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## In Prosecutors We Trust: UK Lessons for Illinois Disclosure

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## INTRODUCTION

It is of critical importance to [Illinois], and fundamental to our system of government, that we have a criminal justice system upon which we can rely to produce a just and fair result. Revelations of wrongful convictions and miscarriages of justice inevitably undermine the confidence of the general public in the reliability of the criminal justice system as a whole.<sup>1</sup>

American prosecutors have a duty to uphold justice. In the words of the United States Supreme Court, the public prosecutor is “the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>2</sup> The prosecutor’s role as a “minister of justice”<sup>3</sup> gives rise to the prosecutorial responsibility of assuring that the criminal justice system produces fair results.<sup>4</sup> To ensure just outcomes, prosecutors are tasked with distinct responsibilities, including disclosure obligations to turn over exculpatory information to the defense.<sup>5</sup> This obligation is rooted in the United States Constitution and is commonly referred to as the *Brady* rule.<sup>6</sup> A failure to disclose evidence favorable to the defendant “casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice” and thus violates due process.<sup>7</sup>

As is the case across the United States, troubles abound in Illinois with respect to prosecutorial compliance with the *Brady* rule. Failures to disclose became especially visible in recent years amidst revelations pointing to the “persistent problems in the administration of the death penalty” in Illinois.<sup>8</sup> Illinois quickly became the center of a media

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1. ILLINOIS GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT (2002), cmt. to Recommendation 83 [hereinafter RYAN COMMISSION REPORT].

2. *Berger v. United States*, 295 U.S. 78, 88 (1935).

3. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

4. *See Berger*, 295 U.S. at 88 (“It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).

5. *See infra* Part I.A (discussing the *Brady* rule that requires prosecutors to turn over exculpatory evidence to the defense).

6. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court set forth the prosecutorial disclosure duty. *See infra* Part I.A.1 (discussing the *Brady* rule).

7. *Brady*, 373 U.S. at 87–88.

8. EXECUTIVE ORDER AS ISSUED BY FORMER GOVERNOR GEORGE RYAN CREATING THE

maelstrom; the nation watched as innocent men continued to surface in the Illinois prison system.<sup>9</sup> After thirteen wrongfully convicted individuals were released from death row, the then Illinois governor, George H. Ryan, imposed a moratorium on further executions and, in May 2000, created a Commission on Capital Punishment to study the state capital punishment system.<sup>10</sup> Among the many injustices uncovered by the Commission were prosecutorial failures to disclose exculpatory evidence to the defense,<sup>11</sup> including the suppression of promises made to state witnesses,<sup>12</sup> and police failures to investigate alternative leads and suppression of exonerating evidence.<sup>13</sup> Serious

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COMMISSION ON CAPITAL PUNISHMENT (2000), available at [http://www.idoc.state.il.us/ccp/ccp/executive\\_order.html](http://www.idoc.state.il.us/ccp/ccp/executive_order.html) [hereinafter ORDER] (last visited on May 10, 2007).

9. Illinois first grabbed media headlines in the late 1990s, starting in 1996, with the death row exonerations of the “Ford Heights Four.” See *infra* note 13 and generally DAVID L. PROTESS & ROBERT WARDEN, A PROMISE OF JUSTICE 230–36 (1998) (documenting media reactions to exonerations of four death row inmates). This was followed by the *Chicago Tribune’s* 1999 series entitled “The Failure of the Death Penalty in Illinois.” Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois* (pts. 1–4), CHI. TRIB., Nov. 14–18, 1999, at 1. Interest in Illinois developments peaked again in 1999, with the exoneration of Anthony Porter, who was released within forty-eight hours of his scheduled execution. See Andrew Bluth, *Illinois Man Is Finally Cleared in 2 Murders: An Armed Robbery Conviction Lingers from a Murder Case*, N.Y. TIMES, Mar. 12, 1990, at A20; Sharon Cohen, *Last-Minute Exonerations Fuel Death-Penalty Debate Justice: Wrongful Convictions Shift Focus from Morality to Legitimacy*, L.A. TIMES, Aug. 15, 1999, at A1.

10. ORDER, *supra* note 8. To date, eighteen individuals have been released from Illinois’ Death Row. Steve Mills, *State to Free 18th Person Who Was on Death Row*, CHI. TRIB., May 27, 2004. In January 2003, then Governor Ryan commuted the sentences of 167 inmates on death row to life in prison. Frank Main, *Ryan Fights Subpoena Seeking Testimony on Pardons*, CHI. SUN TIMES, April 19, 2005, at 22.

11. RYAN COMMISSION REPORT, *supra* note 1, at 125 n.3 (describing *People v. Hopley*, 696 N.E.2d 313 (Ill. 1998), in which the State failed to turn over potentially exculpatory information, and *People v. Simms*, 736 N.E.2d 1092 (Ill. 2000), in which the State apparently failed to turn over complete police reports).

12. RYAN COMMISSION REPORT, *supra* note 1, at 125 n.8 (discussing *People v. Olinger*, 176 Ill. 2d 326, 342–51 (1997), in which a key government witness testified untruthfully as to promises made by the State in exchange for his testimony).

13. See RYAN COMMISSION REPORT, *supra* note 1, at 8–9, 48–49 nn.53–54 (describing several wrongful conviction cases in which physical evidence connecting the defendants to the crimes was lacking and leads to other potential suspects were overlooked or ignored). Law enforcement misconduct in the “Ford Heights Four” case was particularly egregious. In this 1978 case, four Cook County men were convicted for the double murder of a man and woman. *Id.* Two were sentenced to death and two were sentenced to extended terms of imprisonment. *Id.* In 1996, all four were exonerated after new DNA tests revealed their innocence. *Id.* at 8. Prior to their trials, the Cook County Sheriff’s police obtained a lead pointing them in a direction away from the accused men. Peter M. King & William H. Jones, *Crimes of the State: Obtaining Justice for the Wrongfully Imprisoned*, 29 LITIG. 14, 17 (2002). The police eventually abandoned the lead and concealed the evidence they had unearthed. *Id.* Years later, this hidden evidence was revealed along with prior inconsistent statements made by state witnesses that were never produced. *Id.* Journalism students at Northwestern University used this evidence to track down the old lead and attained confessions from the true murderers, thus bringing about the release of

concerns about the death penalty process also prompted the Illinois Supreme Court to appoint a special committee to propose new rules pertaining to capital cases.<sup>14</sup> Both the Commission and Committee proffered a host of suggestions, including measures for preventing *Brady* violations. Several of these proposals have been adopted by the Illinois legislature and courts.<sup>15</sup>

Owing to its attempts to better protect the rights of the accused, Illinois has become the bellwether of criminal justice reform in the United States.<sup>16</sup> Across the country, states are contemplating ways to improve the administration of criminal justice and are looking to Illinois for guidance. Formerly the state that triggered the current national crisis of confidence in the American criminal justice system, Illinois now serves as a role model for other states seeking to avert future instances of false conviction.<sup>17</sup>

This Article endeavors, by comparative study, to assess the potential of the Illinois reforms to actually alleviate miscarriages of justice and strengthen prosecutorial observance of the *Brady* imperative. Specifically, this Article examines the Illinois prosecutor's responsibility to disclose exculpatory evidence to the defense and evaluates the likelihood that the latest amendments to the disclosure obligation will meet with success in view of the problems encountered by the United Kingdom in implementing similar reforms. Part I provides an overview of the government's duty to disclose exculpatory evidence to the defense.<sup>18</sup> This Part also discusses prosecutorial failure to satisfy disclosure requirements and state proposals for guaranteeing compliance with federal and state directives.<sup>19</sup> Part II discusses the United Kingdom's disclosure experience, from its common law origins

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the Ford Heights Four in 1996. *Id.* at 18. See generally PROTESS & WARDEN, *supra* note 9, at 230–36 (discussing the Ford Heights case).

14. Steve Mill, *Bar Raised for Capital Case Trials: State High Court Sets Standards*, CHI. TRIB., Jan. 23, 2001, at 1. Examination of the Illinois capital punishment system was conducted by other groups as well, including both House and Senate task forces and private groups. RYAN COMMISSION REPORT, *supra* note 1, at 4–5.

15. See *infra* Part I.A.2 (discussing the adoption of proposals offered by the Commission and Committee).

16. See Joseph L. Hoffmann, *Welcoming Remarks*, 80 IND. L.J. 29, 29 (2005) (describing reforms suggested by Ryan Commission as “potent catalyst for death-penalty reforms elsewhere”); Franklin E. Zimring, *Symbol and Substance in the Massachusetts Commission Report*, 80 IND. L.J. 115, 118 (2005) (describing 2002 Ryan Commission Report as “extraordinary . . . in a field which has been virtually non-literate prior to 2002”).

17. See Hoffmann, *supra* note 16, at 29 (noting that many states have followed Illinois' lead in examining possible problems in the administration of the death penalty).

18. See *infra* Part I.A.

19. See *infra* Part I.B.

to the current statutory regime of the Criminal Procedure and Investigations Act 1996 (“CPIA”).<sup>20</sup> This Part also describes the CPIA’s detailed framework for advance disclosure of exculpatory evidence to defense solicitors.<sup>21</sup> Part III contemplates the changes to Illinois laws and ethical provisions in light of the UK disclosure experience, focusing especially on the UK experience with the CPIA.<sup>22</sup> Illinois’ struggles with disclosure and efforts to reform its system track the UK’s disclosure dilemmas and its attempts to resolve them.<sup>23</sup> Consequently, a comparison of the two systems as well as discussion of the UK experience with disclosure under the CPIA should prove instructive for state policymakers dedicated to advancing the due process protections secured by the *Brady* rule.

### I. THE ILLINOIS DISCLOSURE EXPERIENCE

Illinois prosecutors bear evidentiary disclosure responsibilities under both the United States Constitution and state rules. Recent findings, however, show that prosecutors do not always fulfill their disclosure obligations. To address these shortcomings, the Illinois legislature and courts have sought ways to ensure that state prosecutors disclose exculpatory evidence to criminal defendants.

#### A. *The Disclosure of Exculpatory Evidence in Illinois*

##### 1. Federal Constitutional Disclosure Requirements

In *Brady v. Maryland*,<sup>24</sup> the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>25</sup> *Brady* was an extension of prior Court decisions

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20. See Parliament, Criminal Procedure and Investigations Act, 1996, ch. 25 [hereinafter CPIA], available at <http://www.opsi.gov.uk/acts/acts1996/1996025.htm> (last visited May 10, 2007); see *infra* Part II.A–B.

21. See *infra* Part II.C.

22. The CPIA changes to the common law duty of disclosure have been severely criticized and proved unworkable in practice. See *infra* Part II.B (discussing how the CPIA altered the common law duty of disclosure).

23. In particular, though, the present UK structure provides for a broader range of discovery than that which exists in Illinois, the Illinois proposals for reform are markedly reminiscent of several CPIA provisions and the Illinois amendments follow a similar overall trajectory as disclosure obligations established in the CPIA. See *infra* Part II.B (describing the disclosure structure followed in the UK).

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

25. *Id.* at 87.

condemning government actions in misrepresenting or suppressing the truth in criminal cases.<sup>26</sup> These earlier cases established that a conviction is invalid if attained through the use of evidence known by the State to be false.<sup>27</sup> Likewise, the earlier precedent established that a State cannot allow false evidence to remain uncorrected, regardless of its innocence in soliciting the untruthful information.<sup>28</sup> This requirement of candor before the court comports with the “rudimentary demands of justice”<sup>29</sup> and is “implicit in any concept of ordered liberty.”<sup>30</sup>

The purpose of the disclosure rule is to ensure fair trials, and the failure to comply with the *Brady* rule violates due process.<sup>31</sup> As stated by the *Brady* Court, “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”<sup>32</sup> The suppression of *Brady* material inflicts harm on an accused<sup>33</sup> and undermines public faith in prosecutorial integrity<sup>34</sup> and the accuracy of criminal convictions.<sup>35</sup> Accordingly, a conviction resulting from a failure to disclose cannot stand.<sup>36</sup>

Following *Brady*, the Court and lower federal courts have continued to develop the prosecution’s duty to disclose. Pursuant to the due

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26. *Id.* at 86 (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) and *Pyle v. Kansas*, 317 U.S. 213, 216 (1942)).

27. In *Mooney*, allegations that the prosecution deliberately suppressed impeachment evidence lead the Court to declare that “depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured” violates due process guarantees. *Mooney*, 294 U.S. at 112. In *Pyle*, the Court declared that allegations of government use of perjured testimony and deliberate suppression of favorable evidence were sufficient to charge a deprivation of due process rights. *Pyle*, 317 U.S. at 216.

28. *Napue v. Illinois*, 360 U.S. 264, 269–70 (1959).

29. *Mooney*, 294 U.S. at 112.

30. *Napue*, 360 U.S. at 269.

31. *Brady*, 373 U.S. at 87 (“The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.”).

32. *Id.*

33. *See id.*; *United States v. Agurs*, 427 U.S. 97, 104 n.10 (1976) (noting “the harm to the defendant resulting from nondisclosure”).

34. *See Brady*, 373 U.S. at 88 (stating that failure to disclose “casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice”); *Agurs*, 427 U.S. at 111 (stating that prosecutor “must always be faithful to his client’s overriding interest that ‘justice shall be done’ and “that guilt shall not escape or innocence suffer”) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

35. *See Kyles v. Whitley*, 514 U.S. 419, 440 (1995) (stating that disclosure rule “will tend to preserve the criminal trial . . . as the chosen forum for ascertaining the truth about criminal accusations”); *United States v. Bagley*, 473 U.S. 667, 675 (1985) (stating that disclosure rule ensures “that a miscarriage of justice does not occur”).

36. *Kyles*, 514 U.S. at 440.

process mandate, the prosecution must divulge exculpatory evidence, including evidence that can be used to impeach a prosecution witness,<sup>37</sup> even in the absence of a request for information from the defense.<sup>38</sup> The disclosure rule applies regardless of the good or bad faith of the prosecution in falling short of its command;<sup>39</sup> the rule is equally applicable to negligent and willful nondisclosures.<sup>40</sup> What is more, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police” and thus may be charged with knowledge of exculpatory evidence known to other government entities.<sup>41</sup>

The Court has also set limitations on the otherwise broad duty to disclose by defining what evidence is material to guilt or punishment. Evidence is material if there is a “reasonable probability” that the result of the proceeding would have been different if the evidence had been disclosed.<sup>42</sup> A reasonable probability is “a probability sufficient to undermine confidence in the outcome.”<sup>43</sup> Not every failure to disclose, however, amounts to a “true” *Brady* violation.<sup>44</sup> A “true” *Brady* violation transpires only when the “nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would

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37. *Giglio v. United States*, 405 U.S. 150, 154 (1972). The government, however, is not charged with disclosing favorable information that would be inadmissible as evidence unless a reasonable likelihood exists that the result would have been different at trial. *Wood v. Bartholomew*, 516 U.S. 1, 5–8 (1995) (finding no *Brady* violation stemming from failure to disclose inadmissible polygraph information showing that key prosecution witness had lied). *Cf. Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) (“Inadmissible evidence may be material if the evidence would have led to admissible evidence.”).

38. *Agurs*, 427 U.S. at 106–07. In *Agurs*, the Court established differing standards of materiality for failures to disclose, based on whether the defense requested the withheld information and, if so, whether the request was a specific or general request. *Id.* at 108–12. These standards were replaced by the uniform criterion of *Bagley*. *See Bagley*, 473 U.S. at 682 (abandoning *Agurs* categories of “specific request,” “general request,” and “no request”).

39. *Giglio*, 405 U.S. at 153; *Brady*, 373 U.S. at 87.

40. *United States v. Keogh*, 391 F.2d 138, 147–48 (2d Cir. 1968); *Ingram v. Peyton*, 367 F.2d 933, 936 (4th Cir. 1966); *Levin v. Katzenbach*, 363 F.2d 287, 290 (D.C. Cir. 1966); *Ashley v. Texas*, 319 F.2d 80, 84–85 (5th Cir. 1963).

41. *Kyles*, 514 U.S. at 437. Others acting on the government’s behalf may include not only law enforcement agencies and officials, such as other prosecutors and investigators working with a prosecutor’s office in addition to the police, but also non-law-enforcement agencies as well. *See infra* notes 69–73 and accompanying text.

42. *Bagley*, 473 U.S. at 682 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)) (creating a standard for addressing claims of ineffective counsel).

43. *Id.* (quoting *Strickland*, 466 U.S. at 694). In *Kyles*, the Court reaffirmed the reasonable probability standard and further explained that such standard was met if the undisclosed exculpatory evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435.

44. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

have produced a different verdict.”<sup>45</sup> Furthermore, information is not material if it is cumulative of previously disclosed information<sup>46</sup> or if the accused had knowledge of the information or the ability to acquire such information with reasonable diligence.<sup>47</sup>

## 2. Illinois Disclosure Requirements

To facilitate government compliance with constitutional disclosure requirements, the State of Illinois has implemented rules to address prosecutorial obligations. In particular, the Illinois Supreme Court has adopted Rule 412(c), which provides: “[T]he State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefore.”<sup>48</sup> The Due Process Clause already imposes this obligation, but the Illinois rule does not limit the duty to disclosing only evidence material to the guilt or punishment of the accused.<sup>49</sup> Rather, the rule commands the state to produce any exculpatory evidence.

Rule 412(c) also requires the prosecution to “make a good-faith effort” to identify these materials at the time of disclosure if such identification is possible.<sup>50</sup> To this end, the commentary following the rule provides examples of information likely to be exculpatory or mitigating, including a statement that someone other than the defendant

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45. *Id.* (distinguishing between “so-called *Brady* material” and true *Brady* material).

46. *See, e.g.*, *Byrd v. Collins*, 209 F.3d 486, 518–19 (6th Cir. 2000) (finding undisclosed impeachment evidence to be cumulative and hence non-material when credibility of key prosecution witness had already been effectively undercut); *United States v. Avellino*, 136 F.3d 249, 257 (2d Cir. 1998) (noting that undisclosed evidence that is merely cumulative is not material).

47. *See, e.g.*, *Johns v. Bowersox*, 203 F.3d 538, 545 (8th Cir. 2000) (stating that no suppression violation occurs “if defendant could have learned of the information through reasonable diligence . . . [or] when the defendant and the State have equal access to the information”); *Westley v. Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) (finding no *Brady* violation because information sought was “readily available”).

48. ILL. SUP. CT. R. 412(c). The Illinois Supreme Court crafted section (c) to comply with the mandate of *Brady* and its progeny. *See* Committee Comments to ILL. SUP. CT. R. 412. The rule does not, however, apply to protected materials such as attorney work product or information that, if disclosed, poses a risk to national security. ILL. SUP. CT. R. 412(j). In addition, courts possess discretion to require additional or to deny disclosures to the defense. ILL. SUP. CT. R. 412(h) and (i).

49. *See supra* notes 39–47 and accompanying text (discussing how it is irrelevant whether the prosecutor intended to withhold disclosure or was negligent in doing so and discussing the standard for materiality).

50. ILL. SUP. CT. R. 412(c). This obligation reinforces but is not as far-reaching as the duty to disclose. *Id.* at Committee Comments. In addition, the rule prohibits the defense from offering at trial the State’s identification of information as possible *Brady* information as evidence that the materials negate or mitigate the defendant’s guilt. *Id.*

committed the crime, a non-inculpatory scientific test result, and impeachment evidence that calls into question the veracity of testimony provided by a government witness.<sup>51</sup> The purpose of the added identification requirement is to “reinforce” prosecutorial obligations and lessen the likelihood of failure to comply with the *Brady* rule.<sup>52</sup>

To aid prosecutors in ascertaining the extent of their disclosure responsibilities in any given case, section (f) of Rule 412 requires the State to “ensure that a flow of information is maintained between the various investigative personnel and its office . . . .”<sup>53</sup> Furthermore, should the defense request materials or information that is in the possession or control of a governmental entity or individual other than someone in the prosecutor’s office, section (g) directs the State to make a good-faith effort “to cause such material to be made available” to the defense.<sup>54</sup>

Illinois prosecutors are also bound by Rule 3.8 of the Illinois Rules of Professional Responsibility,<sup>55</sup> which reaffirms prosecutorial responsibilities under *Brady*:

A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense.<sup>56</sup> As is the case with Rule 412(c), disclosure

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51. Committee Comments to ILL. SUP. CT. R. 412.

52. *Id.*

53. ILL. SUP. CT. R. 412(f). In capital cases, the prosecution must specially certify 14 days before trial that it “has conferred with the individuals involved in the investigation and trial preparation of the case and represents that all material or information required to be disclosed pursuant to Rule 412 has been tendered to defense counsel.” ILL. SUP. CT. R. 416(g). This rule ensures that the prosecution has met the requirements of Rule 412. ILL. SUP. CT. R. 416(f)(iii).

54. ILL. SUP. CT. R. 412(g).

55. ILL. RULES OF PROF’L CONDUCT R. 3.8 (2001).

56. ILL. RULES OF PROF’L CONDUCT R. 3.8(c) (2001). The duty of a prosecutor embodied in the Illinois rule derives from the American Bar Association (“ABA”) Model Rules of Professional Conduct and the Supreme Court’s opinion in *Berger v. United States*, 295 U.S. 78, 88 (1935). ILL. RULES OF PROF’L CONDUCT R. 3.8 cmt. (2001). In particular, ABA Model Rule of Professional Conduct 3.8(d) states that a prosecutor in a criminal case shall:

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 PROF’L CONDUCT R. 3.8(d) (2006); *see also* MODEL CODE OF PROF’L RESPONSIBILITY EC 7–13(3) (1983); ABA STANDARDS FOR CRIMINAL JUSTICE STANDARD 3–3.11 (1993) (setting forth similar standards for disclosure). For an interesting discussion about recent attempts to address prosecutorial conduct by enhancing ABA Model Rule of Professional

under Rule 3.8 is not limited to material exculpatory evidence.<sup>57</sup> Additionally, Rule 3.8 provides a reminder to the prosecutor of her ethical duty to “act fairly, honestly, and honorably”:<sup>58</sup> “The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict.”<sup>59</sup>

### B. Disclosure Violations

Notwithstanding the disclosure rule, *Brady* violations frequently occur.<sup>60</sup> A recent *Chicago Tribune* analysis of thousands of court records nationwide revealed that, since the Court delivered its opinion in *Brady*, the homicide convictions of at least 381 defendants have been overturned because prosecutors concealed exculpatory evidence or knowingly presented false evidence.<sup>61</sup> Forty-six of these defendants were convicted in Illinois courts.<sup>62</sup> According to a national study of death penalty verdicts, prosecutorial misconduct, primarily the suppression of exculpatory and mitigating evidence, is the second most frequent explanation for serious error in capital cases.<sup>63</sup> Case studies show that suppressed exculpatory material can be evidence indicating that someone other than the defendant actually committed the crime, prior inconsistent statements made by government witnesses,

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Conduct 3.8, see Bruce A. Green, *Prosecutorial Ethics As Usual*, 2003 U. ILL. L. REV. 1573.

57. See *supra* notes 48–52 and accompanying text (expanding the State’s obligation under Rule 412(c) to disclose any exculpatory evidence).

58. ILL. RULES OF PROF’L CONDUCT R. 3.8 cmt. (2001).

59. ILL. RULES OF PROF’L CONDUCT R. 3.8(a) (2001). This section is a recent addition to the Illinois ethical rules and characterizes the duty of the prosecutor as stated by the Illinois Supreme Court in *People v. Cochran*, 145 N.E. 207, 214 (1924) (stating that the prosecutor “is the representative of all the people, including the defendant, and it [is] as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen”), and *Berger v. United States*, 295 U.S. 78, 88 (1935). ILL. RULES OF PROF’L CONDUCT R. 3.8 cmt.

60. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 431 (2001) (“*Brady* violations are among the most common forms of prosecutorial misconduct.”); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56–57 (1987) (detailing hundreds of wrongful convictions, including many in which prosecutors suppressed exculpatory evidence). Unfortunately, most violations likely go undiscovered. See 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, 869 (1997) (“For every one of these cases, we have every reason to suspect that there are many more in which the prosecutor’s refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney.”).

61. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1. Of the 381 defendants, 67 had received death sentences. *Id.*

62. *Id.* (“Illinois’ record for misconduct by prosecutors is particularly abysmal.”).

63. See James S. Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases and What Can Be Done About It*, Feb. 11, 2002, <http://www2.law.columbia.edu/brokensystem2/index2.html>. Nineteen percent of reversals stemmed from prosecutorial suppression of exculpatory and mitigating evidence. *Id.*

psychiatric exculpatory evidence, or testimony about physical evidence.<sup>64</sup> Some prosecutors have also been known to present false testimony about physical evidence.<sup>65</sup>

Failures to meet disclosure obligations may arise from the prosecution's deliberate decision to withhold information from the defense.<sup>66</sup> For example, in the infamous Ford Heights Four case, in which four men were wrongfully convicted of a 1978 murder, the prosecutors presented false and misleading scientific evidence during the trial.<sup>67</sup> They also allowed witnesses to lie about benefits used to induce their testimony.<sup>68</sup>

Refusals to disclose, however, are not always willful. Oftentimes, prosecutors are simply unaware of or lack access to evidence that must be made available to the defense. Prosecutors typically rely on investigating agencies and other individuals to supply information regarding a case and thus may not have in their immediate possession all information that should be released to the defense. For example, exculpatory information may be in the knowledge and possession of others acting on the government's behalf, such as another prosecutor,<sup>69</sup> law enforcement officers,<sup>70</sup> or even other governmental agencies.<sup>71</sup>

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64. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 700-01 (1987) (citing cases involving these various types of suppressed material).

65. *Id.* at 700 (citing cases involving this type of *Brady* misconduct).

66. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83, 84 (1963). In *Brady*, the prosecution knowingly withheld a statement made by the defendant's alleged accomplice in which the accomplice admitted to committing the homicide. *Id.* *Brady* did not learn of the statement until after he had been sentenced to death for first-degree murder. *Id.* *See also* *Mooney v. Holohan*, 294 U.S. 103, 110 (1935) (discussing the prosecution's deliberate suppression of impeachment evidence concerning the credibility of government witnesses).

67. Ken Armstrong & Maurice Possley, *Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, at N1. For a brief description of the Ford Heights Four case, see *supra* note 13.

68. Armstrong & Possley, *supra* note 67, at N1. The Ford Heights Four were exonerated eighteen years later by DNA testing and brought a civil rights action against the Cook County Sheriff's Department after exculpatory evidence was discovered in the prosecution's files. Testimony of Professor Lawrence C. Marshall, Professor, Northwestern University School of Law before the Prosecutorial Misconduct Committee of the Illinois Legislature (June 21, 1999) (on file with author) [hereinafter Marshall Testimony]. The suit was eventually settled. *See* Robert Becker, *Ford Heights 4 to Get Their Settlement from County*, CHI. TRIB., Mar. 16, 1999, at N3 (describing the \$36 million settlement). For a more detailed description of this case, see Armstrong & Possley, *supra* note 67, at N1.

69. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150, 154 (1972). In *Giglio*, the prosecutor failed to disclose impeachment evidence known to another attorney in the office, but not to the prosecutor. *Id.*

70. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 671-72, 676 (1985) (finding error in the prosecutor's failure to disclose an informant possessed by and known only to Bureau of Alcohol, Tobacco, and Firearms); *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) ("For *Brady* purposes, the FDA and the prosecutor were one.").

Moreover, an investigative officer may be disinclined to release evidence favorable to the defense for fear that it will harm the prosecution's case or in the belief that it is immaterial.<sup>72</sup> The suppression of exculpatory or mitigating information by law enforcement officers can make the prosecution's task of disclosing *Brady* materials difficult.<sup>73</sup>

Another reason for lack of compliance with disclosure imperatives may be a prosecutor's overzealous commitment to advocacy.<sup>74</sup> The desire to win a case may cause some prosecutors to concentrate their sights solely on achieving victory, at the expense of upholding justice.<sup>75</sup> The quest for success can affect a prosecutor's ability to objectively weigh the materiality of potentially exculpatory evidence, a

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71. See, e.g., *Wood*, 57 F.3d at 737 (imputing to the prosecutor information possessed by other government agencies involved in investigating case); *Pennsylvania v. Ritchie*, 480 U.S. 39, 43–58 (1987) (finding that the defendant was entitled to *Brady* information known to a non-law-enforcement protective service agency to which the prosecution had no access and of which the prosecution was unaware). *But see* *United States v. Morris*, 80 F.3d 1151, 1169–70 (7th Cir. 1996) (refusing to impute knowledge to the prosecutor of information unknown to the prosecutor and possessed by government agencies uninvolved in the investigation of the case). For a summary of federal circuit court approaches to determining the extent of the prosecutor's duty to search for *Brady* material not in his immediate possession, see Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1493–1512 (2003).

72. Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 34 (2001).

73. See generally Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379 (2000) (discussing the prosecutor's duty to disclose exculpatory evidence known to the police).

74. Numerous law review articles have addressed this issue. See, e.g., Michael E. Gardner, Note, *An Affair to Remember: Further Refinement of the Prosecutor's Duty to Disclose Exculpatory Evidence*, 68 MO. L. REV. 469, 480 (2003) (“[P]rosecutors can, in good faith, downplay or overlook exculpatory evidence because they have difficulty in acting as a ‘minister of justice’ rather than as a ‘zealous advocate.’”); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 390 (2001) (“The desire to win inevitably wins out over matters of procedural fairness, such as disclosure.”); Weeks, *supra* note 60, at 843 (discussing how “the kind of objective determination of materiality required by *Bagley* is capable of being made only by saints”); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time To Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 278 (2004) (noting that in some wrongful conviction cases, “a team of police and prosecutors were so convinced of their righteousness that they were willing to do anything to get their man”) (quoting BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* 175–76 (2000)); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 107 (1991) (discussing “conflicting mandates” placed on prosecutors to be zealous while tempering zeal).

75. Armstrong & Possley, *supra* note 67, at C1 (“Winning has become more important than doing justice.”) (quoting Professor Alan Dershowitz); Marshall Testimony, *supra* note 68 (discussing how some prosecutors “forget that *judgment* and *wisdom* are key job qualifications for the position—not simply the ability to obtain convictions at whim”).

phenomenon referred to as “tunnel vision” or “confirmatory bias.”<sup>76</sup> In particular, a prosecutor may “convince [herself] that a satisfactory reason justifies not providing the exculpatory evidence, such as ‘the defense must have discovered it themselves,’ or ‘it is just an aberration and does not really undercut the prosecution’s case.’”<sup>77</sup>

Finally, the consequences of a *Brady* violation are not particularly daunting. Even if the defense learns about the exculpatory evidence,<sup>78</sup> to gain a new trial, the defendant must show that the failure to disclose denied him a fair trial.<sup>79</sup> The standard for evaluating these claims is strict: the defendant must demonstrate that there exists a reasonable probability that disclosure of the information would have changed the outcome of the proceeding.<sup>80</sup> This showing is often quite difficult to make once the government has procured a conviction.<sup>81</sup> Moreover, prosecutors rarely face professional discipline for suppressing evidence,

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76. See, e.g., Thomas F. Geraghty, *Trying to Understand America’s Death Penalty System and Why We Still Have It*, 94 J. CRIM. L. & CRIMINOLOGY 209, 233 (2003). This bias may also compromise the integrity of police investigations. *Id.* See also RYAN COMMISSION REPORT, *supra* note 1, at 20–21. The Commission Report describes tunnel vision as “the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and one’s conduct in response to that information.” *Id.* at 45 n.4 (quoting a Canadian inquiry into cases of wrongful conviction).

77. Levenson, *supra* note 72, at 34. Levenson also remarks that “[p]rosecutors are particularly likely to lose their judgment if they enjoy a close working relationship with the officers whose misconduct will be disclosed when impeachment or exculpatory information is revealed to the defense.” *Id.* at 35.

78. See Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1145 (2005) (noting the unlikelihood that exculpatory evidence will be discovered); Weeks, *supra* note 60, at 869 (“For every one of these cases, we have every reason to suspect that there are many more in which the prosecutor’s refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney.”).

79. Prior to conviction, courts will often remedy *Brady* violations by ordering late compliance. Levenson, *supra* note 72, at 34.

80. *United States v. Bagley*, 473 U.S. 667, 682 (1985). In *Bagley*, the Court declared that “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* See also *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995) (asserting that the defense must show that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”).

81. Levenson, *supra* note 72, at 35. Critics of the “reasonable probability” standard argue that it is too demanding and thus encourages prosecutors to withhold *Brady* evidence. See, e.g., Weeks, *supra* note 60, at 870; Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 438 (1992) (stating that, in practice, if “a conviction results, reversal will not be ordered unless an appellate judge can conclude that the trial jury probably would have acquitted the defendant had the evidence been disclosed”); Rosen, *supra* note 64, at 707–08 (asserting that “a prosecutor knows that a decision to withhold or falsify evidence, even if discovered, will not necessarily result in a reversal of the conviction”).

thus rendering any deterrent effect offered by the ethical rules a practical nullity.<sup>82</sup>

### C. Illinois Proposals for Reform

In response to vociferous public outcry stemming from the many recently publicized cases of wrongful conviction in Illinois, the Illinois Supreme Court Committee on Capital Cases and former Governor Ryan's Commission on Capital Punishment issued numerous proposals to reform the state criminal justice system.<sup>83</sup> Among their many recommendations, the Death Penalty Committee and the Governor's Commission provided suggestions for ensuring prosecutorial adherence to the *Brady* rule.

Several of these suggestions were incorporated into Illinois laws and court rules. The revisions seek to educate prosecutors about their disclosure duties and encourage them to "do justice."<sup>84</sup> For example, in response to a committee proposal, the Illinois Supreme Court amended Rule 3.8 of the Illinois Rules of Professional Conduct to include the declaration of the justice-seeking duties of prosecutors:<sup>85</sup> "The duty of a public prosecutor or other government lawyer is to seek justice, not

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82. Ken Armstrong & Maurice Possley, *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, at N1; see also Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?* 19 LOY. U. CHI. L.J. 39, 47 (1987) ("Disciplinary sanctions are rarely imposed against prosecutors."). Professor Richard Rosen surveyed lawyer disciplinary bodies in all fifty states and the District of Columbia and discovered a dearth of proceedings pursued against prosecutors for *Brady* violations over the course of six years. Rosen, *supra* note 64, at 720–30 (finding only nine disciplinary proceedings). Professor Lawrence Marshall attributes the disinclination to discipline prosecutorial misconduct as tacit approval: "Many players in the system—judges, defense lawyers, prosecutors—know some of the stuff that happens, but nonetheless tend to turn a blind eye. There's a feeling that that is how it works, that it's legitimate to bend the truth sometimes when you are doing it with 'the greater good' in mind." Armstrong & Possley, *supra*, at N1 (quoting Professor Marshall). *But see* Armstrong & Possley, *supra* note 61, at C1 (describing charges brought against Cook County law enforcement officials for conspiring to frame defendant for murder of ten-year-old girl by, *inter alia*, concealing exculpatory evidence). Though ultimately acquitted, the law enforcement officers called the "DuPage 7" were brought to trial. Christy Gutowski, *Indictment Hovering Over Sad Anniversary*, CHI. DAILY HERALD, Feb. 26, 2005, at 1.

83. See Mark R. Madler, *Illinois Death Penalty Committee Issues Final Report: Recommendations Made to State Supreme Court*, American Lawyer Media, Nov. 3, 2000, <http://www.truthinjustice.org/illdpreport.html>; Report of the Commission on Capital Punishment, April 2002, [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html).

84. Several scholars have suggested similar solutions. See, e.g., 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, 970–71 (1996) (suggesting general and specific rules governing prosecutorial ethical behavior); Zacharias, *supra* note 74, at 110–12 (calling for greater specificity in ethical rules for prosecutors).

85. ILL. RULES OF PROF'L CONDUCT R. 3.8 cmt. (2001).

merely to convict.”<sup>86</sup> Likewise, the committee provided the impetus for the addition of the government’s duty to specifically identify exculpatory or mitigating information in Illinois Supreme Court Rule 412<sup>87</sup> and the directive to the state to ensure the flow of information among investigative and prosecutorial personnel.<sup>88</sup> With respect to the Capital Punishment Commission, a recommendation regarding the disclosure of information on informant witnesses in capital cases has been codified in the state criminal procedure rules.<sup>89</sup> Illinois legislators also adopted a commission recommendation requiring investigative agencies to provide all investigative material and exculpatory information to the prosecution.<sup>90</sup>

In addition to these recommendations, the Capital Punishment Commission suggested that the Illinois Supreme Court assist prosecutors in their *Brady* obligations by defining “exculpatory evidence.”<sup>91</sup> To this end, the Commission recommended the following definition:

Exculpatory information includes, but may not be limited to, all information that is material and favorable to the defendant 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 evidence that the state 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 state anticipates offering in its case-in-chief; or (4) Diminish the

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86. ILL. RULES OF PROF’L CONDUCT R. 3.8(a) (2001).

87. See ILL. SUP. CT. R. 412 cmt. (2001). The amended provision reads: “[T]he State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor.” ILL. SUP. CT. R. 412(c).

88. See ILL. SUP. CT. R. 412 cmt. The amended provision reads: “The State should ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to place within its possession or control all material and information relevant to the accused and the offense charged.” ILL. SUP. CT. R. 412(f).

89. 725 ILL. COMP. STAT. 5/115-21 (2004). This statute establishes the prosecution’s duty to timely disclose information about informant witnesses such as the informant’s complete criminal history, any inducement offered or to be offered to the informant, and any information that bears relevance to the informant’s credibility. *Id.* See also RYAN COMMISSION REPORT, *supra* note 1, at 120–21 (recommendations 50–51).

90. See 725 ILL. COMP. STAT. 5/114-13 (2004). Newly enacted section 5/114-13(b) explicitly obligates investigative agencies to provide to the prosecutor all exculpatory materials, documented or otherwise, associated with an investigation generated or possessed by the agency and requires these agencies to adopt policies to ensure compliance with the statute. *Id.* See also RYAN COMMISSION REPORT, *supra* note 1, at 40–41 (recommendation 16).

91. RYAN COMMISSION REPORT, *supra* note 1, at 119–20. The Illinois Supreme Court has yet to adopt this recommendation.

degree of the defendant's culpability or mitigate the defendant's potential sentence.<sup>92</sup>

The Commission also recommended that the state legislature clearly describe police duties "to pursue all reasonable lines of inquiry," including those that point away from an identified suspect,<sup>93</sup> and to document all evidence, including exculpatory evidence.<sup>94</sup> The former proposal was designed to combat tunnel vision and confirmatory bias in policing, which may lead investigating officers to focus exclusively on a particular suspect and prevent them from objectively evaluating whether other individuals are potentially guilty.<sup>95</sup> The latter proposal calls for the police to keep schedules listing all relevant evidence and to provide copies of the schedules to the prosecutor.<sup>96</sup> The Commission also suggested that a specific law enforcement employee be responsible for maintaining these records<sup>97</sup> and that the legislature expressly require the police to "give the prosecutor access to all investigatory materials in their possession."<sup>98</sup>

## II. THE UK DISCLOSURE EXPERIENCE

In considering the Illinois experience, there are valuable lessons to be learned from the United Kingdom, where defective pretrial disclosure also contributed to a series of notorious miscarriages of justice.<sup>99</sup> In

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92. *Id.* at 119. This definition was drawn from the Local Criminal Rules for the Federal District Court in Massachusetts. *Id.* at 120.

93. *Id.* at 20 (recommendation 1). This recommendation is based on provisions of the British Criminal Procedure and Investigations Act 1996. *Id.* The Illinois legislature has not adopted this recommendation.

94. *Id.* at 22 (recommendation 2). This recommendation is also based on provisions of the British Criminal Procedure and Investigations Act 1996. *Id.* The Illinois legislature has yet to adopt this recommendation.

95. *Id.* at 20–21 (comments to recommendation 1).

96. *Id.* at 22 (recommendation 2).

97. *Id.* Under the proposal, the designated record-keeper must certify her compliance in writing to the prosecution. *Id.*

98. *Id.*

99. A far from exhaustive list includes, *Unreliability of Police Evidence Quashes Convictions*, THE TIMES (LONDON), Oct. 20, 1989, at Issue 63530 (discussing *R v. Richardson*); *R v. McKenny*, (1991) 93 Crim. App. 287; *R v. Maguire* (1992) Q.B. 936; *R v. Taylor* (1994) 98 Crim. App. 361. Most of these cases arose from the IRA bombing campaigns of the 1970s, but perhaps the clearest example of both the importance of the disclosure process and the disastrous consequences of its failure is *R v. Kiszko*. Michael Horsnell, "Wrong Man" Jailed for 1975 Killing, THE TIMES (LONDON), Feb. 18, 1992. In the 1970s, Stefan Kiszko, a young, learning-disabled man, was charged with the rape and murder of a young girl and documentary evidence of his sterility (which rendered him incapable of producing the DNA evidence found at the scene) was known to the prosecution, but was not disclosed to the defense. *Id.* Consequently, Kiszko was convicted and served sixteen years in prison before the documents came to light and his conviction was quashed. *Id.* He died shortly after his release. *Id.*

many of these cases, had the United Kingdom retained capital punishment, it is almost certain that such sentences would have been imposed.

The law of disclosure in the United Kingdom initially developed through the common law. Alarm at the failings of the system, however, coupled with concern from police and prosecutors at the ever-expanding scope of the disclosure obligations, culminated in the passage of the Criminal Procedure and Investigations Act 1996.<sup>100</sup> The Act imposed more stringent disclosure obligations on police and prosecutors, but also, for the first time, imposed a reciprocal duty of disclosure on the defense, thereby reinforcing the inequality of bargaining power between the state and the accused.<sup>101</sup> Unfortunately, the imposition of a statutory disclosure regime has done little to prevent further miscarriages of justice in the United Kingdom.

#### A. *The Development of Disclosure in the United Kingdom*

Although the principle of disclosure is well established in the United Kingdom,<sup>102</sup> there have been concerns for many years over the application of the common law procedures.<sup>103</sup> With the issue of the Attorney General's Guidelines for the Disclosure of 'Unused Material'

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100. Criminal Procedure and Investigations Act, 1996, c. 25 (Eng.).

101. This was very much in keeping with a series of provisions introduced in the mid-1990s by a conservative government that was heavily influenced by the "law and order" agenda. At the same time as the CPIA forced the defense to reveal its case by means of advance disclosure, the Criminal Justice and Public Order Act 1994 criminalized various forms of public protest and freedom of expression and also abrogated the right against self-incrimination by permitting the court to draw adverse inference when a defendant remains silent or refuses to testify. Criminal Justice and Public Order Act, 1994, c. 33, §§ 34–37 (Eng.). The weapon of adverse inference is also used to compel defense disclosure under § 11 of the CPIA.

102. See generally JOHN NIBLETT, DISCLOSURE IN CRIMINAL PROCEEDINGS (1997) (describing the history of English disclosure law). For a general overview of the disclosure regime see Mike Redmayne, *Criminal Justice Act 2003: (1) Disclosure and its Discontents*, 2004 Crim. L.R. 441; David Ormerod, *Improving the Disclosure Regime*, 7 INT'L J. EVIDENCE & PROOF 102 (2003); Chris Taylor, *Advance Disclosure: Reflections on the Criminal Procedure and Investigations Act 1996*, HOWARD J. CRIM. JUST. 114 (2001).

103. See, e.g., Doreen McBarnet, *The Fisher Report on the Confait Case: Four Issues*, 41 MODERN L.R. 455 (1978) (discussing the inquiry into the *Confait* case, in which three boys were wrongfully convicted of murder and arson based on a faulty investigation). The Fisher Report was forthright in its criticism of the existing practices, and its concerns were reiterated by the courts in *R v. Leyland Magistrates, ex parte Hawthorn*, [1979] Q.B. 283, which held non-disclosure by the prosecutor of potentially exculpatory evidence to be a denial of natural justice sufficient to warrant overturning a conviction. See also *R v. Hassan and Kotaish*, (1968) 52 Crim. App. 291. Ultimately, the matter was referred to the Royal Commission on Criminal Procedure, which called for disclosure of all non-sensitive witness statements. ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1981, Cm. 8092, at para. 8.19 [hereinafter 1981 ROYAL COMMISSION REPORT]. It concluded that, in matters of disclosure, discretion should lie with the prosecutor. *Id.*

to the Defence<sup>104</sup> in 1982, police and prosecutors received more structured guidance on the precise scope of their duties in relation to disclosure. The Guidelines introduced the term “unused material”<sup>105</sup> into the vocabulary of the criminal justice system and provided that such material is subject to disclosure when “it has some bearing on the offence(s) charged and the subsequent circumstances of the case.”<sup>106</sup> Despite its apparent simplicity, however, subsequent events showed just how broadly this rule of instruction could be interpreted.<sup>107</sup> Also, the fact that the Guidelines did not entirely replace the common law rules on disclosure sparked confusion over their precise legal status. Dispute as to whether they enjoyed the full force of law<sup>108</sup> or whether they were merely advisory<sup>109</sup> was finally resolved in 1995 when the Court of Appeal approved the latter interpretation.<sup>110</sup> Nonetheless, the courts continued to progressively expand the remit of the prosecution disclosure obligation. By 1989, the scope of “unused material,” as defined in *R v. Saunders and Others No.1*,<sup>111</sup> was broad in the extreme: “[I]t is clear the term ‘unused material’ may apply to virtually all material collected during the investigation of a case.”<sup>112</sup>

Clearly, this inclusive interpretation could encompass any material that had, or might have, some bearing on the offense charged and the surrounding circumstances of the case. Even more far-reaching was the statement that the relevance of any unused material was to be decided not by the police or prosecution, but by the defense. The inevitable consequence was a fundamental reappraisal of the scope of the existing

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104. (1982) 74 Crim. App. R. 302.

105. Although this term clearly included statements (including drafts) that did not form part of the committal bundles (statements and documentary exhibits used by the prosecution to determine whether to proceed with a case) served on the defense, the Guidelines were less helpful in identifying precisely which other categories of material might fall within the category and so qualify for disclosure.

106. 1981 ROYAL COMMISSION REPORT, *supra* note 103, at para. 2.

107. *See, e.g., R v. Livingstone*, [1993] Crim. L.R. 597 CA (“It is the duty of the prosecution in all cases where material, whether documentary or otherwise, which is of relevance to the defence comes into their hands to make the defence a present of such material.”). Over time, the categories of unused material subject to disclosure expanded to encompass virtually all potential forms of evidence as in *R v. Ward*, (1993) 96 Crim. App. 1. It was this process of expansion that led to calls for restriction of the prosecution duty and so provided the impetus for passage of the CPIA.

108. Lord Runciman, chair of the Royal Commission on Criminal Justice, concluded that they “to all intents and purposes have the force of law.” ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, 1993, Cm. 2263, 91 n.20 [hereinafter 1993 ROYAL COMMISSION REPORT].

109. *In re Barlow Clowes, Ltd.*, [1992] Ch. 208.

110. *R v. Brown*, (Winston) [1995] 1 Crim. App. 191.

111. (unreported) Central Criminal Court, 29th September 1989, Transcript T881630.

112. *Id.*

provisions. However, when the Attorney General declined to redraft the Guidelines,<sup>113</sup> the task of providing guidance for prosecutors and the police fell, instead, to the Director of Public Prosecutions. The result was the “Guinness Advice,” issued in 1992, which instructed the police to catalog all materials generated during an investigation, while leaving decisions regarding disclosure to the Crown Prosecution Service (CPS).<sup>114</sup> The police reaction was largely negative, partly due to the time expended meeting defense requests for material, but mainly because, in reality, control of what material was disclosed lay not with the police or CPS, but with the defense. Consequently, the defense routinely demanded copies of all unused material, relevant or not, thereby imposing enormous logistical pressures on the police in relation to the copying of documents, interview tapes, closed-circuit television, and other investigatory items.<sup>115</sup>

The new regime was barely in place when the Court of Appeal delivered another blow to the Attorney General’s Guidelines in upholding the appeal of Judith Ward in *R v. Ward*.<sup>116</sup> The court was severely critical of the prosecution’s failure to disclose a mass of conflicting evidence that undermined the Crown’s case and concluded: “[T]hose who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence.”<sup>117</sup> What is more, in the

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113. 202 PARL. DEB., H.C. (6th ser.) (1992) 39.

114. This was accompanied by the Association of Chief Police Offices and Crown Prosecution Service *Joint Operational Instructions for the Disclosure of Unused Material* (1997) (unpublished), a key aspect of which was the introduction of standard forms for use by the police as part of file preparation. The schedules MG6C (non-sensitive unused material) and MG6D (sensitive unused material) record all the unused material generated during the inquiry and are passed to the Crown Prosecution Service who would then provide the defense with copies of the MG6C. The defense was then entitled not only to inspect the non-sensitive listed documents, but also to have them copied at prosecution expense. As with later changes to the disclosure regime, the system was introduced with minimal training. *Id.*

115. However, in *R v. Bromley Magistrates’ Court ex parte Smith and Another*, [1995] 1 W.L.R. 944 (Q.B.D.), the court, in extending disclosure to summary cases, also approved the police policy of refusing to copy materials for the defense unless a defense representative had inspected the documents at the police station and identified them as being relevant to the case. *See also R v South Worcestershire Justices ex parte Lilley*, [1996] 1 Crim. App. 420 (Q.B.D.) (regarding non-disclosure of unused material when public interest immunity is claimed).

116. (1993), 96 Crim. App. 1. Ward was wrongfully convicted of several fatal IRA bombings pursuant to the suppression of numerous items of exculpatory material by the police (in particular, contradictory forensic evidence and psychological reports indicating that the Judith Ward was prone toward confessing to offenses that she had not, in fact, committed). She was released from prison after serving eighteen years. *See NIBLETT, supra* note 102, at 1–3, 74–77, 115–16.

117. *Ward*, 96 Crim. App. at 25 (quoting Lawton LJ in *R v. Hennessey*, (1979) 68 Crim. App. 419, 426).

process of reprimanding the prosecution, the court looked to the definition of unused material given in *R v. Hennessey*<sup>118</sup> in describing the scope of “relevant evidence”:

We would emphasise that “all relevant evidence of help to the accused” is not limited to evidence which will obviously advance the accused’s case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.<sup>119</sup>

In other words, the defense was to have access to *all* material collected by the prosecution, irrespective of its relevance to the case and any costs incurred by the prosecution in granting this access.

At the same time as the courts grappled with the precise nature and extent of the duty of disclosure as defined in *Ward*, the subject was also under scrutiny from another quarter. The Royal Commission on Criminal Justice had been appointed to consider the operation of the entire criminal justice system in the wake of a string of damaging miscarriages of justice, most of which involved defective disclosure by the prosecution.<sup>120</sup> For this reason, it was anticipated that the Commission would recommend even greater disclosure to the defense. The tone of the Commission’s final report,<sup>121</sup> however, demonstrated far more sympathy with the police perspective on disclosure than with the defense: “[T]he defence can require the police and prosecution to comb through large masses of material in the hope either of causing delay or of chancing upon something that will induce the prosecution to drop the case rather than have to disclose the material concerned.”<sup>122</sup>

The import of this finding was clear. The Commission concluded that the purpose of defense requests for disclosure was not to secure relevant information, but to subvert the prosecution process—a position made all the more iniquitous by the absence of any comparable obligation on the defense to reveal information in its possession to the prosecution.<sup>123</sup> For this reason, the Commission was prepared to take

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118. (1979), 68 Crim. App. 419.

119. *Ward*, 96 Crim. App. at 25.

120. This inquiry was announced on the day that the appeals of the Birmingham Six, a case involving one of the worst miscarriages of justice in the history of the modern-day UK legal system, were allowed. The Birmingham Six were six men wrongfully convicted for two IRA pub bombings that killed twenty-one people. Sixteen years after their conviction, they were released from prison after evidence of police fabrication and suppression of evidence during their trial was unearthed. *R v. McKenny and Others*, (1991) 93 Crim. App. 287.

121. 1993 ROYAL COMMISSION REPORT, *supra* note 108, at para. 42.

122. *Id.*

123. Nevertheless, the informal practice had evolved of the prosecution providing the defense

the radical step of recommending a reciprocal, albeit more limited, duty on the part of the defense “to disclose the substance of their defence in advance of the trial.”<sup>124</sup> The result was a fundamental shift of power back to the police and prosecution in determining what, if any, information should be revealed to the defense.<sup>125</sup> Unsurprisingly, this pronouncement was met with enthusiasm by a conservative government that was eager to demonstrate its commitment to a “law and order” agenda. When it came, the government’s response went even further than the Commission’s recommendations, particularly in relation to the proposals for a duty of defense disclosure.<sup>126</sup> The end product was the Criminal Procedure and Investigations Act 1996.<sup>127</sup>

*B. The Criminal Procedure and Investigations Act 1996*

The Criminal Procedure and Investigations Act 1996 fundamentally changed the conduct of criminal cases. In particular, it introduced a three-stage disclosure procedure. The new process replaced the previous system of largely automatic disclosure by the prosecution with a new system that recognized that the prosecution would routinely withhold certain material. Pursuant to the CPIA, the prosecution is required to disclose material to the defense only when the material in question first satisfies the test of “relevance” imposed by the Act:

[M]aterial may be relevant to the investigation if it appears to an investigator, or to the officer in charge of the investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or to the surrounding

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with a letter outlining the issues that had influenced the prosecution’s disclosure decisions and inviting the defense to comment and outline its position.

124. 1993 ROYAL COMMISSION REPORT, *supra* note 108, at para. 66.

125. The potential dangers of this were recognized from the outset: “[w]e cannot see how any system can conclusively guarantee that the investigator will not bury such evidence if the defence are unaware of it.” LEONARD H. LEIGH & LUCIA ZEDNER, *THE ROYAL COMMISSION ON CRIMINAL JUSTICE, A REPORT ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE PRE-TRIAL PHASE IN FRANCE AND GERMANY* 73 (London, HMSO 1992).

126. HOME OFFICE, *DISCLOSURE: A CONSULTATION DOCUMENT*, 1995, Cm. 2864. More fundamental, however, were concerns over the role of defense disclosure as a trigger for further disclosure by the prosecution which, it was feared, would restrict the scope of the defense case at trial as well as allow the prosecution to seek to justify withholding material on the grounds that its relevance was to a line of defense other than that contained in the defense statement. The Government openly acknowledged this point when seeking to restrict the common law duty of disclosure: “[t]he current law requires the prosecutor to disclose to the accused anything which might possibly be relevant to an issue at the trial, whether or not it has any bearing *on the defence which the accused relies on at trial.*” 567 PARL. DEB., H.L. (5th ser.) (1959) 463 (emphasis added).

127. The CPIA came into force on April 1, 1997.

circumstances of the case, unless it is incapable of having any impact on the case.<sup>128</sup>

Under the CPIA, each investigation has a nominated “disclosure officer,” who is responsible for satisfying the requirements of the Act relating to the collation and disclosure of unused material.<sup>129</sup> The most crucial aspect of this post is the officer’s preparation of the schedules listing unused material that form the basis for all subsequent disclosure.<sup>130</sup> Although the wording of the Act suggests that the work of the disclosure officer bears a supervisory role with respect to the work of the officer in the case (OIC), in the overwhelming majority of cases, the same individual performs both roles. This is problematic for two reasons: first, it produces a potential conflict of interest for the officer concerned; second, an investigator who makes an error in assessing material for disclosure is hardly likely to correct that error by revisiting the decision as the disclosure officer. From the disclosure officer, the file is passed to the Crown Prosecution Service, and, ultimately, it falls to the CPS lawyer to fulfill the prosecution responsibilities set out under the Act.

Although the Act has undergone significant changes in the past year,<sup>131</sup> in its original form, the threefold disclosure procedure established by the CPIA begins with the primary disclosure stage, during which the prosecution must:

- (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor’s opinion might undermine the case for the prosecution against the accused, or
- (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).<sup>132</sup>

The term “material” covers anything:

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128. Draft Codes of Practice § 2:1. The disclosure obligations under the CPIA apply once the accused is sent to Crown Court for trial on indictment, CPIA at § 1(2), and voluntarily appears before the magistrates’ court. *Id.* at § 6. The Act imposes no disclosure obligations prior to charge. DPP *ex parte* Lee, [1999] 2 Crim. App. 304 (Q.B.D.). *But see* DPP v. Ara, [2002] 1 Crim. App. 16, 165 (stating that, in relation to a suspect’s right to disclosure of his police interview record, “[t]he question of whether or not a defendant should accept a caution is inextricably linked with his entitlement . . . to legal advice and to the necessary prerequisite for informed legal advice, that those advising know accurately the terms of the interview on the basis of which the police are prepared to issue a caution.”)

129. Draft Codes of Practice §§ 3.1–3.6.

130. *Id.* at §§ 7.1–7.5.

131. *See infra* notes 157–60 and accompanying text (discussing amendments to the 1996 statute).

132. CPIA at § 3(1). The duty is subject to the provisions for “protected material” in sexual cases under the Sexual Offences (Protected Material) Act 1997.

- (a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or
- (b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.<sup>133</sup>

Notably, the individual prosecutor<sup>134</sup> must make a subjective assessment of the possible impact of the material on the prosecution's case based on the schedules prepared by the disclosure officer.<sup>135</sup> The non-sensitive schedule is then passed to the defense and, with it, the duty of disclosure.

Under the original 1996 Act, the defense is required to produce a detailed statement:

- (a) setting out in general terms the nature of the accused's defence,
- (b) indicating the matters on which he takes issue with the prosecution, and
- (c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.<sup>136</sup>

The defense statement is to be served on the prosecution within fourteen days of primary disclosure<sup>137</sup> and prompts a reexamination of the unused material by the prosecution. This third step in the disclosure process is undertaken not by reference to the initial subjective test of primary disclosure, but, instead, by means of an objective assessment of the remaining unused material,<sup>138</sup> whereby the prosecutor must:

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133. *Id.* at § 3(2). Subsequent case law has established that the words "in connection with the case for the prosecution against the accused" are to be broadly construed. *R v. Reid*, [2002] Crim. L.R. 234.

134. Materiality is not dependent on the admissibility of the evidence. *R v. Preston*, [1994] 98 Crim. App. 405, 429 (H.L.) (appeal taken from Eng.) (U.K.). On issues of materiality, the intervention of the court is reserved for matters of non-disclosure on grounds of Public Interest Immunity. *R v. B.*, [2000] Crim. L.R. 50 CA. It is also open to the defense in common law to seek the assistance of the court in determining issues of materiality, although even this requires the defense to establish a clear prima facie case for opposing the prosecutor's view. *R v. Bromley Justices ex parte Smith and Wilkins*, [1995] 2 Crim. App. 285, 291 (Q.B.D.).

135. In a similar vein, the test of relevance is also based on the opinion of the investigator. *See supra* notes 128–29 and accompanying text (discussing the investigator's role in determining relevance).

136. CPIA § 5(6).

137. This time period is subject to extension. The Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations, 1997, S.I. 1997/684, reg. 2 and extension reg. 3(2).

138. Critics have assailed the use of separate tests during the primary and secondary stages of disclosure as being "logically indefensible, confusing and the cause of much unnecessary pre-trial dispute and delay." R. L.J. AULD, *A REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES*, ch. 10, at para. 1 & 2 (London, HMSO 2001).

- (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, or
- (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).<sup>139</sup>

The purpose of requiring the prosecution to revisit its initial assessment of the unused material in the case is to provide additional protection for the accused without reverting to the previous regime under the Attorney General's Guidelines, which often required the police to provide copies of all material in their possession. The procedure under the CPIA, however, depends entirely on the defense statement to indicate the proposed character of the defense and identify material that may undermine the prosecution's case.<sup>140</sup>

Despite the various amendments that have followed, the CPIA remains a procedure that leaves discretion in matters of disclosure to the prosecution, with only limited safeguards for the accused. Even the penalties for noncompliance or inadequate disclosure are unequal, as the 1996 Act provides no sanction for the prosecution beyond the granting of an order by the court compelling additional disclosure.<sup>141</sup> Furthermore, the procedure for obtaining additional prosecution material places the burden on the defense to show "reasonable cause to believe that there is prosecution material which might be reasonably expected to assist the defence,"<sup>142</sup> thereby raising the question of to what extent the defense is equipped to identify such material when both the defense and the court may be ignorant of its existence.<sup>143</sup>

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139. CPIA § 7(2).

140. *Id.* at § 7(2)(a). The prosecutor is required only to disclose that "which might be reasonably expected to assist the accused's defence as disclosed by the defence statement." *Id.* (emphasis added).

141. This is in contrast to the power to draw "adverse inference" following a defense failure to comply with the disclosure provisions. *Id.* at § 11.

142. *Id.* at § 8(2)(a).

143. As one observer states:

Though the defence may apply to the court to order the disclosure of material held by the police, it first has to show how this helps its particular case. Without seeing it, the defence may not know how it is relevant and unless it can show its relevance will not be allowed to see it.

Roger Ede, *In the Name of Justice*, TIMES (LONDON), Apr. 1, 1997, at 33.

So-called "fishing expeditions" were again discouraged in *R v. Brown (Winston)*, [1995] 1 Crim. App. 191 CA and *R v. Guney*, [1998] 2 Crim. App. 242.

*C. CPIA Disclosure*

Since its inception, the 1996 Act has accumulated a somewhat troubled history<sup>144</sup> and attracted widespread concern. After eight years of CPIA disclosure, it is clear that the statutory disclosure regime is not working. All of the extant research<sup>145</sup> has highlighted numerous structural failings in the operation of disclosure that continues to produce miscarriages of justice. For example, a government study of disclosure revealed that “the CP[I]A is not at present working as Parliament intended; nor does its present operation command the confidence of criminal practitioners . . . . [I]n a significant proportion of contested cases CPS compliance with CPIA procedures is defective in one or more respects.”<sup>146</sup> These disclosure deficiencies have raised doubts among criminal practitioners about the quality of disclosure<sup>147</sup> and “have led to a lack of trust in the comprehensiveness and accuracy of the schedules of non-sensitive and sensitive material provided by the

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144. From the outset, there were concerns over the provisions as they progressed through Parliament. As an example, the Bill arrived for consideration with 102 government amendments having been tabled in a single day, leading to much criticism: “In some 25 years of parliamentary life I can remember no occasion on which a Bill that was not urgent has come forward so ill prepared and so carelessly drafted . . . . The truth is that the Bill has been rushed forward in a most extraordinary way.” 567 PARL. DEB., H.L. (5th ser.) (1995) 1408.

145. For a discussion of these structural failures, see Law Society (1999) CPIA 1996 Disclosure Provisions Survey; JOYCE PLOTNIKOFF & RICHARD WOOLFSON, ‘A FAIR BALANCE’? EVALUATION OF THE OPERATION OF DISCLOSURE LAW (2001); R. L.J. AULD, A REVIEW OF THE CRIMINAL COURTS IN ENGLAND AND WALES, FINAL REPORT (2001).

146. CROWN PROSECUTION SERVICE INSPECTORATE, REPORT ON THE THEMATIC REVIEW OF THE DISCLOSURE OF UNUSED MATERIAL, 2000, at para. 1.6.

147. *Id.* at para. 3.38. According to the report:

Criminal practitioners outside the prosecution . . . expressed almost universal lack of faith that the system is working satisfactorily. There were doubts about the consistent quality of investigations and the capturing, recording or following up of relevant matters. There were doubts about the quality of consultation and communication between the officer in charge of the investigation and others involved in a particular investigation . . . . There were doubts about the priority given to the task by the nominated disclosure officer and about the suitability of some disclosure officers.

*Id.* In addition, in a survey of criminal barristers in the UK conducted by the Criminal Bar Association, 83% of respondents felt that police schedules of unused material were likely to be unreliable, 90% felt that there was no reliable method of independent scrutiny of the disclosure procedures and 84% concluded that CPIA as a whole was, “either not working well or working badly.” British Academy of Forensic Sciences and the Criminal Bar Association (1999) Survey of the Practising Independent Bar into the Operation in Practice of the Criminal Procedure and Investigations Act 1996 Disclosure Provisions. Another study commissioned by the Home Office found that, of those surveyed, nearly 60% of barristers, 72% of defense barristers, 50% of defense solicitors, and 15% of judges believed that non-sensitive unused material that should have been disclosed to the defense was frequently not so disclosed. PLOTNIKOFF & WOOLFSON, *supra* note 145, at 71.

disclosure officer to the prosecutor.”<sup>148</sup> The study also noted concerns about the overall ability of investigating and disclosure officers to perform their duties under the CPIA.<sup>149</sup>

The continuing failings of CPIA disclosure are dramatically illustrated by the “London City Bond” cases, which developed from a protracted investigation by HM Customs and Excise (HMCE) into the evasion of excise duty by customers of the London City Bond Warehouse in the late 1990s. The fraud related to alcohol, which could be bought and sold between dealers within the network of bonded warehouses without incurring any tax. The tax became payable once the alcohol was released for sale into the domestic market; therefore, if the goods were simply bound for another bonded warehouse then no tax was paid. By falsifying documentation that suggested that the goods were being transferred from one bonded warehouse to another, it was possible for fraudsters to remove the alcohol from the warehouse without paying tax in order to sell it on the open market at an enormous profit. Due to the controls in place within the bonded warehouse system, such frauds are difficult to conceal from the warehouse management and this led to senior staff within the London City Bond Warehouse notifying HMCE officials of the existence of large scale fraud on the part of some of their customers. Rather than arrest the rogue traders immediately, HMCE investigators elected to allow the crimes to continue in order to increase the sums involved and so be seen to solve a larger fraud. This was achieved with the assistance of informants who worked at the warehouse. However, because of the active encouragement of the offences by investigators, the existence of the informants was not disclosed to the defense.<sup>150</sup> More egregiously, this information was concealed not only from the defense but also from the court,<sup>151</sup> thus fatally undermining the convictions attained by the

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148. CROWN PROSECUTION SERVICE INSPECTORATE, REPORT ON THE THEMATIC REVIEW OF THE DISCLOSURE OF UNUSED MATERIAL, 2000, at para. 3.39.

149. *Id.*

150. J. BUTTERFIELD, REVIEW OF CRIMINAL INVESTIGATIONS AND PROSECUTIONS CONDUCTED BY HM CUSTOMS AND EXCISE ch. 4 (2003).

151. *Id.* Although the role of informants is routinely concealed from the defense under the doctrine of ‘public interest immunity’ (PII), it is an essential aspect of the process that the court is fully apprised of any such sensitive material in order to determine whether it should be disclosed. The principles on which such issues are determined are well established, *see* *R v. Davis, Rowe and Johnson* [1993] 1 W.L.R. 613 (discussing the use of PII to justify non-disclosure) and *R v. Keane*, [1994] 1 W.L.R. 746 (discussing the judge’s role in conducting a “balancing exercise” regarding non-disclosure), although the procedure has recently been reviewed by the House of Lords in *R v. H and C*, [2004] UKHL 3. For an overview of the law of public interest immunity see, Chris Taylor, *What Next for Public Interest Immunity?*, 69 J. CRIM. L. 75 (2005). An additional consideration is that the UK is subject to Article 6.3 of the European Convention on

prosecution. The end result was a series of prosecutions that were, by any objective standard, disastrous, with the collapse of thirteen separate trials involving a total of 109 defendants and an estimated total fraud of £668 million.<sup>152</sup> By the conclusion of the proceedings, all appeals against conviction (even those following a guilty plea) had been successful.<sup>153</sup> In addition, following lengthy abuse of process hearings, the prosecution offered no evidence against the forty defendants who were yet to stand trial or in respect of whom retrials had previously been ordered.<sup>154</sup>

The conclusions of the subsequent government inquiry are indicative of the tenor of the criticism directed at the disclosure debacle:

[C]ourts were misled . . . . Judges were not told by counsel, who themselves had been misled, that there were other undocumented contacts with the informant. If the nature and extent of the missing contacts had been known to counsel and disclosed to the judges concerned it is at least possible and in some cases likely that a different conclusion would have been reached . . . and with it the question of whether to proceed in respect of certain of the prosecutions.<sup>155</sup>

[The Court of Appeal] . . . was prepared to make express findings that HMCE officers had lied . . . and that the lies were told by reason of a deliberate decision on the part of HMCE to conceal from the judge the

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Human Rights, which provides that everyone charged with a criminal offence is entitled, “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him,” and “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, Rome, Nov. 4, 1950, Art 6(3)(a) & (d). This causes particular problems in relation to PII hearings, and the UK has fallen afoul of the European Court of Human Rights on a number of occasions. *Edwards v. United Kingdom*, (1992) 15 E.H.R.R. 417; *Rowe and Davis v. United Kingdom*, (2000) 30 E.H.R.R. 1; *Edwards and Lewis v. United Kingdom*, 22 July 2003, Application Nos. 39647/98 and 40461/98. For further discussion of the issues raised by these cases, see B. Emmerson, *The CPIA and the Human Rights Act—Compatibility PII and the Human Rights Act*, in DISCLOSURE UNDER THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 (conference papers) (British Academy of Forensic Sciences (BAFS) 1999); S. Sharpe, *Human Rights Act 1998: Art 6 and the Disclosure of Evidence in Criminal Trials*, [1999] Crim. L.R. 273; John Wadham, *Prosecution Disclosure, Crime and Human Rights*, 147 NEW L.J. 697 (1997).

152. BUTTERFIELD, *supra* note 150, at para. 8.36.

153. See *R v. Patel and Others*, [2001] EWCA Crim. 2505 (quashing the convictions of five appellants, including one who pled guilty at trial); *R v. Early*, [2002] EWCA Crim. 1904 (quashing the “unsafe” convictions of eight appellants); *R v. McIlfatrick*, [2005] EWCA Crim. 693 (overturning appellant’s “tainted” conviction).

154. BUTTERFIELD, *supra* note 150, at para. 8.39.

155. *Id.* at para. 8.16.

true status of [the informant] and the real nature of the relationship between HMCE and London City Bond.<sup>156</sup>

Such cases have done little to dispel the prevalent belief that the CPIA provisions are commonly misapplied and misunderstood, and confidence in the disclosure regime remains fragile. Three years after the CPIA was implemented, fresh Attorney General's Guidelines were issued in an attempt to clarify the obligations of both police and prosecutors, and to address the inconsistent practices of both police and prosecutors across the United Kingdom.<sup>157</sup> However, it became clear that more fundamental changes were required and so, in April 2005, sections of the Criminal Justice Act 2003<sup>158</sup> came into force, making two important and related amendments to the 1996 statute. First, at the primary disclosure stage, the phrase, "in the prosecutor's opinion might undermine" is replaced by, "might reasonably be considered capable of undermining."<sup>159</sup> Second, the 2003 Act creates a continuing duty to disclose on the part of the prosecutor.<sup>160</sup> The combined effect of these provisions is not only to remove the subjective test for disclosure that previously existed in relation to initial disclosure, but also to abolish the distinction between "primary" and "secondary" disclosure, creating instead a single ongoing duty on the part of the prosecution.<sup>161</sup> Crucially, however, the primary responsibility for ensuring that all relevant exculpatory material is disclosed to the defense remains with the disclosure officer who continues to work with a minimum of training and supervision.

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156. *Id.* at para. 9.64.

157. See THE CROWN PROSECUTION SERVICE, THE CROWN PROSECUTION SERVICE ANNUAL REPORT 2000–2001 (2001), <http://cps.gov.uk/publications/reports/annualreport01.html>.

158. Criminal Justice Act, 2003, c.44 §§ 32–40 (Eng.).

159. *Id.* at § 32(a).

160. Pursuant to the new § 7(A) of the CPIA:

(2) The prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material which-

(a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and

(b) has not been disclosed to the accused.

(3) If at any time there is any such material as is mentioned in subsection (2) the prosecutor must disclose it to the accused as soon as is reasonably practicable (or within the period mentioned in subsection (5)(a), where that applies).

*Id.* at § 37.

161. This prompted yet another set of Attorney General's Guidelines. See *Attorney General's Guidelines on Disclosure (updated April 2005)* available at <http://www.attorneygeneral.gov.uk/attachments/disclosure.doc> (last visited Mar. 17, 2007). For an excellent summary of the amendments to the CPIA, see RICHARD TAYLOR, MARTIN WASIK & ROGER LENG, BLACKSTONE'S GUIDE TO THE CRIMINAL JUSTICE ACT 2003 35–50 (2004).

### III. UK LESSONS FOR ILLINOIS DISCLOSURE

#### A. *Lessons Learned*

An examination of the UK disclosure experience reveals many potential learning points for Illinois and other states that wish to address problems surrounding the disclosure of exculpatory evidence. A side-by-side inspection shows obvious similarities—both Illinois and the United Kingdom require the disclosure of exculpatory and mitigating evidence to the accused as part and parcel to an adversarial criminal justice system,<sup>162</sup> but neither has been particularly successful at enforcing this mandate. In addition, both have adopted reforms in the aftermath of highly publicized governmental failures to hew to the duty to disclose. Whereas Illinois has sought to shore up deficiencies in the practice of disclosure by reasserting and reaffirming the prosecutor's duty to disclose throughout its procedural and professional rules, the United Kingdom has attempted to strengthen its commitment to disclosure by adopting a detailed system of discovery designed to guide both police and prosecutors through the process and to ensure the disclosure of evidence favorable to the defendant in a criminal case. Although the reforms initiated are not identical, the differences are more in degree than in kind. The revisions and amendments to both discovery processes serve the same goals—to remind of (or reiterate) and further define the existing disclosure duty.

A bird's-eye view of the two systems offers even more compelling points of comparison. Over the past thirty years, the United Kingdom has operated under three distinct systems regulating the disclosure of exculpatory evidence to the accused: the common law system as applied by the courts, the quasi-statutory system created by the Attorney General's Guidelines, and the current statutory system of the CPIA.<sup>163</sup> The shifting sands of the UK approach reflect dissatisfaction with the various methods of enforcing the disclosure obligation. When disclosure violations erupted in a series of injustices, the informal common law discovery structure gave way to increased regulation under the Attorney General's Guidelines.<sup>164</sup> As disclosure continued to present an intractable problem, the Guidelines, in turn, yielded to the

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162. This is in contrast to the judge-controlled system of countries, like France, that employ an inquisitorial system of justice. For information about the French system, see Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791 (comparing differences in criminal procedure between the United States and France).

163. See *supra* Part II.

164. See *supra* Part II.A.

enactment of the CPIA.<sup>165</sup> All three systems evolved to give meaning to the accused's fundamental right to disclosure in advance of trial, yet all have foundered.<sup>166</sup>

In Illinois, prosecutors safeguard the right of an accused to disclosure of exculpatory evidence pursuant to the *Brady* doctrine, as developed by the United States Supreme Court and lower federal courts, along with professional rules of conduct established by the Illinois Supreme Court.<sup>167</sup> The shocking exposure of disclosure failures accompanying the current crisis in the administration of the death penalty compelled Illinois to reconsider its approach to enforcing the *Brady* rule. Faced with increasing public pressure to ensure prosecutorial observance of the constitutional duty, the Illinois Supreme Court reinforced mandatory language in its professional rules, and the Illinois legislature codified specific disclosure duties in capital cases.<sup>168</sup> In addition, state policymakers continue to debate recommendations made by the Capital Punishment Commission for further legislation addressing the disclosure mandate.<sup>169</sup>

From an evolutionary standpoint, Illinois appears to be on the brink of, or perhaps is in the early stages of, a fundamental change in its method of enforcing the duty to disclose—contemplating a move from an era dominated by court doctrine and professional rules toward a system of statutory enforcement. This alteration in approach parallels earlier transformations in the United Kingdom. Certainly, if the Illinois legislature were to give effect to the comprehensive array of recommendations made by the Capital Punishment Commission, the similarities between the Illinois and UK disclosure structures would continue to grow in number as well as in kind. Considering that several of the proposals bear a marked resemblance to disclosure duties described in the CPIA,<sup>170</sup> increased legislative oversight could portend

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165. *See id.*

166. *See supra* Part II.

167. *See supra* Part I.A.2.

168. *See supra* Part I.C.

169. Zimring, *supra* note 16, at 119 (noting that “most of the big-ticket items . . . are still being debated in the Illinois legislature”).

170. For example, the Ryan Commission's recommendation of statutory duties for the police to pursue all reasonable investigative leads matches CPIA provisions mandating that police take “all reasonable steps . . . for the purposes of the investigation,” CPIA, 1996, ch. 25 § 23(1)(a), and the Draft Codes' requirement that investigators “pursue all reasonable lines of inquiry, whether these point towards or away from the suspect,” Draft Codes of Practice, § 3.4. The Commission also suggested that a disclosure officer be appointed for every criminal case and that the police be required to create schedules documenting evidence and share these schedules with the prosecution. *See supra* notes 96–97 and accompanying text.

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a shift in the direction of the statutory regime currently in force in the United Kingdom.

Given that Illinois is considering a path already well worn by the United Kingdom, the UK disclosure experience is useful for evaluating not only the latest changes to Illinois law but also the more aggressive proposals that have yet to be adopted by the Illinois legislature. Every criminal justice system faces an unpalatable decision in deciding how rigorous to make the disclosure regime. Recent history in the United Kingdom has shown that a wide-ranging disclosure obligation advances the prosecutorial duty, but exacerbates investigations and creates expense and delay.<sup>171</sup> Too narrow a disclosure duty reduces costs and burdens for investigators and the prosecution, but risks further miscarriages of justice.<sup>172</sup> In seeking to strike that elusive balance between public pressure for a more robust criminal justice system and the right of the accused to the disclosure by the government of exculpatory or mitigating evidence, the United Kingdom tested three distinct models of disclosure, but all three systems failed to remedy the problems.

Why did these systems fail? The answer cannot be found in the wording of the common law, Attorney General's Guidelines, or the provisions of the CPIA. Instead, the answer is evident in the attitudes and working practices of those charged with their implementation. The UK experience has shown that subjecting investigators to a duty to disclose exculpatory evidence creates, for many of them, an unenviable conflict of interest. Tests for material to be disclosed are routinely ignored and items are omitted from unused material schedules when officers consider them to be either irrelevant or problematic.<sup>173</sup> The basis of most, if not all, of these problems is the desire of the investigator to secure a conviction, based on his or her personal belief in the guilt of the suspect.<sup>174</sup> The approach adopted by the OIC toward the

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171. *See supra* Part II.A.

172. *See id.*

173. For a detailed study of operational police practice in relation to disclosure, see CHRIS TAYLOR, *MAKING A CASE: THE CID, CASE CONSTRUCTION AND DISCLOSURE* (2005).

174. This concept of the officer's certainty of guilt is a well-documented aspect of many previous studies of operational police work. "Officers suppose that they have access to privileged knowledge because they 'know' that the suspect is guilty and therefore accept some responsibility for seeing that justice is done, even if that means helping the evidence along a little." SIMON HOLDAWAY, *INSIDE THE BRITISH POLICE* 112 (1983). This paternalistic approach to the criminal justice system is frequently expressed by police officers and lies at the root of much so-called "noble cause corruption." As articulated by one Chief Inspector, "[t]he feeling is that the rules of evidence are weighted [against the prosecution] and need help. There's the honest belief that the fellow is guilty and the law needs a bit of help to ensure the right result is achieved." JAMES MORTON, *BENT COPPERS* 275 (1993). "The adversary system itself molds a context for the

investigation, together with the discretion exercised at all stages of the inquiry, allows the final case file to be shaped in a way that limits the potential challenges posed by any unused material so as to emphasize those aspects of the case most favorable to the prosecution.<sup>175</sup>

The 1996 Act, in particular, creates a fundamental conflict for the police because, while officers are required to conduct their investigations with all diligence, they must also actively seek out and disclose information that assists the defense. Inevitably, many officers regard this as undermining their work by reducing the chances of achieving what they see as their primary objective of securing a conviction,<sup>176</sup> leading to the common perception that, by providing adequate disclosure, the police are “doing the defense’s job for them.” The CPIA is predicated on the modern role of the police officer, as a

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discretionary decision . . . [t]he great benefit is to win; the great cost is to lose . . . [d]iscretionary actions made under this cost/benefit assumption will invariably tend toward presumption of guilt in assessing the meaning of facts.” Candace McCoy, *Police, Prosecutors and Discretion in Investigation*, in *HANDLED WITH DISCRETION: ETHICAL ISSUES IN POLICE DECISION MAKING* 166 (John Kleinig ed., 1996). The potentially detrimental impact of such police preconceptions has received attention in relation to the interviewing of suspects:

[T]heir minds are made up before the interview starts and, once on these tramlines, they are not easily derailed. Denials are brushed aside and alternative perspectives and explanations disregarded . . . the interviewer does not consider false confession in such cases even as a remote possibility because the assumption of guilt is honestly held.

John Baldwin, *Police Interviewing Techniques: Establishing Truth or Proof?*, 33 *BRIT. J. CRIMINOLOGY* 325, 342–43 (1999). Such findings mirror a 1992 study that found that 73% of the sample of police interviewers were certain of the guilt of the suspect prior to the commencement of the interview and, in 80% of cases, the stated aim of the interview was simply to obtain a confession. Stephen Moston, Geoffrey M. Stephenson & Thomas M. Williamson, *The Effects of Case Characteristics on Suspect Behaviour During Police Questioning*, 32 *BRIT. J. CRIMINOLOGY* 23, 33–34 (1992). This was particularly so when the suspect had previous convictions. *Id.* at 26. A later study by the Police Research Group censured officers for appearing to have prejudged the outcomes of cases and for failing to be impartial. Many were judged to be biased or “blinkered,” in their unwillingness to consider all aspects of the case or to accept the possibility of any deficiency in their investigation. JANET E. STOCKDALE & PETER J. GRESHAM, *POLICE RESEARCH GROUP, THE PRESENTATION OF POLICE EVIDENCE IN COURT* 12 (1995), <http://www.homeoffice.gov.uk/rds/prgpdfs/fprs15.pdf>.

175. This is of crucial importance as there is an enduring tension between the police and the CPS, which has the power to abandon prosecutions against the wishes of the police. In order to prevent such “discontinuances,” the police inevitably underplay any areas of uncertainty (as presented by unused material) in order to present the case as “winnable.” In his study of detectives at work, Ericson characterized this as a process of “information control”: “[T]he investigations they do or do not undertake; the questions they do and do not ask; the interpretations they do and do not give to the answers; the written accounts they give and what they leave out.” RICHARD V. ERICSON, *MAKING CRIME: A STUDY OF DETECTIVE WORK* ix (1981).

176. “Most police officers have one very specific goal in mind, to produce guilty people before the courts and see them justly convicted.” ROBERT CHESHYRE, *THE FORCE: INSIDE THE POLICE* 5 (1989).

gatherer of evidence rather than an agent of the prosecution,<sup>177</sup> but this role does not come naturally to many officers and creates undeniable tensions.<sup>178</sup> Thus, although the impact of the latest amendments to CPIA disclosure has yet to be felt, there is little expectation that merely modifying the wording of the provisions will fundamentally alter the approach of investigators towards their disclosure obligations.

These observations apply equally to the current situation in Illinois. In Illinois, as well as generally throughout the United States, the responsibility for serious cases of non-disclosure of exculpatory evidence has rested with prosecutors<sup>179</sup> more so than on the police or other investigative personnel, which has been the case in the United Kingdom,<sup>180</sup> but the disclosure violations and their underlying reasons are much the same in both countries. The trouble with disclosure appears to arise from the ineffectiveness of a system dependent on the discretion of individual prosecutors and officers and the adversarial context within which they carry out their disclosure duties.<sup>181</sup> Mere amplification of the duty to disclose is insufficient to dislodge “deeply ingrained norms about the proper role of the prosecutor as zealous advocate.”<sup>182</sup> Justice Marshall, in his dissent in *Bagley*, aptly described the problem:

At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of

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177. The principle of the prosecutor as working for the furtherance of justice is well established. *R v. Thursfield*, (1838) 173 Eng. Rep. 490. Calls for the police to adopt a more impartial approach have also come from a former Chief of Her Majesty’s Inspectorate who recommended that the police “must cease to believe that they are solely the agents of the prosecution and become what . . . they were originally designed to be, the gatherers of evidence.” John Woodcock, *Why We Need a Revolution*, POLICE REV., Oct. 16, 1992, at 1929, 1932.

178. This echoes the comments of the former Director of Public Prosecutions, David Calvert-Smith, that “[u]nused material is a bore and much less fun than the preparation and presentation of the case. There is therefore an instinctive and understandable desire to get through it as quickly as possible.” D. Calvert Smith, *The Prosecuting Authority’s Role: Making the Criminal Procedure and Investigations Act Work to Facilitate Fair Trials and Just Verdicts*, in DISCLOSURE UNDER THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 (conference papers) (BAFS 1999).

179. See, e.g., Marshall Testimony, *supra* note 68, at 3–4 (discussing prosecutorial failure to disclose exculpatory evidence); but see Yaroshefsky, *supra* note 74, at 285 (suggesting that “[a]ny commission established to examine prosecutorial misconduct should necessarily examine the oversight of police agencies by prosecutors’ offices”).

180. See *supra* notes 163–66 and accompanying text.

181. See *supra* notes 74–77 and accompanying text; Hoefel, *supra* note 78, at 1142–44.

182. Hoefel, *supra* note 78, at 1151.

a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith.<sup>183</sup>

Moreover, the high degree of discretion granted prosecutors under the *Bagley* materiality standard, together with the remote prospect of reversal<sup>184</sup> and the unlikely event of professional sanctions,<sup>185</sup> provides little assurance that all prosecutors “will resolve doubtful questions in favor of disclosure.”<sup>186</sup> Academics have been making these points for years,<sup>187</sup> yet little movement has been made toward true reform. Perhaps, the concrete example set by the UK experience will assist United States policymakers in putting hypothesis into practice.

Although the Illinois reforms and proposals for reform are well-intended, it is questionable as to whether they will actually reduce the number of cases in which compliance fails to occur. None of the recent additions are novel; all are based on long-standing constitutional and ethical duties.<sup>188</sup> But even the innovative and more extensive disclosure

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183. *United States v. Bagley*, 473 U.S. 667, 696–97 (1985) (Marshall, J., dissenting).

184. *See supra* notes 44–45 and accompanying text (detailing the burden on the defendant to prove a “true” *Brady* violation).

185. *See supra* note 82 and accompanying text. *See also* Yaroshefsky, *supra* note 74, at 289–96 (enumerating six reasons for current unwillingness to discipline prosecutors, including belief that internal controls adequately regulate prosecutorial misconduct and political power of executive branch). *But see* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 70 (1995) (arguing that critics of formal disciplinary mechanisms overlook the importance of informal judicial controls on prosecutorial misconduct); Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 145 (1988) (arguing that critics exaggerate occurrence and gravity of prosecutorial misconduct).

186. *United States v. Agurs*, 427 U.S. 97, 108 (1976) (stating that “the prudent prosecutor will resolve doubtful questions in favor of disclosure”). It is worth noting that internal advancement for prosecutors may depend on conviction rates. *See* Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL’Y & L. 305, 321 (2001) (“Promotions within the Los Angeles District Attorney’s office often include consideration of conviction rates.”); Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 293 (2001) (“Promotions for subordinate prosecutors depend on their ‘scores’ for convictions.”).

187. *See, e.g., supra* note 74 (listing various articles addressing negative impact of adversarial nature of prosecutorial role on disclosure duties).

188. The commentary to the new Supreme Court provisions and the Commission recommendations bear out this point. *See, e.g.,* ILL. RULES OF PROF’L CONDUCT R. 3.8 cmt.

reforms proposed by the Commission are destined to fail. Regardless of whether the duty to disclose is reaffirmed by broad rules or by the introduction of a more formal or statutory system, the crime-control ethos of policing and prosecution will always weaken the safeguards within the disclosure process. As one observer has noted, "The real question remains whether restating and reminding will result in reform."<sup>189</sup> And the answer, based on the UK disclosure experience, appears to be a resounding no.

### B. Real Reform

Recognition that problems with disclosure emanate from the criminal justice system itself presents a seemingly intractable problem.<sup>190</sup> Nonetheless, if our adversarial system of justice and operational culture of the prosecutor's office are the underlying culprits, then reform must be targeted at compelling prosecutorial observance of *Brady* obligations.<sup>191</sup> To this end, scholars have proposed a variety of cures. Chief among the suggestions are harsher sanctions for prosecutors who commit *Brady* violations. For example, Fred Zacharias recommends that disciplinary authorities target supervisors responsible for the "ethos" of the prosecutor's office.<sup>192</sup> Richard Rosen suggests that

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(2001) (noting that paragraph (a) is substantially similar to a standard of the American Bar Association Standards for Criminal Justice and restates a principle noted in a 1924 Illinois Supreme Court case and a 1935 United States Supreme Court case); RYAN COMMISSION REPORT, *supra* note 1, at 121 (Commentary to Recommendation 51) (noting that Supreme Court Rule 412 already requires state to disclose information about witnesses and their criminal records but recommending that rule "make clear that it is particularly important" that information relevant to witness be "promptly provided" to defense).

189. Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265, 1294 (2001) (discussing special committee proposals for changing Illinois Supreme Court rules).

190. Janet Hoefel ultimately concludes that, short of a drastic change in the culture of our adversarial system, solutions are unavailing because of "deeply ingrained norms about the proper role of the prosecutor as zealous advocate." Hoefel, *supra* note 78, at 1151.

191. The same is true in the United Kingdom where one factor that has consistently undermined the operation of the disclosure regime has been the absence of any significant sanction for those investigators who cannot, or will not, apply the provisions correctly. See Mike Redmayne, *Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996*, 60 MOD. L. REV. 79, 93 (1997) (noting lack of specific sanctions in Act). The result is a situation in which officers are able to offer perfunctory or "token" disclosure with little or no prospect of adverse consequence. From the perspective of the investigator, the worst that can happen is that the case is lost. However, this is of minimal importance to the investigator as there is no personal loss incurred. Within the crime-control culture of the police, a lost case is invariably the fault of other aspects of the criminal justice system, such as the CPS or the courts. Thus, there is no loss of status or reputation attached to the ultimate failure of the prosecution. Officers are able to justify perfunctory disclosure on the grounds of workload pressure and the absence of disciplinary implications merely encourages a minimalist approach to the disclosure obligations.

192. Zacharias, *supra* note 74, at 108–09.

courts and attorney disciplinary bodies start punishing *Brady* violations more severely.<sup>193</sup> Ellen Yaroshefsky proposes that independent state and federal commissions be created to examine wrongful conviction cases and enforce disciplinary rules for prosecutors.<sup>194</sup>

Other commentators urge states to better protect the due process right. For example, Joseph Weeks suggests that states impose more substantial disclosure obligations under their state constitutions.<sup>195</sup> Janet Hoeffel argues that courts could “create better legal standards for the due process violation than those set as the floor in *Bagley*.”<sup>196</sup>

Similar solutions have been offered in Illinois. In a statement made before the Illinois House Prosecutorial Misconduct Committee, Professor Lawrence Marshall suggested that the state “put some real bite into the disciplinary system” by creating a special regulatory body to investigate and prosecute prosecutors.<sup>197</sup> As described by Professor Marshall, “Judges should be required to refer all cases on which they find misconduct to this body, and this body should be charged with the duty of ensuring that only individuals with unblemished records should be trusted with the title prosecutor.”<sup>198</sup> He also requested that the Committee consider reducing the absolute immunity provided to prosecutors to qualified immunity, which would expose prosecutors who intentionally violate disclosure rules to civil suits.<sup>199</sup> Finally, Professor Marshall appealed to legislators to statutorily augment the standard set in *Bagley*.<sup>200</sup> This particular recommendation found new life in a House bill requiring prosecutors to disclose exculpatory evidence to the defense.<sup>201</sup> The drafted statute set forth a remedy for

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193. Rosen, *supra* note 64, at 736.

194. Yaroshefsky, *supra* note 74, at 297–98.

195. Weeks, *supra* note 60, at 903–14.

196. Hoeffel, *supra* note 78, at 1151.

197. Marshall Testimony, *supra* note 68, at 6–7.

198. *Id.*

199. *Id.* at 7.

200. *Id.* at 6. Professor Marshall recommended that Illinois courts be required to reverse convictions in cases in which prosecutorial misconduct was intentional. *Id.* To avoid reversal in cases of unintentional misconduct, the state would need to prove, beyond a reasonable doubt, that the misconduct did not affect the result at trial. *Id.* In addition, Professor Marshall proposed that the state create a specialized disciplinary commission to investigate and prosecute charges of misconduct and encourage civil accountability among prosecutors by reducing the absolute immunity enjoyed by prosecutors to the qualified immunity retained by other government officials. *Id.*

201. Former State Rep. James B. Durkin, who served as chair of the House Special Committee on Prosecutorial Misconduct, sponsored this bill in February 2001. H.B. 1843 92d Gen. Assem., Reg. Sess. (Ill. 2001) available at <http://www.ilga.gov/legislation/legisnet92/hbgroups/hb/920HB1843LV.html> (last visited on Apr. 9, 2007).

*Brady* violations: new trials for defendants if prosecutors withheld exculpatory evidence absent clear and convincing evidence that the misconduct did not affect the trial outcomes.<sup>202</sup> Although the bill died in committee,<sup>203</sup> the good intentions that fueled it need not. Unless officers are held accountable for defective disclosure decisions by means of sanctions or by reversing convictions that spring from disclosure violations, there is little likelihood that they will adopt a more thorough approach to their disclosure obligations.

#### CONCLUSION

Illinois has drawn national attention in its attempts to redress a spate of wrongful convictions uncovered in recent years. As the number of death row exonerations continues to climb, the need for reform increases. This article is an important first step toward the development of a workable model of disclosure for the State of Illinois. Illinois prosecutors bear evidentiary disclosure responsibilities under the United States Constitution and state rules, but revelations of errors in capital cases demonstrate that these protections can fail, with potentially lethal consequences. Similar failures in the United Kingdom have triggered a mixture of judicial, executive, and legislative response, but the UK experience has shown that mere fortification of disclosure responsibilities is insufficient to curb violations. Reinforcement via reminders will not work to contain the adversarial and crime control culture of the prosecutor's office, but reinforcement via enforcement will. Accordingly, frank discussion among policymakers about a system of accountability for prosecutors is pivotal to stemming the injustices that flow from *Brady* violations.

American disclosure practice is built on trust—trust in prosecutors as representatives of our government to choose public justice over personal victory;<sup>204</sup> trust that, although prosecutors may strike hard blows, they will not strike foul ones.<sup>205</sup> But the mounting numbers of highly publicized wrongful convictions have shaken society's confidence in

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202. *Id.* If the failure to disclose related only to sentencing, the bill required the court to “vacate the sentence and conduct a new sentencing hearing” unless the State can establish “by clear and convincing evidence” that the sentence was appropriate. *Id.*

203. Information on the status of H.B. 1843 available at <http://www.ilga.gov/legislation/legisnet92/status/920HB1843.html> (last visited on Apr. 9, 2007). H.B. 1843 had many detractors. See *Prosecutors United to Form Response Unit*, ISBA Bar News, Vol. 41, No. 5 (Oct. 2, 2000) (describing newly formed association of 700-plus Illinois prosecutors and noting association's objections to proposed statutory changes to disclosure rule).

204. *Berger v. United States*, 295 U.S. 78, 88 (1935) (noting that prosecution's interest in criminal case “is not that it shall win a case, but that justice shall be done”).

205. *Id.*

the criminal justice system. We have begun to question our faith, and state legislators must take measures to preserve it.