecting record-keeping, but the contents of departmental regulations are sometimes closely guarded.[249] Also, the investigative practices of American law enforcement agencies have not been widely studied.[250] In such environments, American

248. *See* Yale Kamisar et al., Modern Criminal Procedure 9-10 (9th ed. 1999) (describing "fragmentation" of enforcement agencies, especially at the state level). *But see* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 Buff. Crim. L. Rev. 815, 843 (1999) (mentioning influence of the Commission on Accreditation for Law Enforcement Agencies (CALEA) in articulating professional standards and "stimulating needed administrative reforms in police departments across the country").

249. For example, in the city where I practiced as a public defender in 1989-90, police department regulations were treated as confidential, rather than public, documents.

State and local police agencies can probably restrict access to their internal regulations more easily than can federal investigative agencies, such as the FBI or DEA, which operate as branches of large bureaucracies. *See* Kamisar et al., *supra* note 248, at 9. I have found no literature on the subject of record keeping requirements of federal law enforcement agencies. Their official manuals of investigation are not generally available to the public. Perhaps as a result of requests made under the Freedom of Information Act, however, photocopied portions of unpublished manuals are available upon request. For example, the FBI Manual of Investigative Operations and Guidelines, 1927-78 (formerly called the "FBI Manuals of Instruction, Investigative Procedures and Guidelines, 1927-1978"), is available from the FBI on microfiche. Also, a table of contents of the 1986 edition is available, and members of the public may order photocopies of particular sections. Portions of the DEA Agents Manual became available to the defense bar in 1999, apparently for the first time, as a result of a Freedom of Information Act request. *See NACDL Makes DEA Agents' Manual Available—Well, Most of It*, 13 Crim. Practice Rep. (BNA), no. 3, at 44 (1999).

250. Although some studies have been done in the United States, *see, e.g.*, Fisher, *Just the Facts*, *supra* note 17, at 18-21 & n.93 (describing various approaches taken in the study of police investigative practices), we know relatively little about police investigative procedures and record-keeping in this country. Thus, it was possible for a scholar to declare in 1975: "Regrettably, empirical studies of detectives are nowhere to be found. As with most of the specialized units, hypotheses about decision-making are made . . . , but with very little evidence in the literature as foundation." William B. Sanders, Detective Work 6 (1977) (quoting Harold Pepinsky, *Police Decision-making*, *in* Decision-making in the

prosecutors— particularly at the state level— may face a difficult challenge simply to discover what investigative records are regularly kept, by whom, and where.[251] This undoubtedly poses an obstacle to implementation of the prosecutor's disclosure obligations. Proposed Standard 3-2.7(c) directs the prosecutor to become familiar with existing police record-keeping practices in her jurisdiction. This requirement reflects the view that a prosecutor's ability to carry out her duty to learn what potentially exculpatory evidence exists in any case depends initially on her understanding of those practices. Such an understanding is also crucial to the prosecutor's obligation, expressed in the proposed paragraph 3-2.7(d), to promote adoption of satisfactory uniform reports of criminal investigations.

The advantages of uniform police report forms are obvious.[252] In its 1973 report on the Courts, the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") recommended that prosecutors "should develop for the use of the

Criminal Justice System, at 27 (Don M. Gottfredson ed., Rockville, Md.: National Institute of Mental Health 1975)). By way of contrast, British scholars have conducted an impressive number of empirical studies on police investigative procedures in England, many of which are cited in this Article. *See, e.g.*, John Baldwin & Timothy Moloney, Supervision of Police Investigations in Serious Criminal Cases (Royal Comm'n on Crim. Justice, Research Study No. 4, 1992); John Baldwin, Preparing the Record of Taped Interview (Royal Comm'n on Crim. Justice, Research Study No. 2, 1992); John Baldwin, The Role of Legal Representatives at the Police Station (Royal Comm'n on Crim. Justice, Research Study No. 3, 1992); Barrie Irving & Ian McKenzie, A Brief Review of Relevant Police Training (Royal Comm'n on Crim. Justice, Research Study No. 21, 1993); Irving & Dunnighan, *supra* note 109; Michael Levi, The Investigation, Prosecution and Trial of Serious Fraud (Royal Comm'n on Crim. Justice, Research Study No. 14, 1993); Maguire & Norris, *supra* note 108.

251. *See, e.g.*, Palmer v. City of Chicago, 562 F. Supp. 1067, 1071 (N.D. Ill. 1983), *order rev'd by*, 755 F.2d 560 (7th Cir. 1985) (noting that Chicago prosecutors may have been unaware of the city-wide system of "double" police files); People v. Young, 591 N.E.2d 1163, 1165 & n. (1992) (telling how New York City prosecutors discovered a Police Department practice of generating intra-departmental "unofficial" "confidential" reports that were not disclosed to prosecutors).

252. For a discussion of the functions and content of typical police incident reports, see Fisher, *Just the Facts*, *supra* note 17, at 4-6.

police a basic police report form that includes all relevant information about the offense and the offender necessary for charging, plea negotiations, and trial."[253] In making this recommendation, the commission stated:

> The police report form is the single most important document in the prosecutor's case file. Prosecutors . . . rely on the police report to identify necessary witnesses, to familiarize themselves with the facts of the case, and to identify the problems that may arrive at trial. Since the police report form is the basic prosecutive document, it should be designed by the prosecutor to meet his requirements and not by the police based on their interpretation of the prosecutor's requirements.[254]

The National District Attorneys Association ("NDAA"), in Commentary to its National Prosecution Standards, also urged prosecutors to develop uniform police reports.[255] According to the NDAA, a proper report form "insures that all information necessary for a successful prosecution is available for each case."[256] The NDAA Commentary also supports discretionary disclosure of "merely potentially useful material" to the defense, a position which logically presupposes prosecutorial access to such material in police hands.[257] Reflecting these recommendations,

253. Nat'l Advisory Comm'n on Crim. Justice Standards and Goals, Courts 247 (1973) [hereinafter Nat'l Advisory Comm'n, Courts]. The Commission's recommendation was not reflected in its standards for the police. *See* Nat'l Advisory Comm'n on Crim. Justice Standards and Goals, Police 570-73 (1973) [hereinafter Nat'l Advisory Comm'n, Police].

254. Nat'l Advisory Comm'n, Courts, *supra* note 253, at 248. The Commission's Report added: "A well-designed report form should require police officers to detail all of the evidence which supports each element of the offense, the relevant surrounding circumstances, and all known witnesses and their addresses." *Id.*

255. *See* Nat'l District Attorneys Ass'n, National Prosecution Standards Standard 22.1 cmt. (2d ed. 1991) [hereinafter NDAA Standards].

256. *Id.* ("The prosecutor has the expertise to design a form that will fit both the needs of prosecution and those of local law enforcement.").

257. *See id.* Standard 53.1-53.5 cmt. (stating that prosecutors should consider the rule of *Arizona v. Youngblood* as "the minimum standard and not a reason for denial of discretionary . . . disclosure that aids the administration of

proposed paragraph 2.7(d) expressly states that uniform police reports should contain potentially exculpatory information.[258]

The commentary to proposed Standard 3-2.7 should address and elaborate upon the connection between the prosecutor's duties under *Kyles*, and her obligations under sub-paragraphs 2.7(a) and (b) to assist in advising and training the police. First, the commentary should advise prosecutors to promote police training in the importance of recording, preserving, and revealing potentially exculpatory evidence to prosecutors. Second, it should stress the importance of persuading the police to adopt reporting forms that would include specific categories of potentially exculpatory evidence.[259] In these ways, the commentary would reinforce the duties in Model Rule 3.8 and Prosecution Standard 3-3.11, as amended. Also, Model Rule 3.8, Standard 3-3.11, and Standard 3-2.7 should cross-refer to each other.

3. Training Police in the Importance of Revealing Potentially Exculpatory Evidence to Prosecutors

Prosecutors' access to exculpatory evidence known to the police depends ultimately on the willingness of police to record, preserve, and reveal such evidence. Despite pressures inclining police against such practices,[260] they also have an interest in cooperating with prosecutors to implement *Brady*. As Professor Kevin McMunigal has pointed out, police have an interest, especially in the early stages of investigation, in exonerating innocent suspects in order to refocus their efforts on finding the guilty.[261] Training

justice;" the prosecutor should set an office standard that goes beyond the rule in *Youngblood* and make it known that the office expects the same for law enforcement agencies.)

258. *See supra* notes 224-29 and accompanying text; *cf.* Standards for Criminal Justice Discovery and Trial by Jury Standard 11-4.4(c) (3d ed. 1996) (requiring prosecutors to "make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the prosecutor's office").

259. *See infra* notes 289-317 and accompanying text.

260. *See supra* note 231 and accompanying text.

261. *See supra* note 231 and accompanying text.

should stress the risk that suppression of exculpatory evidence will lead to conviction of the innocent. More particularly, it should— as in England— stress the potentially exonerative value of "negative information" and "first descriptions" from witnesses.[262] Like much potentially exculpatory evidence, such information is "casually acquired" by the police as a by-product of the search for incriminating evidence.[263] If police reports specifically required inclusion of such information, prosecutors would be better able to comply with *Kyles*. The growing ease of electronic recording and transmission of investigative data should reduce the costs to police of expanding reporting requirements in this way.[264]

As part of their mission to offer the police legal advice and training, prosecutors should also educate the police in their increasing vulnerability to suit, both as individuals and agencies, under the federal Civil Rights Act.[265] Such knowledge should give police a powerful reason to cooperate with prosecution efforts to establish a regular flow of potentially exculpatory evidence from investigators to the prosecutor's office.[266] Although police have no constitutional duty to *gather* exculpatory evidence,[267] and only a qualified duty to *preserve*

262. *See supra* notes 121-58 and accompanying text.

263. *See* McMunigal, *supra* note 22, at 1000 (citing Professor Kronman's distinction between "casually" and "deliberately" acquired information, *in* Anthony Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Legal Stud. 1, 2 (1978)).

264. *See supra* note 199 and accompanying text.

265. *See* 42 U.S.C. § 1983 (1994). Other possible sanctions include reversal of a guilty defendant's conviction, criminal liability, and internal discipline.

266. *See* Slobogin, *supra* note 149, at 392-400 (describing how entity liability of police departments promotes systemic deterrence, achieved through training and internal discipline).

267. Once police have established probable cause, they have no constitutional duty to investigate further. *See* Baker v. McCollan, 443 U.S. 137, 145-46 (1979) (holding that after valid arrest, police have no duty to investigate arrestee's claims of innocence); White v. Tamlyn, 961 F. Supp. 1047, 1062 (E.D. Mich. 1997) (finding no duty to seek test of arrestee's blood for cocaine). The *White* court found no case "which holds that the due process clause is violated when the police

such evidence once it comes into their possession,[268] they are constitutionally required to *reveal Brady* material to the prosecutor.[269] Unlike prosecutors, who are absolutely immune from civil liability for violating a defendant's *Brady* rights,[270] police officers have only a defense of

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fail to gather potentially exculpatory evidence." *White*, 961 F. Supp. at 1062 (quoting *Miller v. Vasquez*, 868 F.2d 1116, 1119 (9th Cir. 1989)). The *White* court also characterized the holding in *Miller v. Vasquez*, 868 F.2d at 1119, that "a bad faith failure to collect potentially exculpatory evidence would violate the due process clause," as "an aberration and the law only in the Ninth Circuit." *White*, 961 F. Supp. at 1062 n.12.

268. The due process clause does not impose "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." Arizona v. Youngblood, 488 U.S. 51, 58 (1988). Under *Youngblood* and *California v. Trombetta*, 467 U.S. 479 (1984), the state's duty to preserve exculpatory evidence applies only to "material" evidence, *i.e.*, "evidence that might be expected to play a significant role in the suspect's defense." *Trombetta*, 467 U.S. at 488. Relief depends on the defendant's showing that the exculpatory nature of the evidence was apparent to the police at the time they lost or destroyed it, and that the police acted in bad faith. *See, e.g.*, United States v. Jobson, 102 F.3d 214, 219 (6th Cir. 1996) (finding no constitutional violation where police failed to preserve a dispatch tape because there was no evidence that the dispatch tape would contain exculpatory information).

269. As a precondition for recovery under section 1983, the plaintiff must have suffered harm by conviction or punishment. *See* Williams v. Krystopa, No. Civ. A. 98-CV-1119, 1998 WL 961375, at *3 (E.D. Pa. Dec. 16, 1998) (holding that despite the egregious conduct of the prosecution and the police in suppressing a police report, the *Brady* violation resulted in no due process deprivation because the defendant, plaintiff in the section 1983 action, was acquitted at trial after spending 530 days in an adult correctional facility between the time of arraignment and acquittal). Also, plaintiff's conviction or sentence must have "been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance of a writ of habeas corpus . . . ." Heck v. Humphrey, 512 U.S. 477, 487 (1994). The police duty is to disclose evidence to the prosecutor or the court, not to the defense. *See* Jean v. Collins, 155 F.3d 701, 708 (4th Cir. 1998), *vacated on other grounds*, 119 S. Ct. 2016 (1999) (finding police absolutely immune from civil suit for failure to disclose exculpatory evidence to the defense).

270. *See, e.g.*, *Jean*, 155 F.3d at 705 (citing Kalina v. Fletcher, 522 U.S. 118 (1997)) (holding prosecutors absolutely immune from suit when performing functions that require the exercise of prosecutorial discretion); Reid v. New Hampshire, 56 F.3d 332, 336 (1st Cir. 1995) (stating that a prosecutor

"qualified immunity" for their actions.[271] Therefore, an officer is liable if a reasonable official would have known that his failure to disclose evidence to the prosecutor violated clearly established constitutional rights under *Brady*.[272]

The recent case of *Jean v. Collins*[273] illustrates the operation of qualified immunity in this context. Lesly Jean was convicted of rape and given two consecutive life sentences. He spent nine years in prison before his conviction was reversed because of *Brady* violations.[274] Following his release, Jean sued the police under 42 U.S.C. § 1983 for failing to reveal exculpatory evidence. A Fourth Circuit panel ruled that the police have a direct duty under *Brady* to disclose material exculpatory evidence to the prosecutor:

> If the police allow the State's Attorney to produce evidence pointing to guilt without ever informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant . . . .[275]

On rehearing, the Fourth Circuit *en banc* conceded the existence of this duty,[276] but, adopting a rigorous test for deciding whether the duty to disclose was "clearly established" at the time the police failed to disclose, held that plaintiff had failed to satisfy the test.[277] On review, the

cannot be held personally liable for knowing suppression of exculpatory information); Geter v. Fortenberry, 849 F.2d 1550, 1552-53 (5th Cir. 1988) (citing Imbler v. Pachtman, 424 U.S. 409 (1975)) (finding of absolute immunity for claim based on prosecutor's alleged solicitation of false testimony).

271. *See Jean*, 155 F.3d at 708.

272. *See id*.

273. 155 F.3d 701 (4th Cir. 1998)

274. *See* Jean v. Rice, 945 F.2d 82, 83 (4th Cir. 1991).

275. Jean v. Collins, 107 F.3d 1111, 1119 (4th Cir. 1997) (Hamilton, J., concurring) (quoting Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964)), *vacated en banc*, 155 F.3d 701 (4th Cir.1998), *vacated on other grounds*, 119 S. Ct. 2016 (1999).

276. *See Jean*, 155 F.3d at 710 & n.3.

277. Over a dissent by five judges, the Fourth Circuit held that, to determine whether a right was clearly established at a particular time, a federal circuit court need not look beyond decisions of the Supreme Court, the relevant circuit court, and the highest court of the state in which the case

Supreme Court summarily vacated the Fourth Circuit's opinion, remanding the case for reconsideration in light of an intervening case that also upheld a claim of qualified immunity for law enforcement officials.[278]

Both the Fourth Circuit and Supreme Court opinions in *Jean* show an inclination to grant qualified immunity to police officers unless fairly explicit authority establishes the unconstitutionality of their conduct. With regard to the duty to disclose exculpatory evidence to the prosecutor, however, the immunity defense is becoming obsolete. Although some courts have upheld police immunity on the ground that, at the relevant time, the duty to disclose was not "clearly established,"[279] a growing number of courts have recognized the duty.[280]

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arose. *See id.* at 709. In a dissenting opinion, Judge Murnaghan accused the *Jean* majority of moving "to a rule of actually unqualified, though technically called qualified, immunity for police officers [by, *inter alia*] a dramatic narrowing of that law which, for police officers, will be considered well-settled at the critical time." *Id.* at 712-13.

278. *See* Wilson v. Layne, 119 S.Ct. 1692, 1695 (1999) (upholding Fourth Circuit finding of qualified immunity of defendant state and federal law enforcement officials against claim that their actions violated the Fourth Amendment for allowing media to enter a home searched pursuant to a warrant, on ground that the right allegedly violated was not "clearly established" at the time). The Court suggested that the plaintiff needs to show either "cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely," or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* at 1700.

279. *See Jean*, 155 F.3d at 708, 710 & n.3 (ruling that although reasonable police officer in 1982 would not have known that failure to disclose exculpatory evidence to prosecutor violated criminal defendant's *Brady* right, intervening court decisions "now provide notice to police officers that they can be subject to monetary damages under section 1983 for failure to disclose"). The Fourth Circuit's *dictum* in *Jean* was qualified, but essentially preserved, in an unpublished disposition. *See* Walker v. Sopher, Nos. 95-2248 & 96-1088, 1998 WL 682283, at **3 (4th Cir. Sept. 23, 1998)).

280. *See* Brady v. Dill, 187 F.3d 104, 114 (1st Cir. 1999); McMillian v. Johnson, 88 F.3d 1554, 1567 (11th Cir. 1996); Jones v. City of Chicago, 856 F.2d 985, 995 (7th Cir. 1988); Geter v. Fortenberry, 849 F.2d 1550, 1559 (5th Cir. 1988); Williams v. Krystopa, No. Civ. A. 98-CV-1119, 1998 WL 961375, at *1 (E.D. Pa. Dec. 16, 1998); Hernandez-Fontan v. City of Lancaster, No. Civ. A. 96-CV-5653, 1998 WL 474171 at *7 n.12

Beyond the liability of individual officers, a police department's failure to establish and enforce procedures governing the disclosure of exculpatory evidence might subject the responsible city or county to liability under section 1983.[281] This theory was argued in *Carter v. Harrison*,[282] by a plaintiff who had spent 28 months in prison for a murder he did not commit. Alleging police suppression of crucial exculpatory statements by several witnesses, he sued the city under section 1983, claiming injury from its policy or custom of failing to train and supervise police to implement *Brady*.[283] A federal district court found sufficient evidence to raise a triable issue of fact as to the city's "grossly negligent" or "deliberately indifferent" failure.[284] The court rejected as inadequate written guidelines requiring detectives to record all "relevant evidence:"

> The recording of "all relevant evidence" does not accomplish the goal of recording and preserving exculpatory evidence. A police officer investigating a crime is likely to assume that relevant evidence includes only inculpatory information.[285]

(E.D. Pa. July 31, 1998); Ahlers v. Schebil, 966 F. Supp. 518, 527 (E.D. Mich. 1997); Carter v. Harrison, 612 F. Supp. 749, 756 & n.5 (E.D.N.Y. 1985).

281. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 690-95 (1978); *see also* Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DePaul L. Rev. 627, 651-67 (1999) (discussing municipal liability for failure to train employees to avoid violating federal rights); Livingston, *supra* note 248, at 822 (1999) (discussing use of consent decrees under Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141(a) (1994), which prohibits governmental authorities from engaging in "a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States").

282. 612 F. Supp. 749 (E.D.N.Y. 1985).

283. *See id.* at 754.

284. *Id.* at 759; *see also* City of Canton v. Harris, 489 U.S. 378, 388 (1989) (finding municipal liability for failure to train or supervise requires proof of city's "deliberate indifference" to the rights of those with whom municipal employees will come into contact).

285. *Carter*, 612 F. Supp. at 756; *see also* Fisher, *Just the Facts*, *supra* note 17, at 27-28 (concluding from examination of police training materials, which commonly instruct police to

By implication, municipalities risk liability if they fail *expressly* to train police to record, preserve and reveal exculpatory evidence.[286]

By adopting rules and standards stressing the prosecutor's obligation to make the police aware of the need to collect and reveal negative information, the ABA would reinforce the courts' growing willingness to impose civil liability on police who suppress such evidence. In the end, the prospect of such liability is likely to give police the greatest incentive to overcome their reluctance to "help" the accused.

4. Specific Categories of Potentially Exculpatory Evidence that Prosecutors Should Routinely Seek from Police

In addition to elaborating the prosecutor's role as legal advisor to the police, the proposed commentary to Standard 3-2.7 should stress the importance of persuading the police to adopt reporting forms that would call for specific categories of potentially exculpatory evidence. On this point, both the English system, and recently adopted local rules for the federal District Court for Massachusetts, suggest directions for reform.

As described in Part II of this Article, the English use detailed codes to describe the types of information that police must record, retain and make available to prosecutors.[287] These codes provide checklists of potentially exculpatory evidence—such as notebook entries, first descriptions by potential witnesses, information

report "all relevant information," that "[b]y implication . . . exculpatory evidence does not qualify").

286. Section 1983 claims against municipalities may also rest upon failure to train *prosecutors* to disclose *Brady* material. *See* Walker v. City of New York, 974 F.2d 293, 300 (2d. Cir. 1992) (finding that complete failure by district attorney to train prosecutors on compliance with *Brady* could constitute "deliberate indifference" under section 1983). Walker had been convicted of murder and spent 19 years in prison. The prosecutor failed to disclose, among other things, that a witness failed to pick Walker out of a lineup, instead identifying another man, "apparently a police officer," as the perpetrator. *Id.* at 295.

287. *See supra* notes 32-36 and accompanying text.

from tapes or telephone records, defendant's explanation of an offense[288]— which alert both the police and prosecutors to the possible existence of specific materials that might be disclosable to the defense. In contrast, American court rules and standards rarely specify categories of exculpatory evidence that prosecutors must disclose and, therefore, obtain from investigators. Instead, guidance takes the form of general formulae, ranging from constitutionally mandated disclosure of "favorable and material" evidence, to sub-constitutional standards requiring disclosure of evidence that is "exculpatory,"[289] or that "tends to negate the guilt of the accused."[290] These formulae leave the precise scope and timing of the disclosure duty unclear, particularly with respect to evidence that does not directly exculpate the defendant.[291]

288. *See supra* notes 32-36 and accompanying text.

289. *See* Mass. R. Crim. P. 14; Mich. R. Crim. P. 6.201; Miss. Uniform Cir. and County Ct. R. 9.04; Wis. Stat. Ann. § 971.23(1) (West 1998). Some state court discovery rules limit the prosecutor's disclosure duty to "any material evidence favorable" to the defendant. *See* N.M. R. Dist. Ct. R. Crim. P. 5-501; Penn. R. Crim. P. 305.

290. *See supra* note 263 and accompanying text.

291. Disputes often occur over whether, and when, prosecutors must disclose evidence that would impeach the credibility of prosecution witnesses or provide leads to exculpatory evidence. The Supreme Court has interpreted *Brady* to allow no distinction between impeachment evidence and exculpatory evidence. *See* United States v. Bagley, 473 U.S. 667, 676-77 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972). Professional responsibility rules and standards are at least as broad. However, none of these duties necessarily apply at the pretrial stage. *See supra* note 231 and accompanying text. Professional responsibility rules typically require "timely" disclosure to the defense, reflecting *Brady*'s ambiguity as to the precise timing required. *See* Model Rules of Professional Conduct Rule 3.8(d) (1999); Model Code of Professional Responsibility DR 7-103(B) (1980); Standards Relating to the Administration of Criminal Justice, Prosecution Function Standard 3-3.11 (a) (3d ed. 1992). This ambiguity permits prosecutors to interpret pretrial disclosure rules as not extending to impeachment evidence. *See, e.g.*, Franklin, *supra* note 221, at 568-69, 574-76 (discussing how some federal prosecutors in Northern California feel free to refrain from requesting from investigators, or disclosing, impeachment material); *cf.* United States v. Owens, 933 F. Supp. 76, 85-86 (D. Mass. 1996) (construing First Circuit cases to require disclosure "coincident with the scope of cross-examination to be afforded in a criminal case").

For an overview of the many questions that have arisen in

In response to uncertainty regarding the scope of required pretrial disclosure by the prosecution, a court could supplement the general standards defining what must be disclosed with rules describing specific categories of exculpatory evidence. This approach is taken by the innovative discovery rules recently adopted by the United States District Court for Massachusetts.[292] Designed to "minimize the possibility that the government will fail to meet its responsibilities [and] to maximize consistency in the practices among prosecutors and judicial officers,"[293] these rules articulate the specific requirements of *Brady* more comprehensively and in more detail than other rules or standards. Because they itemize material that courts might require prosecutors to disclose, they provide prosecutors with a framework for deciding what potentially exculpatory information they should seek from the police.[294]

Subject to judicially-approved exceptions in the interest of justice,[295] the Local Rules require automatic disclosure in felony cases of specified categories of evidence, including both general[296]

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applying *Brady* see James Lappan, *79 Questions: The Catechism of* Brady v. Maryland, 35 Crim. L. Bull. 277 (1999).

292. *See supra* notes 207-12 and accompanying text.

293. The new rules also aim "to implement the principle that different forms of exculpatory information should ordinarily be disclosed at different times." Mass. Rules Committee Report, *supra* note 207, at 5.

294. *See* D. Mass. Local R. Concerning Crim. Cases 116.2(A).

295. *See id.* Rule 116.6. The Rules include procedures for resolving discovery disputes before trial. *See id.* Rules 116.3, 117.1. The most recent edition of the ABA Standards for Discovery offers a different version of this approach. They require broad, automatic disclosure of "all relevant information" held by the team of prosecution and investigatory personnel, *see* Standards for Criminal Justice Discovery and Trial by Jury Standard 11-2.1(a) cmt. (3d ed. 1996), as well as specific items of relevant information, such as the names and addresses of "all persons known to the prosecution to have information concerning the offense charged, together with all written statements," *id.* Standard 11-2.1(a)(ii), and all tangible items that pertain to the case. *See id.* Standard 11-2.1(a)(v).

296. *See* D. Mass. Local R. Concerning Crim. Cases 116.1(C). This category includes, *inter alia*, all identification procedures. Thus, the government must disclose "[a] written statement whether the defendant was a subject of an investigative identification procedure . . . involving a line-

and exculpatory[297] evidence. The Rules expand and clarify the prosecutor's duty to disclose exculpatory evidence in three ways. First, the Rules expansively define the concept of "exculpatory" information that must be disclosed.[298] Second, they regulate the presumptive

up, show-up, photo spread or other display of an image of the defendant." *Id.* Rule 116.1(C)(1)(f). The rule also requires that "[i]f the defendant was a subject of such a procedure, a copy of any videotape, photo spread, image or other tangible evidence reflecting, used in or memorializing the identification procedure." *Id.*; *see also id.* Rule 116.2(B)(1)(f) (requiring a written description of the failure of any percipient witness to make a positive identification of defendant at identification procedure).

297. *See id.* Rule 116.2.

298. The Rule's drafters rejected as unsatisfactory the Supreme Court's limitation of *Brady* to "material" evidence, defined retrospectively as existing "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." United States v. Bagley, 473 U.S. 667, 682 (1985). "Reasonable probability" was defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Recognizing the need for a more useful test in the pretrial context, the Rules Committee adopted a prospective test drawn from *Kyles*. Favorable evidence is "material" for purposes of required disclosure:

> if there is a reasonable probability that, if the evidence is disclosed to the defendant, he could properly be acquitted because of the presence of a reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant . . . .

Mass. Rules Committee Report, *supra* note 207, at V(A) (citing Kyles v. Whitley, 514 U.S. 419, 433-35 (1995)). Expanding upon this definition, the Committee cited with apparent approval the District of Columbia Circuit's interpretation of "materiality" as used in Federal Rule of Criminal Procedure 16(a)(1)(C), requiring pretrial production by the government of documents "which are material to the preparation of the defendants' defense." Materiality exists where there is:

> some indication that the pretrial disclosure of the disputed evidence would enable the defendant significantly to alter the quantum of proof in his favor. This materiality standard normally is not a heavy burden, rather, evidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.

Id. at V(A) (quoting United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993)) (citations, internal quotations and ellipses omitted). The Committee Report, acknowledges that "neither the Supreme Court nor the First Circuit has addressed the definition of materiality in this context, and this issue may

timing of disclosure of different categories of evidence.[299] Third, and most significantly for our purposes, they require the prosecutor automatically to disclose a number of specific categories of information without regard to the prosecutor's judgment whether, in a particular case, the information is "material" and "favorable to the accused."[300] The Local Rules thus resemble the English model in two respects: first, they "codify" particular categories of information which are presumptively disclosable; and second, they specifically require the prosecutor to obtain that information from the police.[301]

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have to be resolved in the litigation of future cases in this District . . . ." *Id.*
Inspired by this broadened standard of "materiality" the Rules define disclosable exculpatory evidence as follows:

> "Exculpatory information," which must be disclosed includes but is not limited to "all information that is material and favorable to the accused" because it tends to:
> (1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;
> (2) Cast doubt on the admissibility of [certain] evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude . . . .;
> (3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief; or
> (4) Diminish the degree of the defendant's culpability or . . . Offense Level under [sentencing guidelines]."

D. Mass. Local R. Concerning Crim. Cases 116.2(A).

299. Unlike the previous Rules, which required routine disclosure of exculpatory evidence "as soon as counsels' trial engagements permit and in all events within fourteen (14) days after arraignment," the 1998 Rules establish four different presumptive times for the disclosure of different categories of evidence. *See* D. Mass Local R. Concerning Crim. Cases 116.2(B). Once triggered, the duty to disclose is continuous. *See* D. Mass. Local R. Concerning Crim. Cases 116.7. It is not clear when the duty ends.

300. *See infra* notes 302-15 and accompanying text.

301. Local Rule 116.8 requires the prosecutor to inform "all . . . law enforcement agencies formally participating in the criminal investigation . . . of the discovery obligations set forth [in the Rules] and obtain any information subject to disclosure from each such agency." D. Mass. Local R. Concerning Crim. Cases 116.8. Both Rule 116.8 and Rule 116.9, requiring police to preserve relevant documents in their possession, apply only to law enforcement agents whose agency at the time was formally participating in a criminal investigation. *See id.* Rules 116.8, 116.9; *see also supra* Part

In addition to automatically disclosable general information, such as identification procedures,[302] the Rules require automatic pretrial disclosure of three kinds of exculpatory information: (1) "[i]nformation that would tend directly to negate the defendant's guilt" of the charged offenses;[303] (2) "[i]nformation that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief;"[304] and (3) "[a]ny information that tends to cast doubt on the credibility or accuracy" of evidence and witnesses that the government anticipates presenting in its case-in-chief.[305] The Rules go on to list specific items of exculpatory information regarding the government's anticipated case-in-chief witnesses that must be disclosed: information regarding promises, rewards or inducements,[306] criminal records,[307] pending criminal cases,[308] the witness' failure to make a positive identification of the defendant in an identification procedure,[309] any inconsistent statements made by the witness,[310] statements made *by any person* that are inconsistent with any statement made by the witness,[311] information reflecting the witness' bias or prejudice against

I.C.2.a. (discussing disclosure responsibilities under the English system). The scope of Rule 116.1(A)(1) is broader, subjecting to automatic discovery "all discoverable material and information in the possession, custody, or control of the government . . . the existence of which is known, or by the exercise of due diligence may become known, to the [prosecutor] . . . ." D. Mass. R. Concerning Crim. Cases 116.1(A)(1).

302. *See* D. Mass. Local R. Concerning Crim. Cases 116.1(C)(1)(f).

303. *Id.* Rule 116.2(B)(1)(a).

304. *Id.* Rule 116.2(B)(1)(b).

305. *Id.* Rule 116.2(B)(2)(a).

306. *See id.* Rule 116.2(B)(1)(c).

307. *See id.* Rule 116.2(B)(1)(d).

308. *See id.* Rule 116.2(B)(1)(e).

309. *See id.* Rule 116.2(B)(1)(f). (applying only to percipient witnesses "identified by name").

310. "[O]r a description of such a statement, made orally or in writing . . . regarding the alleged criminal conduct of the defendant." *Id.* Rule 116.2(B)(2)(b).

311. *See id.* Rule 116.2(B)(2)(c). Oral statements are included, and the witness' statement must be about the alleged criminal conduct of the defendant. *See id.*

the defendant,[312] bad acts committed by the witness,[313] and information regarding any mental or physical impairment that may cast doubt on the witness' ability to testify accurately or truthfully.[314] The Rules also require disclosure of a "failure of *any* percipient witness . . . to make a positive identification of a defendant" at an identification procedure.[315]

The Local Rules are significant not simply because they require broad disclosure to the defense,[316] but because they articulate the specific requirements of *Brady* in such detail. They could, therefore, guide prosecutors in deciding what potentially exculpatory information they should seek from the police. For example, many of the items required by the Local Rules are readily known to investigators, and could be reported in designated spaces on standard and/or on supplementary forms for reporting criminal incidents and arrests. For instance, report forms could call for "first descriptions" of the perpetrator, an account of any identification procedure, and the failure of any percipient witness to identify the suspect. Report forms could also call for inconsistent statements made by inculpating witnesses, as well as observed mental or physical impairments, such as intoxication, that might cast doubt on their ability to report accurately. Other categories of information, such as exculpatory statements made by the suspect and others, could also be expressly sought.

312. *See id.* Rule 116.2(B)(2)(d).

313. *See id.* Rule 116.2(B)(2)(f). Specifically, such background includes any prosecutable federal offense, or conduct that may be admissible under Federal Rule of Evidence 608(b), known by the government to have been committed by the witness. *See id.*

314. *See id.* Rule 116.2(B)(2)(g).

315. *See id.* Rule 116.2(B)(1)(f) (emphasis added); *supra* note 302.

316. Judicial precedents support most if not all of the Rules' disclosure requirements. The Supreme Court has held that the prosecutor's *Brady* duty extends to evidence affecting witness credibility. *See* United States v. Bagley, 473 U.S. 667, 674-78 (1985). Regarding specific types of impeachment evidence that must be disclosed, see Illinois Institute for Continuing Legal Education, Federal Criminal Practice, § 7.51 (1997) (collecting cases).

Other items required by the Rules— such as prior bad acts or pending investigations or prosecutions against prospective government witnesses— might not be suited for inclusion in standard police reports, because they involve facts that would not normally be known by the investigating officer. Prosecutors could seek this information from the police by means of other, later-transmitted forms. Precisely what information should be reported, at what level of detail, in what kinds of cases, and at what stages of the proceedings, are matters beyond the scope of this Article. Reasonable people might disagree on the particulars of any proposal, but not, I think, on the principle that prosecutors should endeavor to persuade police to include exculpatory information on police reports.[317] The duty to undertake that effort follows from the prosecutor's responsibility to meet the challenge posed by *Kyles*.

CONCLUSION

In *Kyles v. Whitley*,[318] the Supreme Court asserted 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

317. One might object to inclusion of exculpatory evidence on police reports on the ground that, in jurisdictions allowing defense discovery of such reports, the defense might gain access to material that would not otherwise be disclosable, and exploit it in damaging ways. *See* Fisher, *Just the Facts*, *supra* note 17, at 56-58 (suggesting that the solution of restricting defense access to, or use of, reported material, is preferable to the current regime, which tolerates police suppression of relevant information from the prosecutor). One could also consider the English procedure in which the police use separate schedules to reveal sensitive material to the prosecutor and reveal "super-sensitive" material to the prosecutor orally. *See* CPIA Code of Practice, *supra* note 33, §§ 6.12-6.14. The English also permit the prosecution to apply *ex parte* for judicial approval to withhold otherwise disclosable sensitive material from the defense, under the doctrine of public interest immunity. *See* Leng & Taylor, *supra* note 31, at 22, 47-48. By insisting that police do reveal even sensitive material to the prosecutor, and requiring judicial approval of non-disclosure in special circumstances, the English system has the advantage of making and preserving a record of relevant, non-disclosed material for later review.

318. 514 U.S. 419 (1995).

police to her office.[319] In reality, such procedures are generally lacking. The English have legislated a comprehensive regulatory framework for police record-keeping and revelation of case information to the prosecutor. They have also devoted significant resources to enforcing this regulation. The English system contrasts starkly with our *laissez-faire* approach to police record-keeping.

As reflected in the Supreme Court's treatment of the issue in *Kyles*, we have consigned to prosecutors the duty to disclose exculpatory evidence known to the police, without devoting particular attention or resources to the issue of implementation. To be sure, as the English experience illustrates, the cost-efficiency of a comprehensive and ambitious effort to produce more "objective" records of investigation is open to question. Nonetheless, the seriousness with which the English have addressed the *Kyles* issue compares favorably to our own posture of denial and neglect. Because neither legislatures nor courts will likely redress this problem, prosecutors must take responsibility for establishing the "procedures and regulations" referred to in *Kyles*. The current professional responsibility rules and standards do not adequately recognize and support that responsibility. The amendments proposed here to the ABA Model Rules and Standards represent a modest step toward breathing life into a process, described in *Kyles*, which should but does not yet exist.

319. *Id.* at 438 (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)).

APPENDIX A

ORGANIZATION OF CRIMINAL COURTS, PROSECUTION AND POLICE, AND POLICE RECORD-KEEPING, IN ENGLAND

Jurisdiction of Courts

Criminal offences in England fall into one of three jurisdictional categories: "summary," "indictable only," and "either-way." "Summary offences," which comprise the vast majority of all criminal offenses,[320] are tried without a jury in the magistrates' court.[321] The most serious crimes are prosecuted by indictment in the Crown Court, before a jury. "Either-way" offenses are tried either in magistrates' court or in Crown Court, at the defendant's option.[322] First appearances and other preliminary proceedings for all criminal defendants occur in the magistrates' court; in appropriate cases, magistrates hold "committal proceedings" to decide whether sufficient evidence exists to commit a defendant for trial in the Crown Court.[323]

Prosecution

Until 1985, England employed a system of private prosecution under which the police themselves prosecuted minor crimes, and retained lawyers to prosecute more serious crimes. In 1879, the post of Director of Public Prosecutions ("DPP") was created in the Attorney-General's office.[324] The DPP was given power to control prosecutions for the most serious crimes.[325] In 1986, with the creation of the Crown Prosecution Service

320. Over 90% of criminal cases are heard at the magistrates' courts. *See* Niblett, *supra* note 31, at 35.
321. In a summary trial a panel of three lay magistrates usually decides the case. *See* Hatchard, *supra* note 31, at 181.
322. *See id.*
323. As a result of 1998 legislation, a new system is being introduced by which cases triable on indictment only will go immediately to Crown Court without any committal hearings. *See* Blackstone's, *supra* note 31, § D7.1.
324. *See* Andrew Sidman, Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U. L. Rev. 754, 760 (1976).
325. *See id.* at 760-61.

("CPS"), the system of centrally controlled public prosecution was extended to all criminal offenses.[326] Crown Prosecutors have no power to direct police investigations or control the initial charging decision,[327] but the CPS has power to continue, modify or stop all criminal proceedings in their preliminary stages.[328] CPS lawyers (solicitors) prosecute offences in the magistrates' court, and normally retain barristers to conduct proceedings in Crown Court.[329] The latter are independent practitioners who might appear in some cases for the prosecution and in others for the defense. Barristers are therefore considered more objective and less identified with the parties than solicitors, who are directly employed by their clients. This is especially true of a prosecuting barrister: the Bar's Code of Conduct states that he "should not regard himself as appearing for a party. He should lay before the Court fairly and impartially the whole of the facts which comprise the case for the prosecution and should assist the Court on all

326. *See* Francis Bennion, *The New Prosecution Arrangements: The Crown Prosecution Service*, 1986 Crim. L. Rev. 3, 9-14. The Service was created by the Prosecution of Offences Act, 1985, which became fully operational in 1986.

327. *See* Ashworth, *supra* note 31, at 178. Crown Prosecutors are available to consult with police before charges are brought. *See* Hatchard, *supra* note 31, at 198-99.

328. *See* Blackstone's Criminal Practice, *supra* note 31, §§ D2.33, 2.38.

329. In English nomenclature, "lawyer" generally refers to a solicitor, and "counsel" to a barrister. Solicitors and barristers receive different training, and are bound by separate codes of professional conduct. Solicitors are represented by the Law Society; barristers, but not solicitors, belong to the Bar. Traditionally, only barristers have a "right of audience" in Crown Courts, but this is changing in the direction of allowing solicitors to try cases in Crown Court and to appear in higher courts. *See* Hatchard, *supra* note 31, at 207-08; Harry Cohen, *From the British Newspapers and Legal Magazines—Changes in the British Legal Profession?*, 23 J. Legal Prof. 3, 9 (1999); Michael Zander, *Private Lawyers in Contemporary Society: United Kingdom*, 25 Case W. Res. J. Int'l. L. 207, 207-14 (1993); Francis Gibb, *Lord Chancellor Eyes Bar's Last Preserve*, Times (London), Dec. 12, 1997, at 6, *available in* 1997 WL 9249120; Julia Hartley-Brewer, *Call for End to Barristers' Higher Courts Monopoly*, Evening Standard (London), June 25, 1998, at 18, *available in* 1998 WL 13923293.

matters of law applicable to the case."[330]

The Police; Records of Police Investigation

Although England has no national police force, since 1918 the central government has had oversight of the local police forces.[331] English police are organized into forty-three police forces, each headed by a Chief Constable, except the two London forces, which are headed by a Commissioner.[332] Each force is answerable to a local, elected Police Authority, which pays forty-nine percent of the police budget; the remaining fifty-one percent is paid by the central government.[333] In matters not controlled by national legislation, local police forces are free to adopt their own policies. However, the Association of Chief Police Officers (ACPO), consisting of all forty-three force chiefs, plays an important role in promoting discussion and adoption of uniform procedures among the different forces. For example, in cooperation with the Crown Prosecution Service, ACPO has promulgated national guidelines for the preparation and submission of police files.[334] Also, an independent national body exists to investigate complaints of police abuses.[335]

Records of police investigation vary according to the particular investigative procedure employed,

330. *See* Code of Conduct of the Bar of England and Wales, Standard 11.1. Standard 11.2 imposes on prosecuting counsel a duty "to ensure that all relevant evidence is either presented by the prosecution or made available to the defence." *Id.* Standard 11.2.

331. The Secretary of State for Home Affairs has overall responsibility for the police. *See* Hatchard, *supra* note 31, at 205-06.

332. *See* interviews with several staff at West Mercia Constabulary Headquarters, Training and Development, in Hindlip, Worcester, U.K. (Apr. 15, 1999).

333. *See id.*

334. *See* Roger Ede & Eric Shepherd, Active Defence: A Lawyer's Guide to Police and Defence Investigation and Prosecution and Defence Disclosure in Criminal Cases 145 (1998) (citing Manual of Guidance for the Preparation, Processing and Submission of Files (1st ed. 1992)).

335. This body, the Police Complaints Authority, was established by PACE. *See* Belloni & Hodgson, *supra* note 31, at 75-81.

the nature and seriousness of the crime,[336] and the location of the particular police force.[337] Despite such variations, as the result of legislation, police practice codes, and custom, certain types of records are commonly kept. These include police notebooks, crime reports, custody records, statements of suspects and witnesses, records of identification procedures, computer investigation data (HOLMES) and policy books.

Police Notebooks

Uniformed police constables in England carry pocket notebooks in which they normally[338] must record their daily activities, including investigations of criminal activity and witness statements.[339] In order to deter after the fact editing or "loss" of exculpatory information, the books are numbered and bound, and have numbered pages.[340] A record is kept of each book's number

336. *See generally* Maguire & Norris, *supra* note 108 (presenting models and methods of management for investigation of serious crimes).

337. Different police forces may use different forms to serve a particular function. For example, some police forces require officers to fill out printed crime report forms, while other forces rely on computer word processing to create equivalent reports. *See* interview with Head of Major Crimes Unit, West Mercia Police H.Q., in Worcester, U.K. (Apr. 26, 1999).

338. In some cases they might instead use incident record books, *see* Ede & Shepherd, *supra* note 334, at 35, or special offense books containing forms for traffic offenses, for example. Special numbered logs, with numbered pages, are also used in police surveillance work. *See* Rob R. Jerrard, The Police Officer's Notebook, 157 Just. of the Peace 8 (1993); Maguire & Norris, *supra* note 108, at 80-83.

339. *See* Jerrard, *supra* note 338, at 6; *see also* Maguire & Norris, *supra* note 108, at 36-37 (regular checks of police notebook used as supervisory tool). PACE Code of Practice C, paragraph 11.5(b), requires the record of any interview with suspects to be written in the officer's notebook or on forms provided for that purpose. *See* Codes of Practice Under the Police and Criminal Evidence Act 1984, Code C, § 11.5(b) (1999), *reprinted in* Blackstone's Criminal Practice, app. 2 (Peter Murphy et al. eds., 1999) [hereinafter PACE Codes of Practice]. In practice, if the interviews are not tape recorded, they are written on forms.

340. In 1993 the Runciman Commission recommended that all forces should adopt this practice. *See* Runciman Comm'n Report, *supra* note 47, at 22. I do not know whether any American police force employs this safeguard. In some, note taking is apparently very informal. *See, e.g.*, William B. Sanders,

and the date it is issued to a particular officer.[341]

Crime Report Forms

As in the United States, English police are commonly required to file police reports, reciting essential data regarding each criminal incident resulting in arrest and/or prosecution.[342]

Custody Records

As a means of avoiding abuses in police detention and questioning of suspects, PACE introduced strict record-keeping requirements, to be administered by a specially-designated "custody officer."[343] The custody officer must be someone of supervisory rank who is not involved in the investigation.[344] This officer's duties include,

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Detective Work 42 (1977) (reporting criticism of one police force in which "each detective took his own notes on scraps of paper"); Fisher, *Just the Facts*, *supra* note 17, at 30 (describing how, in the Atlanta Police Department, officers are taught the strategic advantages and disadvantages of bound versus loose-leaf notebooks).

341. *See* interview with Head of Major Crimes Unit, West Mercia Police H.Q., in Worcester, U.K. (Apr. 26, 1999).

342. The crime report contains, *inter alia*, details of the complaint, the complainant, the offense, description of the suspect, and investigation conducted at the scene. *See* Ede & Shepherd, *supra* note 334, at 23-25, 39-40. In some forces instead of completing a crime report form the officer will directly enter the pertinent data on a portable computer data terminal, or call in the information to the station, where it will be transcribed. *See* interview with Head of Major Crimes Unit, West Mercia Police H.Q., in Worcester, U.K. (Apr. 26, 1999).

343. *See* Police and Criminal Evidence Act, 1984, ch. 78, §§36-39 (Eng.); PACE Codes of Practice, *supra* note 339, Code C § 2.3. For general discussion of the role of the custody officer, see Zander, *supra* note 31, at 74-80, 92-96, 156-62.

344. *See* PACE, *supra* note 114, § 36(3), (5). For criticism of the custody officer's purported "independence," see McConville et al., *supra* note 31, at 118-22. *Cf.* Brown, PACE Ten Years On, *supra* note 31, at 2 ("Custody officers show considerable independence in the way they carry out their job although practical constraints limit their examination of the evidence against the suspect when considering whether to authorise detention."); *see also* Coleman, et al., *supra* note 31, at 24, 30-31 (questioning the role and activities of custody officers); Maguire & Norris, *supra* note 108, at 27 (noting that disagreement exists over whether intended effects of Act have been achieved).

inter alia, keeping a detailed, contemporaneously written record of the suspect's detention,[345] including the grounds therefor, and all relevant events during detention, such as the time and place of all questioning, advice of rights, and the presence of or contacts with a lawyer.[346] The custody record must also include a list of the suspect's possessions when taken into custody.[347] A copy of the custody record is available to the suspect upon his release from custody.[348]

Statements of Suspects

Subject to certain exceptions, police interviews with suspects and suspects' statements, must be tape recorded.[349] If tape recording is not feasible, a contemporaneous written record should be made.[350] Transcripts or summaries are made of taped interviews.[351]

345. *See* Police and Criminal Evidence Act, 1984, ch. 78, § 37(4) (Eng.).

346. *See* Zander, *supra* note 31, at 156-57.

347. *See* PACE Codes of Practice, *supra* note 339, Code C § 4.4

348. *See* Zander, *supra* note 31, at 157; PACE Codes of Practice, *supra* note 339, Code C § 2.4.

349. PACE Codes of Practice, *supra* note 339, Code E § 3.

350. PACE Codes of Practice, *supra* note 339, Code E § 3.4. For skeptical comments on the ability of police to take accurate contemporaneous notes, see Ede & Shepherd, *supra* note 334, at 229-30.

351. In light of interest in the United States in reforms requiring taping of police interrogation of suspects, *see Civil Rights and Civil Liberties: Videotaping the Police*, 17 Crim. Just. Ethics, Winter/Spring 1998, at 42 (symposium), Americans will be interested in developments in England. Studies report both evasion of the requirements by unrecorded "scenic route" interviews before arrival at the police station, and that "the vast majority of tapes are never heard by *anyone*, as defences [sic] request them in very few cases." Maguire & Norris, *supra* note 108, at 116. On the impact of PACE provisions requiring taping of police questioning, see Tom Bucke & David Brown, In Police Custody: Police Powers and Suspects' Rights Under the Revised PACE Codes of Practice 31-39 (Home Office Research Study No. 174, 1997); Mike McConville, *Videotaping Interrogations: Police Behaviour On and Off Camera*, 1992 Crim. L. Rev. 532, 536, 540-42; Moston & Stephenson, *supra* note 31, at 41-47; David Wolchover & Anthony Heaton-Armstrong, *Questioning and Identification: Changes under P.A.C.E. '95*, 1995 Crim. L. Rev. 356, 359. Regarding the time-consuming task of transcribing and summarizing taped suspect interviews, see Maguire & Norris, *supra* note 108, at 32-33 & n.4.

Witness Statements

Statements of witnesses, including police officers, are commonly reduced to writing and signed.[352]

Identification Procedures

PACE provides that identification procedures must be supervised by an "Identification Officer," who is a uniformed officer not lower than the rank of inspector, who must not be involved in the investigation.[353] The Identification Officer's duties include administering lineups and other identification procedures, and making a record of the same on forms provided.[354] Prior to the conduct of identification procedures, the witness' first description of the perpetrator must be recorded, and a copy given to the suspect or his lawyer before further identification procedures take place.[355]

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352. *See* Ede & Shepherd, *supra* note 334, at 48-49; Alan Mackie et al., *Preparing the Prosecution Case*, 1999 Crim. L. Rev. 460, 462.

353. *See* PACE Codes of Practice, *supra* note 339, Code D § 2.2. *See generally* Zander, *supra* note 31, at 172-75. The rule prohibiting an officer who is involved in the investigation from taking part in any identification procedure predates PACE by many years. *See* Home Office Circular No. 9/1969, Identification Parades, para. 3, *reprinted in* Lord Devlin, Report on the Evidence of Identification in Criminal Cases, app. A, at 159 (London: HMSO, 1976).

354. *See* PACE Codes of Practice, *supra* note 339, Code D §§ 2.2-2.4, 2.19-2.21. Lineups are called "identification parades" in England. *See id.* Code D § 2.1-2.6.

355. PACE Codes of Practice, *supra* note 339, Code D § 2.0. This requirement follows recommendations of the Runciman Commission, *see* Runciman Comm'n Report, *supra* note 47, at 11, but was not adopted into law until 1995. *See* Wolchover & Heaton-Armstrong, *supra* note 351, at 367. Code D also requires "the police to disclose to the defense any media material relating to the appearance of a suspect before any identification procedure is undertaken." *Id.* at 368 (citing provisions). For background information on identification safeguards in English law, see generally Anthony Heaton-Armstrong & David Wolchover, *Exorcising Dougherty's Ghost*, 141 New L.J. 137 (1991), and Glanville Williams, *Evidence of Identification: The Devlin Report*, 1976 Crim. L. Rev. 407. PACE identification procedures provide an interesting comparison to those followed in *Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991), discussed *supra* at notes 273-277 and accompanying text.

Computer-Assisted Investigation: HOLMES

On occasion, the police investigate serious offenses such as murder, rape and major robberies by setting up an "incident room," staffed by detectives and uniformed officers brought together from different police divisions.[356] This is done when no obvious suspect or strong leads exists; police therefore require extra investigative resources. Such major inquiries are often conducted with the aid of the computer-based Home Office (Large) Major Enquiry System (HOLMES), a "computerized information storage and retrieval system which allows for all information emanating from the inquiry to be stored, indexed, cross referenced and interrogated for investigative significance."[357] Data is entered, processed and accessed according to standard procedures, and only by specially trained personnel who operate independently from senior officers managing the investigation.[358] Comprehensive records are kept of all information received in the investigation, actions taken and their results. "Every item relevant to the inquiry will either be logged in the system, as in the case of exhibits, or actually contained within the system, as in the case of statements or transcripts of interviews."[359]

Investigations in which the police use HOLMES typically involve intense publicity and corresponding pressure on the police to find the criminal. Such investigations are therefore particularly prone to result in suppression and fabrication of evidence. However, compared to other investigative records, data gathered using HOLMES is especially reliable. "[T]here is little

356. Incident rooms are established in cases that require extra investigative resources because no obvious suspect or strong leads exists. *See* interview with Head of Major Crimes Unit, West Mercia Police H.Q., in Worcester, U.K. (Apr. 26, 1999). HOLMES investigations reportedly number fewer than one in a thousand cases. *See* Maguire & Norris, *supra* note 108, at 55.

357. Maguire & Norris, *supra* note 108, at 57.

358. Maguire and Norris describe the HOLMES system in detail. *See id.* at 55-69; *see also* Ede & Shepherd, *supra* note 334, at 53-56 (detailing the HOLMES system).

359. Maguire & Norris, *supra* note 108, at 68.

incentive for junior officers to manipulate witnesses or to fabricate evidence and, even if they did so, there would be a high chance of it being discovered."[360] For instance, "if one witness claimed that a suspect had been present at the scene, a [computer operation] would immediately indicate who else was present, and checks could be made to see whether this information could be corroborated."[361] Although senior investigating officers, facing intense pressures to produce a "result," might be motivated to conceal "inconvenient" evidence or fabricate "helpful" evidence, they do not normally have direct access to the computer system.[362] Also, senior officers are sometimes subject to other, independent monitoring of the investigation.[363] Finally, "as all documentation is held on a database, it would be difficult technically to tamper with the system to delete statements, or even parts of statements, and leave no trace."[364] In sum, therefore, HOLMES generates "[c]lear and comprehensive documentation of the investigation."[365]

A complete copy of HOLMES data is available to prosecutors, and—subject to court-approved exceptions in particular cases—might be disclosed to the defense.[366]

Policy Books

In HOLMES major inquiries, a "policy book" is kept by a designated administrator who reports to the Senior Investigating Officer in charge of the

360. *Id.* at 64.
361. *Id.* at 68.
362. *See id.* at 64-65, 67-68.
363. *See id.* at 65, 68.
364. *Id.* at 68.
365. *Id.* at 61.
366. See *infra* notes 189-90 and accompanying text. Disclosure can conveniently take the form of downloading the HOLMES files on to a floppy disk. *See* Ede & Shepherd, *supra* note 334, at 301. A defense lawyer told me that, in a recent murder case, the prosecutor had permitted him to go to the police station and look through the entire computerized file of unused material. The solicitor spent a week reading every "action log" entry. In some cases, he stated, such items have led to exonerations. *See* interview with defense solicitor in Birmingham, U.K. (Apr. 13, 1999).

inquiry.[367] This document, which is logged as a computer file, contains records "of all the major decisions taken in an inquiry: for instance, the parameters of house to house inquiries, which lines of investigation should be pursued and why, and the decision to arrest and question a suspect. The Policy Book, therefore, becomes a chronological record of the progress of the investigation which is open to scrutiny . . . ."[368]

367. *See* interview with Head of Major Crimes Unit, West Mercia Police H.Q., in Worcester, U.K. (Apr. 26, 1999); Maguire & Norris, *supra* note 108, at 58. The Runciman Commission recommended that policy books (also called "policy files") be kept in all major inquiries. *See* Runciman Comm'n Report, *supra* note 47, at 19.

368. *See* Maguire & Norris, *supra* note 108, at 66. I do not know whether American police employ any analog to the English "Policy Book."

APPENDIX B

AMERICAN BAR ASSOCIATION
MODEL RULES OF PROFESSIONAL CONDUCT

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
[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.*
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6;
(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

(g) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

AMERICAN BAR ASSOCIATION
STANDARDS FOR CRIMINAL JUSTICE (3D ED. 1993)

STANDARDS FOR PROSECUTION FUNCTION

STANDARD 3-2.7 RELATIONS WITH POLICE

(a) The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters.
(b) The prosecutor should cooperate with police in providing the services of the prosecutor's staff to aid in training police in the performance of their function in accordance with law.
[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.*

STANDARD 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.*

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or 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.
(b) A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
(c) A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

APPENDIX C

FORM MG 6C

POLICE SCHEDULE OF NON-SENSITIVE UNUSED MATERIAL

Page No. one

R v ....

The Disclosure Officer believes that the following material which does not form part of the prosecution case is NOT SENSITIVE.

Item No.	DESCRIPTION	LOCATION	FOR CPS USE *	FOR CPS USE COMMENT
1	Crime Report Re Offences	Steelhouse Lane Pct. Stn.		
2	Person in Custody Record	" "		
3	Tape Audio Admin Forms	" "		
4	Detained Property Records	" "		
5	Police Management Computer Records M.D.I.S.	" "		
6	Police Officers Pocket Books	With individual Officers		
7	Antecedent and Fingerprint Forms	C.J.U.		
8	Section 18 Pace Search Forms	" "		
9	Stop Check Forms on Vehicle Occupants	" "		
10	Vehicle Removal Documentation			
11	Vehicle Release Authority			

Date: 25.11.98

Continuation sheet: Yes ☐ No ☒

Reviewing lawyer:

* Enter:
D = Disclose to defence
I = Defence may inspect

Oct 97

FORM MG 6D

Continuation Sheet

Form MG 6D(CONT)

NOT TO BE DISCLOSED

Page No.............

CONFIDENTIAL INFORMATION

POLICE SCHEDULE OF SENSITIVE MATERIAL

R v ....

The Disclosure Officer believes that the following material which does not form part of the prosecution cases is ~~NSITIVE.

* *Tick if copy supplied to CPS*

Item No.	Description	Reason for sensitivity	*

Continuation sheet:

Yes ☐ No ☐

FOR CPS USE

Agree sensitive Yes/No	Court application Yes/No	CPS views

Oct 97