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H. Mitchell Caldwell is a law professor at Pepperdine University School of Law and teaches in the areas of trial advocacy, criminal law, and criminal procedure. He has published extensively in his subject areas including his work as co-author of the acclaimed Ladies and Gentlemen of the Jury series, which included Ladies and Gentlemen of the Jury, And the Walls Came Tumbling Down, and The Devil's Advocates, published by Scribner/Simon & Schuster. He is also a co-author of The Art and Science of Trial Advocacy (2d ed. 2011).

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THE PROSECUTOR PRINCE: MISCONDUCT, ACCOUNTABILITY, AND A MODEST PROPOSAL

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> *"For unto whom much is given, of him shall much be required; and to whom men have committed much, of him they will ask more."*
> *Luke* 12:48[1]

> *"[G]reat power involves great responsibility."*
> Franklin Delano Roosevelt[2]

John Thompson's death sentence was overturned. The prosecutor had withheld forensic evidence proving Thompson's innocence. Thompson served eighteen years in prison.[3]

Three Duke lacrosse players were charged with rape. The prosecutor was aware that the "victim" had lied. The Attorney General dropped all of the charges a year later.[4]

Mark Sodersten's murder conviction was overturned. The prosecutor had withheld exonerative audiotapes. Sodersten served twenty-two years and died in prison six months before his conviction was reversed.[5]

William Ruehle was indicted for backdating stock options. The prosecutor intimidated the defense's witnesses to prevent them from testifying. A federal judge ultimately dismissed the charges, citing "shameful" conduct by prosecutor.[6]

Michael Morton served twenty-five years in prison for murder. The prosecutor failed to turn over exculpatory evidence. Morton was later exonerated by DNA evidence.[7]

Senator Ted Stevens was convicted of fraud weeks before commencing his sixth re-election campaign for the U.S. Senate. The prosecutor failed to disclose

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1. Some say that an appeal to religious authority constitutes harmful error. *See, e.g.*, Sandoval v. Calderon, 231 F.3d 1140, 1150–51 (9th Cir. 2000) ("[A]ny suggestion that the jury may base its decision on a 'higher law' than that of the court in which it sits is forbidden."); *see also* KATHLEEN M. RIDOLFI & MAURICE POSSLEY, NORTHERN CALIFORNIA INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2002, at 22, 30–31 (2010).

2. Franklin D. Roosevelt, Undelivered Address Prepared for Jefferson Day (April 13, 1945), *available at* http://www.presidency.ucsb.edu/ws/?pid=16602.

3. Connick v. Thompson, 131 S.Ct. 1350, 1355–56 (2011).

4. Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337, 1337–38 (2007).

5. *In re* Sodersten, 53 Cal. Rptr. 572, 576, 610–11 (Cal. Ct. App. 2007); *see also* RIDOLFI & POSSLEY, *supra* note 1, at 4.

6. United States v. Ruehle, 583 F.3d 600, 601–02, 613 (9th Cir. 2009); RIDOLFI & POSSLEY, *supra* note 1, at 18; *see also* Stuart Pfeifer & E. Scott Reckard, *Broadcom Fraud Charges Dismissed*, L.A. TIMES, Dec. 16, 2009, at A1, A16.

7. Morton v. State of Texas, 761 S.W.2d 876, 881 (Tex. Ct. App. 1988); *see also Ex parte* Morton, No. AP-76663, 2011 WL 4827841, at *1 (Tex. Crim. App. Oct. 12, 2011) (per curiam).

exculpatory evidence. Two and a half years later, the verdict was set aside and the indictment was dismissed.[8]

Two truths: (1) prosecutors have awesome powers, and (2) "crime is contagious."[9] In a civil society, a prosecutor's deliberate decision to misuse his power usurps foundational trust in the judicial system. The American criminal justice system is at its fairest when both sides adhere to the rules.[10] It is at its worst "when any accused is treated unfairly."[11] Although society agrees on these general principles, it cannot seem to agree on what to do with those who abuse the system.[12]

To be clear, instances of prosecutorial misconduct are relatively rare.[13] However, when prosecutors abuse their power—causing harm to individuals fighting for their liberty—they too often go unpunished and are therefore encouraged to repeat the unethical conduct.[14] Although the injustice is greater when it harms the innocent,[15] prosecutorial misconduct is still unjust when it harms the guilty, who, regardless of their crimes, are entitled to the full protection of the Constitution.[16]

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8. United States v. Stevens, No. 08-231(EGS), 2009 WL 6525926, at *1 (D.D.C. Apr. 7, 2009); *see* Paul Kane, *Sen. Ted Stevens Loses Reelection Bid*, WASH. POST, Nov. 19, 2008, at A1–A2 (describing the trial's impact on Senator Stevens's campaign).

9. Berger v. United States, 295 U.S. 78, 88 (1935) ("A prosecutor has a duty to refrain from improper methods calculated to produce a wrongful conviction. . . . [W]hile he may strike hard blows, he is not at liberty to strike foul ones."); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("If the government becomes a law-breaker, it breeds contempt for the law . . . it invites anarchy."). Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 124 (2005) ("Prosecutors who engage in misconduct strike not just hard blows, but criminal blows.").

10. Brady v. Maryland, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair. . . .").

11. *Id.*

12. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 964–65 (2009) (discussing disagreement over regulating the conduct of prosecutors).

13. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987); *see also* Kevin C. McMunigal, *Prosecutors and Corrupt Science*, 36 HOFSTRA L. REV. 437, 448 (2007) (noting that there is little information about prosecutorial misconduct).

14. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 409–16 (2001). *See generally* Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083 (1994) (observing that punishment for prosecutorial misconduct is relatively uncommon).

15. RIDOLFI & POSSLEY, *supra* note 1, at 64–66 ("It is impossible to overestimate the magnitude of the wrong done to an innocent person wrongfully convicted of a crime. The psychological, emotional and economic harm can be equivalent to the destruction of a life.").

16. *See* RIDOLFI & POSSLEY, *supra* note 1, at 4 ("Prosecutorial misconduct is an important issue for us as a society, regardless of the guilt or innocence of the criminal defendants involved in the individual cases."); Davis, *supra* note 14, at 408–13, 422–37 (explaining that prosecutorial

It seems irresponsible for a civil society, founded upon bedrock principles of integrity and honor, to tolerate unscrupulous actors with such far-reaching power.[17] These prosecutors cannot be voted out of office (though their bosses can be), and they are rarely punished for their misdeeds through the traditional channels, such as by judicial condemnation, bar association sanctions, or criminal prosecution.[18] Consequently, those channels are not an adequate deterrent.[19] While errant prosecutors who are caught abusing their office may feel the sting of a wrist-slap just long enough to reach for their local government policy handbook, they are likely to forget which aspect of their ethical obligations they intended to refresh in their mind by the time they have located the table of contents. Such is the unfortunate consequence of the ineffective sanctions levied against misbehaving prosecutors.

Because prosecutors are not subject to civil liability for misconduct,[20] they must be subject to some sort of meaningful disciplinary action. Academics and practitioners considering the problem of punishing prosecutorial misconduct agree that the disciplinary measures in place are grossly inadequate.[21] Most

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misconduct, such as overcharging, abuse of the grand jury process, and the introduction of improper evidence violates the defendant's constitutional rights).

17. *See* RIDOLFI & POSSLEY, *supra* note 1, at 4 ("Prosecutorial misconduct fundamentally perverts the course of justice and costs taxpayers millions of dollars in protracted litigation. It undermines our trust in the reliability of the justice system and subverts the notion that we are a fair society.").

18. Bibas, *supra* note 12, at 983–89 (noting that only "head prosecutors" are subject to political checks and can be voted out of office).

19. *See* David Keenan, Deborah J. Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 208–09 (2011) (highlighting Justice Thomas's language in *Connick v. Thompson*, which explained that a prosecutor's broad ability to make legal judgments is not indicative of constitutional danger); *see also* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement*, 8 ST. THOMAS L. REV. 69, 92 (2005) (emphasizing that it is an unusual case in which a court explicitly concludes that the prosecutor committed misconduct and refers the case for punishment).

20. Imbler v. Pachtman, 424 U.S. 409, 431 (1976).

21. *See, e.g.*, Davis, *supra* note 14, at 457–61 & n.364 (discussing the need for a misconduct review board, which was originally proposed in the Citizen Protection Act of 1998); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 453–55 (1992) (suggesting national judicial commissions as a method by which to address prosecutorial misconduct); Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL. W. L. REV. 373, 398–403 (2009) (lamenting the lack of effective remedies to combat prosecutorial misconduct); Lorraine Morey, *Keeping the Dragon Slayers in Check: Reining in Prosecutorial Misconduct*, 5 PHOENIX L. REV. 617, 619 (2011) (recognizing the need for an independent prosecutorial commission to regulate and discipline prosecutorial behavior and to disclose, in each case, the offending prosecutor's name, the outcome of any investigation, and any discipline that was imposed); Morton, *supra* note 14, at 1114 ("[D]isciplinary systems currently in place to remedy and deter prosecutorial misconduct are inadequate to handle the amount and nature of the ethical violations courts regularly witness."); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 982–83 (1984) (proposing that every state adopt legislation similar to a Texas statute that created a

recognize that, although misconduct should not be tolerated, the lack of accountability results in implicit acceptance of wrongdoing.[22] To deter further misconduct and abuse of power, prosecutors must be punished more severely than attorneys who hold less distinguished and privileged positions.[23] For example, prosecutors guilty of misconduct could be punished as willful perjurers, which can carry a heavy penalty.[24]

Although this approach may seem too draconian, meaningful and actionable reform is long overdue. More must be done to protect citizens from the unintended and far-reaching consequences of a prosecutor's deliberate decision to flout the Constitution and her ethical obligations. Accordingly, this Article proposes establishing independent commissions charged with investigating prosecutorial misconduct at all levels and equipped with the power to sanction, suspend, or disbar prosecutors who abuse their positions.

This Article begins by setting forth the proper role of prosecutors. The Article then examines the prevalence and consequences of prosecutorial misconduct and identifies the primary types of prosecutorial misconduct. Part IV surveys the disciplinary efforts of several jurisdictions, and Part V dissects the inadequacies of current practices in coping with the problem. Next, the Article critiques the proposals set forth by others to address prosecutorial abuse. Part VII analyzes the methodology and effectiveness of independent judicial commissions as a model for commissions regarding prosecutors. Finally, the Article proposes establishing independent commissions to effectively investigate and sanction prosecutors guilty of misconduct.

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mechanism for policing and imposing sanctions on prosecutors for their misconduct); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 276, 297–98 (2004) (noting that the current "slap on the wrist" disciplinary scheme fails to deter misconduct); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 776 (2001) (acknowledging the proposals of other commentators to establish an independent body to address prosecutorial misconduct and suggesting that, while such a measure may be "overenthusiastic[]," it is nevertheless necessary).

22. Yaroshefsky, *supra* note 21, at 277 ("While all courts, prosecutors, and defenders would certainly agree that it is 'highly reprehensible' to suppress facts or secrete evidence 'capable of establishing the innocence of the accused,' when it happens, the disciplinary consequence is often nil . . . . [T]here appears to be an implicit agreement that, absent rare circumstances, offending prosecutors should not be subject to sanctions before disciplinary committees."); *see also* Bibas, *supra* note 12, at 965–68 (noting that state legislatures have an incentive to give broad powers to prosecutors in order to reduce crime); Green, *supra* note 19, at 69–70 (explaining that many prosecutors fail to fulfill their ethical duties and that current enforcement mechanisms are inadequate to remedy the problem).

23. *See* RIDOLFI & POSSLEY, *supra* note 1, at 75.

24. *See, e.g.*, CAL. PENAL CODE § 128 (West 1999) ("Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole.").

I. THE ROLE OF THE PROSECUTOR

"Anyone entrusted with power will abuse it if not also animated with the love of truth and virtue, no matter whether he be a prince, or one of the people."

Jean de La Fontaine

Prosecutors are at the heart of the criminal justice system.[25] They initiate the process,[26] prioritize the process,[27] and, to a great extent, determine the outcome of the process.[28] For the American criminal justice system to function as intended, prosecutors must temper their power by fulfilling the ethical and professional duties owed to the defendants they prosecute.[29]

While a prosecutor has an obligation to prosecute vigorously, she has a corresponding duty to ensure a just result and to avoid wrongfully convicting innocent defendants.[30] Indeed, "the prosecutor is not only the defendant's adversary, but is also the '. . . guardian of the defendant's constitutional rights.'"[31] She may not "act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."[32] Unfortunately, idealistic words espousing the merits of an adversarial system can easily be lost in the rough-and-tumble of the competitive, and often mean-spirited, world of criminal trials.[33] Frequently, lofty notions of the prosecutor prince holding himself above

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25. *See* Berger v. United States, 295 U.S. 78, 88 (1934); Morton, *supra* note 14, at 1086 ("[Prosecutors] occupy a unique position in our adversarial system.").

26. *See* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L 223, 224–25 (2006).

27. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997 (2006) (observing that prosecutors "make key decisions in criminal matters").

28. *See* Langer, *supra* note 26, at 224–25 (arguing that prosecutors control the outcome of criminal matters because they control charging, guilty pleas, and sentencing). The Supreme Court has curtailed some of the power of state and federal prosecutors to control sentencing through the use of sentencing guidelines. *See* United States v. Booker, 543 U.S. 220, 244–46 (2005) (holding that federal sentencing guidelines are not mandatory, but rather advisory, unless the defendant admits facts necessary to enhance a sentence or the government proves them beyond a reasonable doubt at trial); Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (invalidating state sentencing guidelines that permitted prosecutors to enhance punishments without proving to a jury the acts essential to the punishment); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (holding that any increase in the penalty for a crime must be charged and proven beyond a reasonable doubt at trial).

29. *See* Morton, *supra* note 14, at 1086–87.

30. *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.").

31. People v. Sherrick, 27 Cal. Rptr. 2d 25, 27 (Cal. Ct. App. 1993) (quoting People v. Trevino, 704 P.2d 719, 725 (Cal. 1985) (en banc)).

32. Maine v. Moulton, 474 U.S. 159, 171 (1985).

33. *See, e.g.*, *id.* at 171 (overturning a conviction based on a coerced confession); Imbler v. Pachtman, 424 U.S. 409, 415–16 (1976) (detailing the false and misleading testimony introduced and the exculpatory evidence suppressed by the prosecution); Massiah v. United States, 377 U.S.

the fray give way to the grisly reality of trials that discredit and demean all participants, including the prosecutor.[34]

Abstract notions of the prosecutor's role presented in judicial opinions lack the specificity needed to properly guide the conduct of prosecutors.[35] Similarly vague is the general admonition in the American Bar Association Model Rules of Professional Conduct (MRPC), which places an affirmative duty on all lawyers to report misconduct of other lawyers.[36]

As a response to the dearth of guidance, the MRPC set forth generalized guidelines that apply to all lawyers,[37] as well as heightened responsibilities specific to prosecutors.[38] The American Bar Association Standards for Criminal Justice also impose heightened standards on prosecutors, including a specific duty to protect the rights of the defendant.[39] Beyond these non-specific notions of how prosecutors must conduct themselves in the real world of the criminal justice system, there are few concrete rules of conduct and even fewer specific consequences that may ensue for errant behavior.

201, 205–06 (1964) (illustrating the prosecutor's use of incriminating statements he knew would violate the Constitution).

34. *See Berger*, 295 U.S. at 88 (explaining that the prosecutor's role is to see that justice is done).

35. *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350, 1362–63 (citing rules governing prosecutors' behavior without explaining their practical use).

36. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2013) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."). The comment accompanying Rule 8.3 further clarifies that "[t]he term 'substantial' refers to the seriousness of the possible offense." MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 2 (2013); *see also* Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 432–33, 431 n.156 (2011) (discussing the model rules).

37. Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 223–24 & n.2 (1993) (noting that the Model Rules define "the posture lawyers should take in a variety of situations").

38. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); *see also* Washington v. Hofbaur, 228 F.3d 689, 709 (6th Cir. 2000) (cautioning that "a prosecutor must be doubly careful to stay within the bounds of proper conduct").

39. *See* RIDOLFI & POSSLEY, *supra* note 1, at 90 & n.97 (citing the applicable ABA standards).

II. PREVALENCE OF PROSECUTORIAL MISCONDUCT

Given the number of prosecutions in this country, wrongful convictions are inevitable. Mistaken identification,[40] forensic errors,[41] lying witnesses,[42] and perjuring police officers[43] all contribute to errors in the system. Those errors, although regrettable, are not the prosecutor's. Rather, when prosecutors err, the system itself becomes suspect. In recent years, prosecutors have been responsible for a number of astonishing instances of wrongful conviction.[44] Wrongful convictions hinder valuable societal interests,[45] diminish the integrity of the legal system, and foster a lack of faith in American justice.[46] Moreover, lest we lose sight of the obvious, a wrongful conviction results in fundamental injustice to a defendant by jeopardizing his livelihood, reputation, finances, and

40. The majority of wrongful convictions involved misidentification. Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 597–98 (2009) (discussing a National Institute of Justice study that reported that mistaken identification contributed to more than seventy-five percent of 183 DNA exonerations).

41. *See* JIM DWYER, PETER NEUFIELD & BARRY SCHECK, ACTUAL INNOCENCE 361 (2003) (noting that thirty-four percent of wrongful convictions "are obtained through forensics that is either incorrect or purposely falsified").

42. *See, e.g.*, Alcorta v. Texas, 355 U.S. 28, 30–32 (1957) (per curiam) (describing a case in which the prosecutor instructed a testifying witness to not volunteer exculpatory evidence); *see also* Mooney v. Holohan, 294 U.S. 103, 111 (1935) (per curiam) (considering a petition for clemency based on the prosecutor's use of perjured testimony and suppression of evidence that would impeach the lying witnesses). The most fundamental form of prosecutorial misconduct during trial is the knowing use of perjured testimony. George A. Weiss, *Prosecutorial Accountability After* Connick v. Thompson, 60 DRAKE L. REV. 199, 204, 207 (2011) (recognizing that subornation of perjury was the first type of prosecutorial misconduct that was determined to violate a defendant's right to due process); *see also* Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1414–15 (2007) (identifying the testimony of lying expert witnesses as a contributing factor to wrongful convictions).

43. Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259, 1265–69 (2005) (citing "overwhelming anecdotal evidence of widespread police perjury in our criminal justice system"); Gershman, *supra* note 21, at 397–98 (describing a situation in which police bribed public officials).

44. Davis, *supra* note 14, at 410–12.

45. Weiss, *supra* note 42, at 120; *see also Harmful Error*, CENTER FOR PUBLIC INTEGRITY, http://www.publicintegrity.org/accountability/harmful-error (last visited Jan. 14, 2014) (providing several articles that discuss prosecutorial misconduct and its effect on society).

46. *See* Weiss, *supra* note 42, at 217 & n.210 (arguing that "widespread misconduct by prosecutors leads to a lack of public faith").

psychological well-being.[47] While the courts afford "great deference" to prosecutors' integrity,[48] that trust is not always warranted.[49]

For example, one national study cited over 11,000 cases of prosecutorial misconduct, reporting that prosecutorial misconduct was a factor in the reversal, dismissal, or reduction of the defendant's sentence in roughly 2,000 of those cases.[50] Another nationwide survey, focusing on capital cases, revealed a sixty-eight percent rate of reversible error from prosecutorial misconduct.[51] The study found that, between 1980 and 1999, twenty-one percent of the wrongful convictions considered were reversed due to prosecutorial misconduct.[52] In a third study, the New York State Bar Association's Task Force for Wrongful Convictions examined fifty-three cases of wrongful conviction, over half of which may have involved misconduct by the government.[53]

III. TYPES OF PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct includes, but is not limited to, *Brady* violations, overcharging, witness tampering, suborning perjury, *Batson* errors, improper argument, and the introduction of improper evidence.

A. Brady *Violations: The Failure to Provide Required Discovery*

A prosecutor's failure to disclose exculpatory evidence is the most frequent abuse of prosecutorial power.[54] Although the disclosure requirement set forth in *Brady v. Maryland*[55] and its progeny is well established, *Brady* violations

47. *Id.* at 217.

48. *See* Hernandez v. New York, 500 U.S. 352, 364–65 (1991) (explaining that the deference awarded to prosecutors in the context of peremptory jury strikes, with which courts assume prosecutors act with great integrity and credibility).

49. *See* David G. Savage, *Registry Tallies Over 2,000 Wrongful Convictions Since 1989*, L.A. TIMES, May 20, 2012, http://articles.latimes.com/2012/may/20/nation/la-na-dna-revolution-20120521 (reporting that California, especially Los Angeles County, has exonerated a large number of wrongfully convicted defendants, in part because of prosecutorial misconduct).

50. Weiss, *supra* note 42, at 217–18. The 2,000 cases cited did not include cases that were not reversed or cases in which misconduct, although present, was not the cause of reversal. *Id.* at 218. Additionally, this figure may underestimate and neglect to distinguish between forms of misconduct. *Id.* at 218–19.

51. Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 MARSHALL L. REV. 409, 409–10 (2001).

52. Hartman & Richards, *supra* note 51, at 423.

53. TASK FORCE ON WRONGFUL CONVICTIONS, N.Y. STATE BAR ASS'N, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTION 6–7 (2009) [hereinafter FINAL REPORT OF THE NEW YORK STATE BAR], *available at* http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26663 (finding that "general errors by a government actor" contributed to wrongful conviction in thirty-one of the fifty-three cases in the study).

54. Davis, *supra* note 14, at 431 (noting that the breadth of the prosecutor's obligations under *Brady* leave room for wrongdoing).

55. 373 U.S. 83, 87 (1963).

continue to plague the criminal justice system. Prosecutors are well aware that "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."[56] Prosecutors are also aware that they must disclose evidence that, if suppressed, would deprive the defendant of a fair trial.[57] Furthermore, they are conscious of the significance of witness credibility and of their obligation to disclose evidence material to witness impeachment.[58] While the precise parameters of *Brady* continue to be refined, its basic premise is well defined and completely clear to criminal attorneys.[59] Ignorance of *Brady* obligations is seldom a reason for non-disclosure.

The battle for discovery often focuses on the timing of the *Brady* disclosure.[60] Prosecutors may disclose the necessary discovery, but often do so too late in the pre-trial process to allow defense counsel to evaluate and utilize the material properly.[61] Under these circumstances, the trial court could delay the trial to give defense counsel time to evaluate and possibly assimilate the newly acquired evidence into the defense case. However, continuance of the trial date is at the discretion of the court, and, even if granted, may not be sufficient for defense counsel to make full use of the recently acquired material.[62] Furthermore,

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56. *Id.*

57. *See* United States v. Bagley, 473 U.S. 667, 677 (1985) (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)) (explaining the requirement to disclose material information); *see also* United States v. Agurs, 427 U.S. 97, 104 (1976) (explaining that suppressing material evidence violates a defendant's due process rights).

58. *See Giglio*, 405 U.S. at 154 (noting that nondisclosure of "evidence affecting credibility" violates *Brady*).

59. Attorneys in every state are required to comply with ethics rules. *See* CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS'N, STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf (noting that every state has adopted a version of the ABA Model Rules of Professional Conduct). The ABA imposes additional ethical obligations on prosecutors, including the duty to disclose exculpatory evidence. MODEL CODE OF PROF'L RESPONSIBILITY DR 7–103(B) (2012) ("A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."). The ABA Model Rules also eliminate a prosecutor's discretion with regard to disclosure requirements and expressly prohibits presentation of false testimony. MODEL RULES OF PROF'L RESPONSIBILITY R. 3.8(d) (2013).

60. Michael A. Collora & William A. Haddad, *Exculpatory Evidence—Getting It and Using It*, CHAMPION, Mar. 2010, at 16, 17–18 (emphasizing the importance of timely *Brady* requests and disclosures for defense counsel).

61. Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 543, 558–61 (2006) (discussing the effect of late discovery on an innocent defendant's choice to plead guilty).

62. *See id.* at 600 n.238 (noting trial courts' reluctance to change trial dates).

judges and court administrators are typically reticent to continue trials that complicate their calendars.[63]

Additionally, exculpatory evidence may not come to light until after trial. The only likely remedy in such cases is a new trial (if the disclosure so permits),[64] or an appeal, in which the harmless error doctrine dramatically reduces the defendant's chances of success.[65] In yet other cases, prosecutors may never disclose discoverable materials.

Typical sanctions for *Brady* violations might include a verbal admonition from a trial judge, or perhaps a rebuke by an appellate court, that will likely have no effect on the verdict under harmless error rationale.[66] More severe sanctions are rare, and, as a result, prosecutors are emboldened by their success in obtaining guilty verdicts by unethical means.[67]

B. Overcharging

The prosecutor's exclusive role as the charging agent and as the negotiator in the inevitable case-disposition process is fraught with the potential for abuse.[68] The expectation of plea bargaining provides an incentive to prosecutors to better position themselves for negotiation.[69] Charging a greater offense than the defendant's conduct warrants, or adding an enhancement of little merit, gives an unfair advantage to the prosecutor.[70] Although it may seem counterintuitive to charge crimes that the prosecutor cannot prove beyond a reasonable doubt, overcharging forces the defendant to determine whether going to trial is worth

63. *See* Johns, *supra* note 9, at 66 (citing political concerns—the fear of appearing soft on crime—as one reason judges do not address misconduct); *cf.* Ginny Sloan, *Congress Must Act to End Prosecutorial Misconduct*, HUFF POST, (Apr. 11, 2012, 11:41 AM), http://www.huffingtonpost.com/ginny-sloan/congress-must-act-to-end-_b_1415695.html (arguing that courts cannot solve the problem of prosecutorial misconduct).

64. *See* FED. R. CRIM. P. 33 (authorizing a new trial "if the interest of justice so requires").

65. *See* Smith v. Phillips, 455 U.S. 209, 219–20 (1982).

66. *See* Davis, *supra* note 14, at 412 (noting that reversal following a *Brady* violation is rare); Gershman, *supra* note 21, at 424–25 (arguing that the harmless error rule indicates to prosecutors that their misconduct will be ignored).

67. *See* Davis, *supra* note 14. A prosecutor may not be compelled to bring or drop charges and what charges to bring are vested upon his judgment. McKlesky v. Kemp, 481 U.S. 279, 311–12 (1987); Gershman, *supra* note 21, at 408–11 nn.95–97.

68. *See* Gershman, *supra* note 21, at 405–06 (describing the prosecutor's broad discretionary power).

69. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 84 (2011).

70. Davis, *supra* note 14, at 413 (suggesting that prosecutors overcharge to create leverage for plea bargaining); *see also* Langer, *supra* note 26, at 240 (arguing that, because prosecutors control the charges in a criminal case, they have the ability to "threaten defendants with trial sentences that are not appropriate to the case").

the risk of the devastating penalties the inflated charges carry.[71] Given such a difficult choice, defendants may plead to charges beyond their level of culpability to eliminate the risk of greater consequences.

Overcharging to gain a competitive advantage in the give-and-take of plea bargaining is an insidious abuse of the prosecutor's power.[72] The MRPC requirement that prosecutors bring only those charges supported by probable cause[73] is inadequate to address overcharging because probable cause is a minimal threshold that is well below what is required to convict.[74] Consequently, the MRPC is insufficient to deter unprincipled prosecutors from overcharging to gain a tactical advantage.

C. Witness Tampering

Prosecutorial misconduct may extend as far as deliberate interference with or an attempt to influence the testimony of witnesses at trial.[75] Prosecutors are ethically bound to communicate with witnesses and the defendant appropriately.[76] Improper witness examinations, misrepresentation of information, intimidation of witnesses, deliberate communication with the defendant outside the presence of counsel, or interference with defense counsel's access to witnesses or defendants while preparing her case may all constitute prosecutorial misconduct.[77]

The federal witness tampering statute criminalizes the use of intimidation or physical force with the intent to influence the testimony of a witness in any court proceeding.[78] Acting with intent to influence a witness's testimony means to act

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71. Davis, *supra* note 14, at 413 (noting that, in situations in which prosecutors overcharge to gain leverage, defendants plead guilty out of "fear of being convicted of all of the charges brought in the indictment," despite the fact that the prosecutor likely cannot prove these charges at trial).

72. Bibas, *supra* note 12, at 971 (characterizing this type of overcharging as coercive); Langer, *supra* note 26, at 233–41 (same).

73. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2013) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."). Once the prosecutor has established probable cause for a charge, courts generally defer to the prosecutor's discretion in what charges to bring. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

74. *See* Bibas, *supra* note 12, at 970–71; *see also* Davis, *supra* note 14, at 413–14 (observing that prosecutors typically charge offenses that they cannot prove beyond a reasonable doubt at trial).

75. *See* FINAL REPORT OF THE NEW YORK STATE BAR, *supra* note 53, at 19 (citing "government practices," including threatening and offering favors or benefits to witnesses, as a cause of wrongful convictions).

76. MODEL RULES OF PROF'L CONDUCT R. 3.8 (defining the parameters in which a prosecutor may interact with the defendant and witnesses).

77. RIDOLFI & POSSLEY, *supra* note 1, at 34–35.

78. 18 U.S.C. § 1512(a)–(b) (2006 & Supp. V 2012) (requiring proof, beyond a reasonable doubt, that (1) the witness was scheduled to testify in court, (2) the offender used intimidation or

for the purpose of persuading the witness to change, color, or shade his testimony in some way.[79] It is not necessary to prove that the witness's testimony did, in fact, change.

D. Suborning Perjury

The most basic form of prosecutorial misconduct is the prosecutor's use of perjured testimony—conduct that clearly violates due process.[80] Prosecutors have the duty to present true testimony, as well as the corresponding duty to correct false testimony.[81] Thus, a prosecutor commits misconduct not only by soliciting false testimony, but also by presenting any testimony that he knows to be false or incorrect,[82] including evidence related solely to the witness's credibility.[83] For instance, if a witness falsely denies having received a deal in exchange for offering testimony, the prosecutor is obligated to report such perjury.

Despite this duty, reports indicate that many times witnesses are, in fact, advised to testify falsely. For example, in *Napue v. Illinois*, the defendant was convicted of murder primarily based on an accomplice's testimony, even though the prosecution was aware that the witness intentionally committed perjury.[84] The accomplice testified that he was not promised anything in return for his testimony,[85] while, in fact, he was promised a reduced sentence in exchange for his cooperation.[86]

Similarly, in *Miller v. Pate*, the Supreme Court vacated the defendant's conviction because of the prosecution's misrepresentations to the jury at trial.[87] The prosecutor repeatedly led the jury to believe that the large stain on the

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physical force against the witness, and (3) the offender did so knowingly and willfully, with the intent to influence the witness's testimony).

79. *Id.*

80. Pyle v. Kansas, 317 U.S. 213, 215–16 (1942) (concluding that the prosecution's knowing use of perjured testimony constituted "a deprivation of rights guaranteed by the Federal Constitution"); Weiss, *supra* note 42, at 204–05 (noting that subornation of perjury was the first form of prosecutorial misconduct to create a deprivation of due process); *see also* Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam) ("Safeguarding the liberty of the citizen against deprivation through the actions of the state embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions."); Ridolfi & Possley, *supra* note 1, at 32 (discussing the due process consequences of a prosecutor's misrepresentation concerning the presumption of innocence).

81. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The prosecution cannot present evidence it knows is false and must immediately correct any falsity of which it is aware even if the false evidence was not intentionally submitted.").

82. Alcorta v. Texas, 355 U.S. 28, 31–32 (reversing and remanding the case because the prosecutor elicited testimony from a witness that misled the jury).

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

84. *Id.* at 265.

85. *Id.* at 270–71.

86. *Id.* at 265.

87. 386 U.S. 1, 3–4, 6 (1967).

defendant's shorts was the victim's blood.[88] The prosecutor relied on the emotional impact of the stain on the jury to obtain a death penalty conviction, despite knowing that most of the stains were actually paint.[89]

E. Improper Jury Selection

Jury selection is another process ripe for abuse. The push and pull for the "right" group of jurors tends to bring out competitive instincts in the advocates on both sides of the courtroom.[90] The competitive instinct to "win" can often override any sense of fairness.[91]

Challenging prospective jurors for legitimate reasons, such as an obvious conflict of interest, is far different from excluding jurors for illegitimate reasons, such as race, religion, ethnicity, or sexual orientation.[92] The challenge is greatest for prosecutors when the defendant belongs to a minority group and the prosecution is confronted with a prospective juror of the same race, or when a juror has strong religious convictions that may limit his ability to convict.[93]

Using peremptory challenges to strike prospective jurors on the grounds of bias against an identifiable group of people, based on race, religion, ethnicity, or similar grounds violates a defendant's right to equal protection under the Constitution.[94] Inappropriate peremptory challenges may also violate the defendant's right to be tried by a jury drawn from a representative cross-section of the community under the relevant state constitution.[95] As set forth in *Batson v. Kentucky*, the Constitution "forbids the prosecutor to challenge

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88. *Id.*

89. *Id.* at 2–4, 6 Similarly, in *Brown v. Borg*, the prosecutor failed to disclose to the jury that some of the evidence presented was not actually stolen in the robbery that served as the basis for the defendant's felony murder conviction. 951 F.2d 1011, 1015 (9th Cir. 1991). The court considered the prosecutor's conduct "intolerable" and a perversion of "the adversarial system [that] endangers its ability to produce just results." *Id.*

90. *See generally* James R. Gadwood, *The Framework Comes Crumbling Down: Juryquest in a* Batson *World*, 88 B.U. L. REV. 291, 291–98 (2008) (describing the different methods of jury selection).

91. *See id.* at 318–19 (concluding that both prosecutors and defense attorneys select jurors using improper methods).

92. Jeffrey L. Kirchmeier et al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1349–50 (2009).

93. *See id.*

94. *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding that exclusion of jurors based on race can violate the Equal Protection Clause whether or not the defendant and the excluded juror are the same race); Batson v. Kentucky, 476 U.S. 79, 88 (1986) (concluding that choosing jurors on racial grounds contravenes the Fourteenth Amendment); People v. Davis, 208 P.3d 78, 115 (Cal. 2009) ("Both the [California] and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity."); People v. Hamilton, 200 P.3d 898, 929 (Cal. 2009) (acknowledging that peremptory strikes based on race violate the defendant's rights to due process, equal protection, and a fair trial).

95. Gadwood, *supra* note 90, at 318–19. For example, the California Constitution considers a jury trial "an inviolate right." CAL. CONST. art. I, § 16.

potential jurors solely on account of their race or on the assumption that [same minority] jurors as a group will be unable impartially to consider the State's case against a [same minority] defendant."[96] It is an unfortunate reality that many prosecutors will attempt to justify their illegitimate challenge by claiming some neutral reason, though still being motivated by the juror's race or religion.[97]

F. Improper Argument

The prosecution is bound to make only appropriate arguments to the judge or jury.[98] One form of improper argument is the prosecutor's endorsement of a witness's truthfulness, as it is widely recognized that "the prosecutor's opinion carries with it the [weight] of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."[99] Inappropriate strategy also includes testifying on behalf of an absent witness.[100] Similarly, a prosecutor commits misconduct by misstating the law, offering his personal opinion, impugning the defense to the jury, or appealing to religious authorities.[101]

G. Introduction of Improper Evidence

The introduction of improper evidence during trial may entail using impermissible out-of-court statements in an attempt to prove a defendant's bad character,[102] or employing tactics to inflame the jury's prejudice against the defendant.[103] To bolster his case, a prosecutor may also introduce, or obtain via witness testimony, inadmissible or prejudicial evidence, even if he knows such

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96. *Batson*, 476 U.S. at 89.

97. *See* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 303–10 (2007).

98. *See* Caldwell v. Mississippi, 472 U.S. 320, 332–34 (1985).

99. United States v. Young, 470 U.S. 1, 18–19 (1985).

100. *See* RIDOLFI & POSSLEY, *supra* note 1, at 27–28. Testifying for an absent witness denies the defendant his Sixth Amendment right to confront and cross-examine that witness. *Id.*

101. RIDOLFI & POSSLEY, *supra* note 1, at 22–23, 30–31; *see also* CAL. RULES OF PROF'L CONDUCT R. 5–200 (2013) (prohibiting attorneys from making a false statement of law to mislead the factfinder); RIDOLFI & POSSLEY, *supra* note 1, at 28 (noting that a prosecutor's misstatement of law could confuse the jury). Such misconduct "tends to diminish the jury's sense of responsibility for its verdict and to imply that another, higher law should be applied." People v. Wrest, 839 P.2d 1020, 1028 (Cal. 1992); *see also* Sandoval v. Calderon, 231 F.3d 1140, 1149–52 (9th Cir. 2000) (proscribing the prosecutor's appeal to religious authority).

102. *See, e.g.*, Good v. State, 723 S.W.2d 734, 735–36 (Tex. Crim. App. 1986). In *Good*, the prosecutor characterized the defendant's attitude and character during his testimony as evidence of guilt. *Id.* at 735. The court concluded that the "prosecutor focused upon the demeanor appellant exhibited during the complainant's testimony, characterizing it as 'cold, unnerved, uncaring.'" *Id.* at 736. The court held that the prosecutor's argument was improper. *Id.*

103. *See* People v. Piper, 162 Cal. Rptr. 833, 839 (Cal. Ct. App. 1980) (finding misconduct because the prosecutor failed to comply with the trial court's order to refrain from referencing the defendant's alcohol use, via the introduction of an exhibit, regardless of whether the reference was intentional).

evidence will immediately draw an objection from defense counsel and a curative instruction from the judge.[104] Prosecutors who engage in this sort of misconduct are not concerned with the court's invocation of prophylactic measures. Rather, the prosecutor's goal is simply to ensure that the jury hears the objectionable evidence. Admonished or not, the prosecutor has spoken the words aloud to the jury, and the damage to the defendant is already done. The same is true in proceedings in which the judge has already ruled that particular evidence is inadmissible, but the prosecutor ventures into the forbidden territory regardless of the ruling.[105] The reasoning is the same; the prosecutor only wants the jury to hear the evidence, and he knows that the judge likely will not hand down anything more than a limiting curative instruction, which has a minimal impact in terms of correcting the misconduct.

For example, even when a prosecutor has stipulated that an informant will not testify, the prosecutor may deliberately ignore his ethical obligation to abide by such a stipulation.[106] Likewise, it is improper for a prosecutor to ask "improperly argumentative" questions that are not designed to elicit helpful evidence.[107] In fact, a prosecutor is bound to *predict*, within reason, whether a witness might engage in misconduct at trial, and to subsequently advise the witness to control his answers to provide admissible responses.[108] Naturally,

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104. Prosecutors cannot knowingly elicit improper evidence by intentionally eliciting testimony that the trial court previously ruled inadmissible. People v. Bonin, 46 Cal. 3d 659, 689 (1988) (finding misconduct because the prosecutor elicited testimony about the defendant's other crimes); *see also* People v. Dagget, 275 Cal. Rptr. 287, 290–91 (Cal. Ct. App. 1990) (admonishing the prosecutor for "unfairly [taking] advantage of the judge's ruling" by asking the jury to draw an inference based on evidence that the judge had excluded); People v. Hudson, 179 Cal. Rptr. 95, 96–100 (Cal. Ct. App. 1981) (reversing the defendant's conviction because of the prosecutor's repeated attempts to elicit hearsay and disparaging character evidence).

105. People v. Luparello, 231 Cal. Rptr. 832, 839–40 (Cal. Ct. App. 1986) (concluding that the prosecutor's questioning violated the court's directive regarding evidence of the codefendant's prior bad acts); People v. Parsons, 203 Cal. Rptr. 412, 415–16 (Cal. Ct. App. 1984) (finding misconduct because the prosecutor elicited evidence of the criminal defendant's prior arrest, even though the prosecutor was aware that the trial court had ruled the evidence inadmissible).

106. *See* People v. Bell, 745 P.2d 573, 579 (Cal. 1987) (concluding that a prosecutor acted improperly because, after stipulating to the court that an informant's testimony would not be introduced, he proceeded to read the informant's statement to the jury by incorporating it into a question). Similarly, a prosecutor commits misconduct by introducing evidence he promised not to introduce by agreement between himself and the defendant. *See* People v. Quartermain, 941 P.2d 788, 798–99 (Cal. 1997) (emphasizing that "when a prosecutor makes a promise that induces a defendant to waive a constitution protection and act to his or her determinant in reliance on that promise, the promise must be enforced" and vacating the defendant's conviction because the prosecutor introduced the defendant's incriminating statements after promising that he would not in exchange for the defendant's waiver of his right to testify).

107. People v. Johnson, 135 Cal. Rptr. 2d 848, 852 (Cal. Ct. App. 2003) (prohibiting questions that go "beyond an attempt to elicit facts within the [witness's] knowledge and [are] instead designed to engage him in an argument").

108. People v. Warren, 754 P.2d 218, 224–25 (Cal. 1988) (holding that a prosecutor "has the duty to guard against statements by his witnesses containing inadmissible evidence").

should a witness commence such testimony without any warning, the prosecutor would not be liable for the inappropriate testimony.

However, what constitutes inappropriate cross-examination of the defendant remains unclear. The Ninth Circuit, for example, decided that the jury—not the prosecutor—must evaluate a defendant's credibility, and therefore it would be misconduct for a prosecutor to attempt to discredit the defendant at trial.[109]

IV. SURVEY OF APPROACHES TO ADDRESSING PROSECUTORIAL MISCONDUCT

One commentator recently observed that "[n]o institution or entity has yet established a system to examine the large percentage of wrongful convictions due to prosecutorial misconduct and to attempt to make recommendations to deter such misconduct."[110] Consequently, one can only guess the number of cases in which prosecutors' misconduct results in wrongful convictions. Despite the absence of a system that can accurately track the percentage of wrongful convictions, some scholars have noted efforts to investigate and sanction prosecutorial misconduct.[111] Therefore, it is necessary to examine both past and present approaches to monitoring prosecutorial behavior before attempting to offer a solution.

Every state has a bar association that, among other traditional responsibilities, is responsible for attorney discipline.[112] Each year, over 125,000 complaints are lodged against the 1.3 million practicing attorneys in the United States.[113] Nearly all of the complaints arise from civil cases.[114] Prosecutor misconduct is not typically reported to state bar associations, and, even if it is reported, bar

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109. *See* United States v. Combs, 379 F.3d 564, 572 (9th Cir. 2004) (finding misconduct because the prosecutor asked a witness whether another witness was lying, and then endorsed that witness's testimony in his closing argument); People v. Zambrano, 21 Cal. Rptr. 3d 160, 170 (Cal. Ct. App. 2004) (refusing to hold that all argumentative questions are improper because, on occasion, it is "necessary to clarify a witness's testimony"). *Zambrano* can be distinguished because the prosecutor's questions were clearly impermissible because they were intended only to "berate [the] defendant . . . and to force him to call the [police] officers liars in an attempt to inflame the passions of the jury." *Id.*; *see also* United States v. Geston, 299 F.3d 1130, 1136 (9th Cir. 2002) (holding that it was erroneous to request a witness to testify to the veracity of another witness's statements because this type of credibility determination is the responsibility of the jury); United States v. Sanchez, 176 F.3d 1214, 1219–21 (9th Cir. 1999) (concluding that the prosecutor committed misconduct by compelling a witness to give his opinion of another witness's credibility); People v. Foster, 3 Cal. Rptr. 3d 535, 539–40 (Cal. Ct. App. 2003) (discussing several lines of "'were they lying' questions" cases).

110. Yaroshefsky, *supra* note 21, at 285.

111. *See, e.g.*, *id.* at 286–88 (discussing the ABA's efforts to establish standardized ethical guidelines for prosecutors).

112. *See* Brian K. Pinaire, Milton Heumann & Christian Scarlett, *"Philadelphia Lawyers": Policing the Law in Pennsylvania*, 2012 A.B.A. J. PROF. LAW. 137, 148–49 (2012) (explaining that many states established bar associations in reaction to an ABA Commission report, known as the "Clark Report," that revealed that discipline for attorney misconduct was virtually nonexistent).

113. *Id.* at 148.

114. *Id.* (noting that private citizens are largely responsible for these complaints).

associations generally do not investigate the claims or initiate disciplinary proceedings.[115]

The American Bar Association's (ABA) Center for Professional Responsibility has collected and analyzed national data concerning attorney misconduct.[116] Although the scope of this information is certainly expansive, the submission of information is purely voluntary and therefore limits the utility of the analysis.[117] For example, if a particular jurisdiction does not maintain the category of data requested (or should a jurisdiction not engage in certain activities), the Commission can only estimate the relevant data in an effort to render an integrated and meaningful statistical analysis.[118] The Commission publishes its results in the *ABA Survey on Lawyer Disciplinary Systems* (SOLD), which details the scope of each jurisdiction's disciplinary enforcement policies, caseload tally, and budgetary information.[119]

The state bar association model has little impact on prosecutors, partly because of the type of complaint that triggers a bar association inquiry. Civil complaints generally focus on financial matters, such as complaints over fees or commingling of assets, which bar associations are equipped to address.[120] Conversely, victims of prosecutorial misconduct typically report misconduct directly to the trial or appellate court hearing their cases because no state has established a disciplinary system to specifically address alleged prosecutorial misconduct.[121]

With rare exceptions, it is left to supervisors in prosecutors' offices to investigate and, if appropriate, sanction errant prosecutors.[122] However, internal investigations are suboptimal.[123] For example, one study of the efficacy of

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115. Brad Heath & Kevin McCoy, *States Can Discipline Federal Prosecutors, Rarely Do*, U.S.A. TODAY (Dec. 8, 2010, 11:04 PM), http://usatoday30.usatoday.com/news/washington/judicial/2010-12-09-RW_prosecutorbar09_ST_N.htm.

116. STANDING COMM. ON PROF'L DISCIPLINE, AM. BAR ASS'N, 2009 SURVEY ON LAWYER DISCIPLINE SYSTEMS (2010) [hereinafter 2009 SOLD REPORT], *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/discipline/2009sold.authcheckdam.pdf.

117. *See 2009 ABA Survey on Lawyer Discipline Systems (S.O.L.D.)*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/resources/survey_lawyer_discipline_systems_2009.html (last visited Jan. 24, 2014).

118. *Id.*

119. *Id.* Other categories include lawyer population, case-processing statistics, sanctions imposed, and disciplinary counsel, among other categories. *Id.*

120. *See* 2009 SOLD REPORT, *supra* note 116, at 3 (reporting that 857 attorneys in New York's First Judicial Department were suspended for failing to pay registration fees).

121. *See* Yaroshefsky, *supra* note 21, at 285 ("No institution has yet established a system to examine the large percentage of wrongful convictions due to prosecutorial misconduct and to attempt to make recommendations to deter such misconduct.").

122. *See* Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors will be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 542–43 (2011) (emphasizing prosecutors' offices' inability to effectively sanction and deter misconduct).

123. *Id.* at 542.

internal investigation found that, of 381 cases in which convictions were overturned because the prosecutor concealed or falsified evidence, only three prosecutors were minimally reprimanded and no prosecutor was disbarred or publicly sanctioned.[124]

Prosecutorial misconduct is particularly prevalent in California, Illinois, and New York.[125] California's Commission on the Fair Administration of Justice studied 2,131 cases in which allegations of prosecutorial misconduct were raised.[126] Appellate courts found prosecutorial misconduct in 444 of these cases, overturning fifty-four.[127] Although California law requires allegations of misconduct to be reported to, and investigated by, the state bar association, the study revealed that none of the fifty-four overturned cases was referred to the bar association.[128]

Perhaps recognizing that their attorneys lack meaningful oversight, some states have taken additional steps to restructure their attorney disciplinary schemes. Some states collaborate with their bar associations, while others have created committees, independent of their state bars, that are under the direct supervision of the states' highest courts.[129] A number of states have instituted disciplinary schemes independent of the traditional bar association model.[130] However, because these schemes still address both civil and criminal matters, meaningful oversight and discipline of prosecutors continues to be elusive.

A. Colorado

In January 1999, Colorado established a new Attorney Regulation Counsel, which investigates attorney misconduct and recommends sanctions to the state's

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124. Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, CHI. TRIB., Jan. 11, 1999, at C1.

125. *See id.* (revealing that New York and Illinois ranked highest for reversals attributed to prosecutorial misconduct); Savage, *supra* note 49 (reporting that California, especially Los Angeles County, follows just behind Illinois in the greatest number of exonerations attributable to prosecutorial misconduct).

126. CAL. COMM. ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 71 (Gerald Uelmen & Chris Boscia eds., 2008) [hereinafter CAL. FINAL REPORT], *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf.

127. *Id.*

128. *Id.*

129. An independent study revealed that about half of the states have created disciplinary systems under the direct supervision of the state's highest court. These states include Arkansas, Colorado, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, and Wisconsin. *See generally* AM. BAR ASS'N, DIRECTORY OF LAWYER DISCIPLINARY AGENCIES 2012-13 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/directory_of_lawyer_disciplinary_agencies.authcheckdam.pdf.

130. Jennifer M. Kraus, *Attorney Discipline Systems: Improving Public Perception and Increasing Efficacy*, 84 MARQ. L. REV. 273, 278–82 (2000) (discussing the disciplinary schemes in Colorado, Minnesota, Michigan, Indiana, California, Montana, Pennsylvania, and New York).

Regulation Committee.[131] The Counsel reviews all attorney grievances, not just allegations of prosecutorial misconduct.[132] The Counsel adjudicates formal charges by three-member panels comprised of one sitting judge and two members appointed by the Colorado Supreme Court from a pool of lawyers and members of the public.[133] Since the implementation of the new scheme, more than two hundred attorneys have been investigated and prosecuted.[134] Between March and September of 2012, twenty-nine Colorado attorneys who engaged in misconduct were sanctioned, including private and public admonition and suspensions.[135] However, none of these attorneys were prosecutors.[136] Moreover, although Colorado also created a separate council within the district attorney's office to "promote, foster, and encourage an effective administration of criminal justice," the council is not responsible for disciplinary measures.[137]

B. Minnesota

Like Colorado, Minnesota abandoned the state bar model and instituted a disciplinary system with several components that execute different disciplinary functions.[138] Minnesota's Lawyers Professional Responsibility Board (LPRB), which is comprised of twenty-three members appointed by the Minnesota Supreme Court, oversees attorney discipline.[139] The Board is divided into several three-member panels that preside over hearings to determine whether there is probable cause for public discipline.[140] In 2008, the Supreme Court

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131. *Id.* at 280. The Regulation Committee is responsible for screening and investigating complaints. *Id.* The Committee is comprised of six attorneys and three members of the public. *Id.*

132. *See id.* (making no distinction between civil and criminal attorneys); *Colorado Supreme Court – Attorney Regulation Counsel*, COLO. SUP. CT., http://www.coloradosupremecourt.com/Regulation/Regulation.asp (last visited Jan. 24, 2014) (same).

133. Kraus, *supra* note 130, at 280; *see also* Press Release, Colo. Judicial Branch, Colo. Supreme Court Selects William R. Lucero as Presiding Disciplinary Judge (Feb. 12, 2004), *available at* http://www.courts.state.co.us/Media/Press_Releases.cfm?year=2004 (select "Feb 04" tab and click on the corresponding link).

134. *Office of the Presiding Disciplinary Judge*, COLO. SUP. CT., http://www.coloradosupremecourt.com/PDJ/pdj.htm (last visited Jan. 24, 2014). Opinions and reports released on this website indicate 232 opinions, many of which imposed sanctions. *Id.*

135. *Id.* An independent search of all of the posted opinions indicated that twenty-nine cases resulted in sanctions.

136. *Id.*

137. *About CDAC*, COLO. DISTRICT ATTORNEY'S COUNCIL, http://www.cdacweb.com/CDAC/AboutCDAC.aspx (last visited Jan. 24, 2014). The Council provides services for effective prosecution, including training, legal research, and management assistance. *Id.*

138. *About the Lawyers Professional Responsibility Board*, MINN. OFF. LAWS. PROF. RESP., http://lprb.mncourts.gov/AboutUs/Pages/default.aspx (last visited Jan. 24, 2014).

139. *Id.* The Board is comprised of fourteen lawyer members and nine non-lawyer members. *Id.*

140. *Id.* More than 327 lawyers and non-lawyers dedicate their time to investigating complaints and provide recommendations based on their expertise of appropriate disciplinary actions for the board to consider. Kent Gernander & Charles Lundberg, *What Works Well and Why*, BENCH & BAR (Feb. 2006), http://www.mnbar.org/benchandbar/2006/feb06/prof_response.htm.

Advisory Committee concluded that Minnesota's disciplinary system was "'healthy' and working well."[141] In 2011, the LPRB received 1,337 complaints alleging misconduct.[142] Twenty-six attorneys were publicly disciplined, but only two attorneys were disbarred, on the basis of dishonesty and misappropriation and disciplinary history.[143] None of the disciplined attorneys were prosecutors.[144]

C. Indiana

Indiana has also shifted disciplinary authority from the state bar association to the judicial branch.[145] However, once again, the investigative and disciplinary functions do not distinguish between civil and criminal attorneys, or between prosecutors and criminal defense attorneys.[146] In 2011, the Indiana Judicial Branch Disciplinary Commission filed sixty-three verified complaints of attorney misconduct with the Indiana Supreme Court, including at least one against a prosecuting attorney.[147] However, that prosecutor received a 120-day suspension for his actions as a private practitioner, not for prosecutorial misconduct.[148]

D. Montana

On July 1, 2002, the Montana Supreme Court also created an attorney regulation system independent of the state bar association.[149] Like its

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141. REPORT OF THE SUPREME COURT ADVISORY COMMITTEE TO REVIEW THE LAWYER DISCIPLINE SYSTEM 11 (2008), *available at* http://lprb.mncourts.gov/AboutUs/Supreme%20Court%20Advisory%20Report/Supreme%20Court%20Advisory%20Commitee%20Report.pdf (characterizing district ethics committees as vital and urging continuation of the system). In 2011, the Director's Office implemented eighty-two percent of the District Ethics Committees recommendations. ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD 24 (2012), *available at* http://lprb.mncourts.gov/AboutUs/Documents/2012%20Annual%20Report.pdf.

142. ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, *supra* note 141, at 2 (noting that this was a slight decrease from 2010, in which 1,365 complaints were filed).

143. *Id.* at 4.

144. *See id.* at A7.

145. *See* Donald R. Lundberg, *Two Case Studies in the Exercise of Discretion in Lawyer Discipline Systems*, 2009 A.B.A. J. PROF. LAW. 107, 107 n.2, 108 (2009) (describing Indiana's attorney discipline system).

146. *See id.* at 113–20 (describing Indiana's discipline scheme with regard to attorneys in general, not solely prosecutors).

147. INDIANA SUPREME COURT, 2010–2011 ANNUAL REPORT 37–39 (2011), *available at* http://www.in.gov/judiciary/supreme/files/1011report.pdf.

148. *Id.* The sanctioned attorney negotiated a contract to bring civil forfeiture suits against criminal defendants' property as a private practitioner. *Id.*

149. OFF. OF DISCIPLINARY COUNS. FOR THE ST. OF MONT., ODC'S 2011 ANNUAL REPORT 1 (2012), *available at* http://montanaodc.org/Portals/ODC/2011%20Annual%20Report.pdf. Before July 1, 2002, the State Bar Association was the primary attorney disciplinary regime in Montana. *Id.* at 16. The state restructured its disciplinary regime to include the Office of Disciplinary Counsel

counterparts in other states, the Montana Office of Disciplinary Counsel also addresses the misconduct of both civil and criminal attorneys.[150] In 2011, only six percent of the complaints filed alleged misconduct by prosecuting attorneys, none of whom were sanctioned publicly.[151]

E. West Virginia

In a few states, special prosecutors are appointed by court order in situations in which the previously assigned prosecutor is unfit to continue.[152] In West Virginia, judges are responsible for the investigation and discipline of prosecutors in their courtrooms.[153] Specifically, judges have the authority to remove prosecutors and to appoint special prosecutors if misconduct occurs.[154] However, the West Virginia Supreme Court is generally reluctant to exercise this authority and has limited the scope of its power to the disqualification of prosecutors with conflicts of interest.[155] Additionally, the court has established constitutional protections for the accused attorney, which require notice and an opportunity for a hearing before the court can disqualify him and appoint a special prosecutor to continue the case.[156]

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and the Commission on Practice under the supervision of the Supreme Court of Montana. *Id.* In 2011, reports indicated that, between 1992 and 2002, there were approximately fifty-eight public disciplinary orders against Montana lawyers. *Id.* at 8. However, from 2003 to 2011, reports indicated 144 public disciplinary rulings, an increase since the new regime was enacted. *Id.*

150. *Id.* at 1–3 (failing to differentiate between criminal and civil attorneys). From 2007 to 2011, over fifty percent of complainants were current or former clients alleging misconduct on behalf of their retained attorneys. *Id.* at 12. Only an average of two percent of complaints were received from the courts. *Id.*

151. *Id.* at 13.

152. *See* Abby L. Dennis, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 145–46 (2007). The appointment of a special prosecutor is not limited to disqualifications based on misconduct. *See id.* at 146. For example, in North Carolina, the Special Prosecution Division was not enacted to investigate and discipline misconduct, but rather to expedite trials and provide trial assistance and resources for complex issues. *Id.* This discussion of special prosecutors is limited to those states that use special prosecutors to tackle prosecutorial misconduct in the courtroom. *Compare* W. VA. CODE ANN. § 7-7-8 (LexisNexis 2010) (vesting the power to appoint a special prosecutor in judicial officials), *with* CAL. GOV'T CODE § 12550 (West 2011) (vesting the power to appoint a special prosecutor in the attorney general), *and* Johnson v. Pataki, 691 N.E.2d 1002, 1003, 1007 (N.Y. 1997) (concluding that supersession was appropriate in a death penalty case in which the prosecutor threatened the "faithful execution of the death penalty law").

153. W. VA. CODE § 7-7-8 ("If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney to act in that case.").

154. *Id.*; *see also* Dennis, *supra* note 152, at 149–50 (citing West Virginia as an example of a state that vests the power to appoint special prosecutors in the state judiciary).

155. Dennis, *supra* note 152, at 15 (indicating that a conflict of interest arises only if "the prosecutor has a direct personal interest in the proceeding").

156. Dennis, *supra* note 152, at 150; *see Ex rel.* Brown v. Merrifield, 389 S.E.2d 484, 487 (W. Va. 1990) (explaining that the judge acted outside of the scope of his authority under

F. New York

New York has addressed attorney misconduct by creating several grievance committees that are responsible for investigating reported misconduct and disciplining offending attorneys.[157] Despite these general efforts to reduce misconduct, New York has failed to address prosecutorial misconduct specifically.[158] The state generally delegates the oversight of prosecutors to individual district attorneys' offices.[159] However, these offices continually fail to report misconduct to the proper disciplinary authority and to discipline their prosecutors for discovered misconduct.[160] According to a study conducted by the New York State Bar Association's Task Force on Wrongful Conviction,[161] of fifty-three cases that resulted in a wrongful conviction, no public disciplinary steps were taken against the prosecutors, only one prosecutor was referred to a disciplinary committee, and only one prosecutor was sanctioned internally.[162]

G. Illinois

Illinois imposes statutory requirements on legal professionals to report certain instances of attorney misconduct.[163] Attorneys who breach their duty to report are subject to suspension.[164] In 1999, an elaborate study by the *Chicago Tribune* of the fifty-nine attorney disciplinary agencies nationwide revealed that Illinois was second only to New York in the number of wrongful convictions attributed

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§ 7-7-8 because he appointed a special prosecutor without providing the former prosecutor with notice or the opportunity for a hearing).

157. *Attorney Grievance Committees: Complaints About Attorneys*, N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/ip/attorneygrievance/complaints.shtml (last visited Jan. 24, 2014); Rudin, *supra* note 122, at 547 (noting that the grievance committees are tasked with investigating and disciplining misconduct and may initiate investigations without a formal complaint). The appropriate grievance office with which to file a complaint alleging misconduct depends on the location of the lawyer's office. *Attorney Grievance Committees*, *supra*.

158. Rudin, *supra* note 122, at 541–42. According to the New York State Bar Association Task Force on Wrongful Convictions, no public disciplinary action had been taken against prosecutors. *Id.*

159. *Id.* at 541.

160. *Id.* at 541–42 (quoting FINAL REPORT OF THE NEW YORK STATE BAR, *supra* note 53, at 29) ("'[T]here is little to no risk to the specific [prosecutor] involved resulting form a failure to follow the [*Brady*] rule.'").

161. FINAL REPORT OF THE NEW YORK STATE BAR, *supra* note 53, at 29. The Task Force surveyed district attorneys' offices across New York, inquiring whether the office had ever imposed sanctions for prosecutorial misconduct. *Id.* Twenty offices responded to the questionnaire, and one office declined to respond because of pending litigation. *Id.*

162. *See* Rudin, *supra* note 122, at 541–42. The study revealed that thirty-one of the fifty-three cases were overturned for, at least in part, "governmental practices," defined to include the use of false testimony by prosecutors, *Brady* violations, improper handling of evidence, and failure to investigate alternative suspects. *Id.* at 541.

163. ILL. S. CT. R. P. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation . . . shall inform the appropriate authority.").

164. *See In re* Himmel, 533 N.E.2d 790, 795–96 (suspending an attorney for one year for failing to report misconduct).

to prosecutorial misconduct.[165] The five-part article revealed a thirty-six-year history of misconduct and an ongoing lack of oversight of Illinois prosecutors.[166] Illinois tried forty-six of the 381 overturned homicide convictions the article examined—twice as many convictions overturned by the third-ranked state.[167] At least a dozen of the prosecutors involved in these cases underwent additional investigation, but none were publicly censured or disbarred.[168]

In 2002, to better address misconduct, Illinois enacted a "duty to report" provision that requires attorneys to report certain known misconduct by fellow attorneys to the Illinois Disciplinary Commission.[169] Since the provision's enactment, judges and attorneys have filed over 5,000 reports of alleged attorney misconduct.[170] Seven hundred and twenty five of those reports alleged prosecutorial misconduct.[171] However, only a handful have been investigated.

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165. Possley & Armstrong, *supra* note 124.

166. *Id.*

167. *Id.*

168. *Id.* One prosecutor was fired, but was later reinstated with back pay. *Id.* One prosecutor received a thirty-day, in-house suspension. *Id.* Two prosecutors were criminally indicted, but the charges were dropped before trial. *Id.* The final prosecutor was suspended for fifty-nine days, as a consequence of additional instances of misconduct unrelated to the wrongful conviction. *Id.*

169. ILL. S. CT. R. P. 8.3.

170. ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2012 ANNUAL REPORT 27 Chart 25 (2013) [hereinafter 2012 ANNUAL REPORT], *available at* https://www.iardc.org/AnnualReport2012.pdf (reporting 5,193 attorney reports filed from 2003 to 2012).

171. *See id.* at 13 Chart 9 (seventy-one allegations of prosecutorial misconduct); ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2011 ANNUAL REPORT 17 Chart 9 (2012), *available at* https://www.iardc.org/AnnualReport2011.pdf (sixty-four allegations of prosecutorial misconduct); ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2010 ANNUAL REPORT 17 Chart 9 (2011) [hereinafter 2010 ANNUAL REPORT], *available at* https://www.iardc.org/AnnualReport2010.pdf (ninety-nine allegations of prosecutorial misconduct); ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2009 ANNUAL REPORT 16 Chart 9 (2010), *available at* https://www.iardc.org/AnnualReport2009.pdf (seventy-five allegations of prosecutorial misconduct); ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2008 ANNUAL REPORT 9 Chart 9 (2009), *available at* https://www.iardc.org/AnnualReport 2008.pdf (sixty-five allegations of prosecutorial misconduct); ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2007 ANNUAL REPORT 11 Chart 9 (2008) [hereinafter 2007 ANNUAL REPORT], *available at* https://www.iardc.org/AnnualReport 2007.pdf (sixty-four allegations of prosecutorial misconduct); ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2006 ANNUAL REPORT 7 Chart 2 (2007), *available at* https://www.iardc.org/AnnualReport2006.pdf (fifty-one allegations of prosecutorial misconduct); ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2005 ANNUAL REPORT 6 Chart 2 (2006), *available at* https://www.iardc.org/AnnualReport 2005.pdf (forty-seven allegations of prosecutorial misconduct); ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2004 ANNUAL REPORT 6 Chart 2 (2005), *available at* https://www.iardc.org/AnnualReport2004.pdf (sixty-nine allegations of prosecutorial misconduct); ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2003 ANNUAL REPORT 7 Chart 2 (2004) [hereinafter 2003 ANNUAL REPORT], *available at* https://www.iardc.org/AnnualReport2003.pdf (fifty-three allegations of prosecutorial misconduct);

Annual reports indicate that only three prosecutors have been sanctioned and only one prosecutor has been suspended for misconduct.[172]

H. Texas

Although a few states have ventured from the mainstream, only Texas and the Federal Department of Justice have implemented separate disciplinary schemes for prosecutors.[173] In 1977, Texas created the Texas Prosecutor Council, which was responsible for regulating prosecutorial conduct.[174] Although this committee was created primarily to assist and educate Texas prosecutors, it also accepted claims of misconduct and instituted a procedure for addressing complaints.[175] The Council was composed of a combination of lay citizens and prosecuting attorneys.[176] Any member of the public could file a complaint alleging prosecutorial misconduct with the Council.[177] Upon receipt of a complaint, the Council would conduct an investigation into the allegation of misconduct.[178] The Council had the authority to privately reprimand the attorney, hold a hearing before the Council, or hold a formal hearing before a

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ATT'Y REGISTRATION AND DISCIPLINARY COMM. OF THE SUPREME COURT OF ILL., 2002 ANNUAL REPORT 6 Chart 2 (2003), *available at* https://www.iardc.org/AnnualReport 2002.pdf (sixty-seven allegations of prosecutorial misconduct).

172. *See* 2012 ANNUAL REPORT, *supra* note 170, at 25 Chart 23 (one prosecutor censured for misconduct); 2010 ANNUAL REPORT, *supra* note 171, at 28 Chart 23 (one prosecutor suspended for misconduct); 2007 ANNUAL REPORT, *supra* note 171, at 20 Chart 23 (two prosecutors censured for "failure to disclose exculpatory evidence"); 2003 ANNUAL REPORT, *supra* note 171, at 14 Chart 14 (one prosecutor censured for misconduct).

173. Texas is the only state to establish a committee solely devoted to state prosecutors. Steele, *supra* note 21, at 983 n.119 (conducting an informal survey of state disciplinary systems and concluding that no state had established a centralized agency comparable to the Texas agency); *see infra* text and accompanying notes 191, 197–200 (discussing the establishment of the DOJ's Professional Misconduct Review Unit). An independent search through Westlaw and the nationwide listed disciplinary agencies confirms Steele's findings.

174. TEXAS CONST. & CIV. STAT. art. 332d (West 1984) (repealed 1985). In 1977, the Sixty-Fifth Texas Legislature created the Texas Prosecutors Coordinating Council, which was designed to be an agency solely responsible for the conduct of Texas prosecutors. *See* S.B. 113, 65th Leg. (Tex. 1977). In 1981, the Sixty-Seventh Legislature renamed the body the "Texas Prosecutor Council." *Texas Prosecutor Council*, TEX. ST. LIBR. & ARCHIVES COMM'N, http://www.lib.utexas.edu/taro/tslac/10174/10174-P.html (last visited Jan. 24, 2014). The Council did not expressly proscribe certain conduct, but rather accepted complaints and investigated instances of alleged prosecutorial misconduct. TEXAS CONST. & CIV. STAT. art. 332d § 8(4).

175. TEXAS CONST. & CIV. STAT. art. 332d, § 8.

176. TEXAS CONST. & CIV. STAT. § 3(a) (requiring the council to be comprised of "four citizens of the State of Texas, who are not licensed to practice law, appointed by the Governor of Texas, with the advice and consent of the senate" and "five incumbent, elected prosecuting attorneys to be elected by prosecuting attorneys, at least one of each of whom shall be a county attorney, a district attorney, and a criminal district attorney").

177. *See* TEXAS CONST. & CIV. STAT. § 8(4) (failing to define who can file charges).

178. *See id.*

specially appointed master.[179] The Council was responsible for operations related to Texas prosecutors until 1986, when budget cuts resulted in restructuring and prosecutorial oversight was once again delegated to the Texas State Bar.[180] Unfortunately, Texas's annual reports do not include sanctions or results of formal hearings.

The State Bar of Texas has reported that only three prosecutors have been reprimanded for misconduct after the abolishment of the Prosecutor's Council.[181] However, the *Texas Tribune* discovered that prosecutorial misconduct contributed to a wrongful conviction in nearly a quarter of the eighty-six convictions overturned between 1989 and 2011.[182] At least one Texas scholar attributes this high level of misconduct to the lack of oversight of prosecutors.[183] The *Texas Tribune*'s investigation further revealed that no prosecutor involved with the eighty-six improperly prosecuted cases was disciplined in any form.[184]

I. Federal Government

The United States Department of Justice (DOJ) has also grappled with the issue of prosecutorial misconduct. As early as 1994, Congress recognized the need for an independent committee to review the actions of federal prosecutors, and it considered adding a provision to the Independent Counsel Reauthorization Act to require the Attorney General to appoint independent counsel to

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179. *See* TEXAS CONST. & CIV. STAT. § 10(g)(1) ("After investigation of a complaint of prosecutor incompetency or misconduct, the council may, in its discretion, issue a private reprimand, order a hearing to be held before the council, or request the supreme court to appoint a master to hold a hearing."). If the council considered a formal hearing necessary, it was required to notify the prosecutor of the complaint against him and the date of the hearing. TEXAS CONST. & CIV. STAT. § 10(h). In a formal hearing, evidence and witnesses were to be presented in accordance with the Texas Rules of Civil Procedure. TEXAS CONST. & CIV. STAT. § 10(g).

180. *See Texas Prosecutor Council*, *supra* note 174. In 1984, the Texas Sunset Advisory Commission reviewed the Prosecutor Council and decided to transfer the Council's responsibilities to other state agencies in efforts to save costs. *Id.* On September 1, 1985, the agency was abolished and its responsibilities were delegated to the State Bar of Texas, Office of Attorney General, and Texas Judicial Council. *Id.*

181. Brandi Grissom, *Courts Found DA Error in Nearly 25% of Reversed Cases*, TEX. TRIB., July 5, 2012, http://www.texastribune.org/2012/07/05/courts-found-prosecutors-erred-25-exonerations/ (noting that none of the three sanctioned prosecutors were involved in the eighty-six convictions overturned between 1989 and 2011).

182. *Id.* (identifying twenty-one cases in which prosecutorial misconduct contributed to a wrongful conviction). The prosecutors in these cases "broke basic legal and ethical rules" by suppressing evidence and testimony and making improper statements to the jury. *Id.* In seventeen of the twenty-one cases involving prosecutorial misconduct, the prosecutor withheld exculpatory evidence from the defense. *Id.*

183. *Id.* (quoting Jennifer Laurin, a professor at the University of Texas School of Law, who stated that there is "next to no oversight" of prosecutors).

184. *Id.* (noting that the Texas State Bar "reports very little public discipline of prosecutors in recent history").

investigate claims of prosecutorial misconduct.[185] However, the Act as passed did not include this provision.[186]

Likewise, the Citizens Protection Act of 1998, as enacted, omitted a review board for alleged prosecutorial misconduct.[187] As originally drafted, the Act included a Misconduct Review Board that was responsible for reviewing the Attorney General's decisions regarding complaints of prosecutorial misconduct.[188] The proposal invited the public to lodge complaints with the Attorney General against any Justice Department attorney who engaged in specified forms of misconduct.[189] If the Attorney General found misconduct, he would either impose the appropriate sanction or, if criminal prosecution was necessary, refer the matter to the grand jury.[190]

In 2011, the DOJ established the Professional Misconduct Review Unit (PMRU), an internal unit designed to impose swift and consistent sanctions for prosecutorial misconduct.[191] Before the PMRU, DOJ supervisors were responsible for punishing attorneys for misconduct identified and investigated by the Office of Professional Responsibility (OPR).[192] The OPR investigated alleged misconduct and reported its results and recommendations for punishment to the Office of the Deputy Attorney General and the appropriate component head, and the attorney's supervisor determined the appropriate

185. Morton, *supra* note 14, at 1113 (noting concern for the growing number of cases of misconduct, corruption, and fraud).

186. Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (codified at 28 U.S.C. § 594 *et seq.* (2006)) (failing to include a provision addressing prosecutorial misconduct).

187. Act of Oct. 21, 1998, Pub. L. No. 105-277, § 801, 112 Stat. 2681, 2681-119 (codified at 28 U.S.C. § 530B (2006)) (failing to include a prosecutorial misconduct review board).

188. Citizens Protection Act of 1998, H.R. 3396, 105th Cong. § 203.

189. H.R. 3396, § 202. The original version of the Citizens Protection Act made it punishable conduct to:

> (1) in the absence of probable cause seek the indictment of any person; (2) fail promptly to release information that would exonerate a person under indictment; (3) intentionally mislead a court as to the guilt of any person; (4) intentionally or knowingly misstate evidence; (5) intentionally or knowingly alter evidence; (6) attempt to influence or color a witness's testimony; (7) act to frustrate or impede a defendant's right to discovery; (8) offer or provide sexual activities to any government witness or potential witness; (9) leak or otherwise improperly disseminate information to any person during an investigation; or (10) engage in conduct that discredits the Department.

H.R. 3396, § 201(a).

190. *See* H.R. 3396, § 201(b) (listing the penalties available to the attorney general); H.R. 3396, § 201(b)(7) (instructing the attorney general to refer allegations to the grand jury).

191. Memorandum from the Attorney General, to H. Marshall Jarrett, Dir., Exec. Office for U.S. Att'ys et al. (Jan. 14., 2011), *available at* http://www.justice.gov/opa/documents/pmru-creation.pdf.

192. OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, OPR ANNUAL REPORT 2011, at 4 (2012) [hereinafter OPR ANNUAL REPORT 2011], *available at* http://www.justice.gov/opr/annualreport2011.pdf.

sanction.[193] If a disagreement arose between the OPR Counsel and the prosecutor's supervisor concerning the investigation or the disciplinary recommendation, the supervisor could submit a request to depart from the report to an Associate Deputy Attorney General (ADAG), who would determine whether the supervisor could deviate from the OPR's recommendation.[194] If the prosecutor had simply exercised poor judgment, the OPR would defer to the attorney's supervisor.[195] The involvement of department supervisors, ADAGs, and the OPR, for which discipline was just one responsibility among many, resulted in delays and inconsistencies in punishment.[196]

By contrast, the DOJ's current approach shifts the adjudicatory function from the attorneys' supervisors to the PMRU. The sole function of the PMRU is to discipline professional misconduct.[197] If OPR finds in its initial investigation that a prosecutor has engaged in intentional or reckless conduct, it refers the matter to the PMRU to discipline the attorney in a timely, fair, and consistent manner.[198] The PMRU may determine the appropriate sanction from a range of specified discipline recommendations, but it is not required to adhere to the OPR's recommendation.[199] PMRU officials may act outside of the OPR's recommended range of punishment, provided that it notifies the Office of the Deputy Attorney General before implementing discretionary action.[200]

In 2011, the OPR received 1,381 complaints alleging attorney misconduct.[201] OPR opened investigations for twenty of these cases and flagged an additional

193. Memorandum from the Attorney General, *supra* note 191 (noting that, if OPR found misconduct, it would recommend a range of possible sanctions). A component head was the Office of the Deputy Attorney General, the Assistant Attorney General, the Director of EOUSA, or any other appropriate component head. *Id.*

194. *Id.*

195. *Id.* (explaining that OPR would return the matter to the attorney's supervisor "for any appropriate action").

196. *Id.*

197. *Id.* ("The creation of a PMRU exclusively dedicated to the resolution of disciplinary matters arising out of findings of professional misconduct within established time limitations will not only reduce delays but also permit consistent resolution of matters involving similarly situated employees.").

198. OPR ANNUAL REPORT 2011, *supra* note 192 (explaining that the OPR refers cases involving intentional or reckless misconduct to the PMRU for determination of punishment); *see* Memorandum from the Attorney General, *supra* note 191 (emphasizing the PMRU's deadlines and the importance of its compliance with those deadlines).

199. OPR ANNUAL REPORT 2011, *supra* note 192 (noting that the OPR's recommendation is not binding on the PMRU).

200. *Id.*

201. *Id.* Of these 1,381 complaints, 720 (fifty-two percent) were filed by incarcerated persons. *Id.* Additionally, some complaints were not matters within the jurisdiction of the OPR and were referred to the appropriate agency. *Id.*

149 for further review.[202] OPR found misconduct in eleven of these cases.[203] At the close of 2011, two federal attorneys had been disciplined and six attorneys had a disciplinary action pending against them.[204] Of the two attorneys disciplined, one received a written reprimand and the other was suspended.[205] Two of the six attorneys awaiting disciplinary action were alleged to have committed reckless professional misconduct during the prosecution of Senator Ted Stevens.[206] Ultimately, the OPR found that the two prosecutors failed to provide the defense with exculpatory evidence, which caused the PMRU to suspend them.[207]

While shifting the initial investigation from a supervisor—who has a relationship with the prosecutor—to a more detached committee is more likely to ensure an objective investigation, the DOJ scheme is still entirely internal,

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202. *Id.* at 5. Of the 149 cases flagged for further review, fifty were obtained through judicial opinions and referrals by department employees of judicial criticism, twenty-one were filed by private attorneys, forty-five were referrals from department components unrelated to judicial findings, twenty were complaints filed by private individuals, five were allegations from other agencies, and eight complaints issued from other sources. OPR ANNUAL REPORT 2011, *supra* note 192, at 8 tbl.1. The most common types of complaint alleged *Brady* violations, *Giglio* violations, and discovery violations under Federal Rule of Criminal Procedure 16. OPR ANNUAL REPORT 2011, *supra* note 192, at 2.

203. OPR ANNUAL REPORT 2011, *supra* note 192, at 14 (reporting that, of the eleven misconduct findings, four involved intentional professional misconduct by a departmental attorney, and nine involved reckless disregard for an applicable obligation). The 2011 statistics were comparable to past years. *Compare id.* (finding professional misconduct in eleven of the 169 cases opened as inquiries or investigations in 2011), *with* OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, OPR ANNUAL REPORT 2010, at 5, 9 (2011), *available at* http://www.justice.gov/opr/annualreport2010.pdf (finding professional misconduct in twenty-four of the 183 cases opened as inquiries or investigations in 2010), *and* OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, OPR ANNUAL REPORT 2009, at 6, 9 (2010), *available at* http://www.justice.gov/opr/annualreport2009.pdf (finding professional misconduct in twelve of the 245 cases opened as inquires or investigations in 2009).

204. OPR ANNUAL REPORT 2011, *supra* note 192, at 15–16. Disciplinary action was ordered for one of the eleven attorneys, but he resigned before it could be implemented. *Id.* at 15. Additionally, disciplinary action was not initiated against two attorneys because they were no longer employees of the department. *Id.* at 16.

205. *Id.* at 16.

206. OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, INVESTIGATION OF ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IN UNITED STATES V. THEODORE F. STEVENS 671–72 (2011), *available at* http://www.leahy.senate.gov/imo/media/doc/052412-081511 Report.pdf.

207. Elizabeth Murphy, *OPR Report Finds "Reckless" Misconduct by AUSAs in Botched Stevens Case*, MAIN JUSTICE (May 24, 2012, 4:14 PM), http://www.mainjustice.com /2012/05/24/opr-report-finds-reckless-misconduct-by-ausas-in-botched-stevens-case/. AUSA Joseph Bottini was suspended for forty days without pay, and AUSA James Goeke was suspended for fifteen days without pay. *Id.*; *see also* Matthew Volkov, *Ted Stevens Case Prosecutors Appeal Disciplinary Action*, MAIN JUSTICE (June 27, 2012, 6:08 PM), http://www.main justice.com/2012/06/27/ted-stevens-case-prosecutors-appeal-disciplinary-action/ (reporting that AUSAs Bottini and Goeke appealed PMRU's disciplinary action and sought review from the U.S. Merit System Protection Board).

with DOJ personnel investigating other DOJ personnel. This provides anything but a reliable mechanism for scrutinizing prosecutorial misconduct.

V. INADEQUACIES OF CURRENT PRACTICES

A. Ineffectiveness of Reporting Requirements

Conduct unreported is conduct left unremedied. Even though trial courts, appellate courts, and defense attorneys are in the best position to recognize prosecutorial misconduct and are ethically obligated to report such misconduct, this rarely happens in practice.[208] Current ethical guidelines obligate judges to report suspected misconduct. The American Bar Association Standing Commission on Professional Discipline's *Judicial Response to Lawyer Misconduct* instructs that "[o]nce a reviewing court has found a prosecutor's actions to be misconduct in the form of a disciplinary rule violation, whether or not reversal or dismissal is warranted, the court should report the conduct to the appropriate disciplinary authorities."[209] Similarly, the Model Code of Judicial Conduct provides:

> A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct . . . should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct . . . that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.[210]

Other attorneys—particularly defense attorneys—are also in an optimal position to raise issues of prosecutorial misconduct and are similarly obligated to report observed misconduct to the appropriate authority.[211] The Model Rules of Professional Conduct require an attorney to report misconduct if he "knows that another lawyer has committed a violation . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness."[212] However, defense attorneys are typically reluctant to report prosecutorial misconduct.[213]

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208. *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128–29 (2008) ("[J]udges [and legislators] have never answered the calls for external regulation of the prosecutor's office, and the political dynamics of American criminal justice make it very unlikely that they will do so in the future.").

209. Bazelon, *supra* note 36, at 436 & n.172 (quoting STANDING COMM. ON PROF'L DISCIPLINE, AM. BAR ASS'N, JUDICIAL RESPONSE TO LAWYER MISCONDUCT § I.12 (1984)).

210. *Id.* at 436 n.172 (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 3(D)(2) (1990)).

211. Attorneys are obligated to report misconduct on the part of both other attorneys and judges. MODEL RULES OF PROF'L CONDUCT R. 8.3(a)–(b) (2013).

212. MODEL RULES OF PROF'L CONDUCT R. 8.3(a).

213. Bazelon, *supra* note 36, at 428–29, 433 ("[I]t is an empirical fact that very few defense attorneys report prosecutors who commit misconduct to the state bar or any other disciplinary authority."); *see also* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1086 (2009) (discussing a study of Boston

Criminal defendants also have the opportunity to report prosecutorial misconduct. However, unlike the reports made by judges and defense attorneys, complaints made by defendants are generally unsuccessful because the defendant is seen as too self-interested or is unable to correctly distinguish between misconduct and zealous advocacy because of his inadequate knowledge of the criminal justice system.[214] Furthermore, most defendants are understandably too focused on their attorneys' ability to protect their interests, leaving little room to worry about reporting possible prosecutorial misconduct.[215]

Why the reticence by judges and defense counsel to report misconduct? Because prosecutors wield significant power and influence over local criminal justice communities, both judges and defense counsel are often concerned about the possible backlash that a report of misconduct might generate.[216] In certain situations, prosecutors have the power to challenge a judge's ability to sit on criminal cases, and, in some states, can even remove a judge from hearing any criminal cases.[217] Moreover, judges are often hesitant to sully prosecutors' careers and reputations.[218] Finally, it is commonly believed that judges can and should remediate problems in their courtrooms *without* resorting to outside authorities.[219]

Defense attorneys are similarly vulnerable to the repercussions that may result from reporting prosecutorial misconduct. A defense attorney who acquires a reputation for "turning in" local prosecutors may find himself ostracized or marginalized from the local criminal justice community.[220] This type of consequence may limit an attorney's effectiveness in the plea negotiation process, which resolves ninety-five percent of cases.[221] This negative impact upon an attorney's ability to represent his clients successfully would, in turn, affect the attorney's ability to obtain new clients.

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attorneys that found "that only 6.3% of lawyers would report their colleagues to the bar were they aware of a flagrant violation of an ethical canon, which, if discovered, might result in criminal liability").

214. Steele, *supra* note 21, at 979–80.

215. *Id.* at 980.

216. *See* Gershowitz, *supra* note 213, at 1086 (arguing that the failure to report misconduct often results from ignorance of ethics rules, fear of retaliation or being considered a "snitch," and the absence of meaningful sanctions for violating the rules).

217. *See* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 693 (1972) (describing jurisdictions in which litigants can move to disqualify a judge for no specific reason, similar to a peremptory challenge in the jury-selection process).

218. Gershowitz, *supra* note 213, at 1086–87 (noting judges' reluctance to report prosecutorial misconduct, which may stem in part from sympathy for the prosecutor and his career).

219. *See* Morton, *supra* note 14, at 1098.

220. Bazelon, *supra* note 36, at 425–26 (describing the difficulties a defense attorney might face if he develops a reputation for reporting misconduct).

221. *Id.* at 437.

Additionally, there also exists the belief that reporting prosecutorial misconduct is futile in the absence of a viable disciplinary body empowered to investigate or discipline the offenders.[222] Indeed, *no* state has established an effective mechanism designed solely to investigate and discipline prosecutorial misconduct.[223] Given the inadequacies of current methodologies and the significant drawbacks to reporting, it comes as no surprise that those in a position to see so much report so little.

B. The Inadequacies of Trial Court and Appellate Court Remedies

Although current attorney discipline practices are largely ineffective, there are instances in which prosecutorial misconduct *is* identified and remedied at the trial level. For example, trial judges frequently resolve problems that arise from discovery-related misconduct.[224] Indeed, the trial court has the option to exclude evidence affected by misconduct, a remedy that is most appropriate in cases in which the prosecutor fails to provide discovery in a timely fashion.[225] Still, while the option of excluding evidence exists, most trial courts are reticent to employ such a measure.[226] Out of concern for the government's case, many judges simply continue the trial to give defense counsel adequate time to react to tardy disclosures. Although this approach maintains the integrity of the state's case, it typically will not result in the sanctioning of the offending prosecutor.[227] The trial judge may choose to give the offending prosecutor a verbal reprimand, but typically there are no further repercussions.[228] There is, therefore, little incentive for offending prosecutors to refrain from future misconduct.

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222. *See id.* at 437–38 (observing that the lack of real consequences for misconduct is a practical justification for failing to report misconduct).

223. *See supra* note 174 (describing two independent searches for jurisdictions that have established a body to investigate and discipline prosecutorial misconduct).

224. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) (explaining that it is the responsibility of the trial court to rule on the admissibility of evidence).

225. *See, e.g.*, Miller v. Pate, 386 U.S. 1, 6–9 (1967); *Brady*, 373 U.S. at 87; Napue v. Illinois, 360 U.S. 264, 265, 272 (1959); Alcorta v. Texas, 355 U.S. 28, 31–32 (1957).

226. RIDOLFI & POSSLEY, *supra* note 1, at 36–37. *Brady* violations are the "most pernicious" form of misconduct because they prevent "the jury from considering proper and admissible evidence supporting the innocence of the defendant." *Id.* at 36.

227. *See* Smith v. Phillip, 455 U.S. 209, 220 (1982) (concluding that there was no proof of actual bias or prejudice to the defendant despite the existence of prosecutorial misconduct). In *Smith*, Justice Rehnquist noted that overlooking the misconduct was appropriate because the "touchstone of due process analysis is the fairness of the trial, not the culpability of the prosecutor." *Id.* at 219.

228. *See* Morton, *supra* note 14, at 1102–03 (explaining that the harmless error doctrine ensures that the prosecutor will not be subject to suppression or exclusion because of his misconduct); *see also* Chapman v. California, 386 U.S. 18, 21 (1967) (admonishing the prosecutor but holding that the misconduct was harmless).

It must be acknowledged that prosecutorial misconduct rarely results in conviction reversals.[229] Accepting the reality that successful appeals of criminal convictions, regardless of the issues, are unlikely, alleging prosecutorial misbehavior as the basis for reversal is a daunting task.[230] The harmless error standard adds an additional hurdle by providing great leeway for appellate courts to uphold convictions, even in light of trial irregularities such as prosecutorial misconduct.[231] Appellate courts often recognize prosecutorial error, but invariably consider it inconsequential to the integrity of the ultimate verdict.[232] Consequently, even if the appellate opinion points out the prosecutor's misconduct, the conviction may nonetheless stand.[233] Generally, the prosecutor receives no greater punishment than the court's rebuking remarks.[234] Without meaningful adverse consequences for prosecutorial misconduct, the prosecutor has no incentive to comply with his professional obligations in the future.

C. The Ineffectiveness of Juror Admonitions

Trial court judges may need to admonish juries to keep them focused on their duties and to remind them to consider only admissible evidence.[235] However, the belief that "unringing a bell" can cure significant errors disregards the fact that admonitions, or "curative instructions," are actually ineffective and may even aggravate the problems they intend to solve.[236] The purpose of an admonition is to diminish the prejudicial impact of improper evidence on jurors

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229. Gershman, *supra* note 21, at 160 (citing the "small number" of cases that are reversed because of prosecutorial misconduct). Indeed, the few cases that are reversed involve conduct egregious enough to surpass the harmless error standard. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 679 (1985) (describing the difficult burden the defendant must overcome to achieve a reversal based on prosecutorial misconduct); People v. Steele, 65 N.Y.S.2d 214 (N.Y. Gen. Sess. 1946) (ordering a new trial because, according to the judge: "A fraud has been perpetrated on the court, which requires me to act. A prosecutor cannot be permitted to profit from his own concealment of the true facts, in derogation of the rights of the defendant.").

230. Andrew Smith, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1954–57 (2008) (acknowledging the difficulty of succeeding on a prosecutorial misconduct appeal).

231. *See* Chapman v. California, 386 U.S. 18, 21–22 (1967) (explaining that convictions need not be automatically overturned because of misconduct under the harmless error doctrine).

232. *Id.* at 22.

233. *Id.* at 21–22.

234. Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do With It?*, 18 GEO. J. LEGAL ETHICS 739, 746–47 (2005) (discussing courts' reluctance to publicly reprimand prosecutors for identified misconduct, despite having the power to do so); *see also* Smith v. Phillips, 455 U.S. 209, 219 (1982) (emphasizing that the purpose for appellate review is not to punish the prosecutor, but to ensure that the defendant had a fair trial).

235. *See* FED. R. EVID. 105 (instructing the trial judge to give a limiting instruction if the evidence is admissible for one purpose, but not for another); *see also* FED. R. EVID. 403 (instructing the trial judge to exclude evidence if it is unfairly prejudicial, might mislead the jury, or is a waste of time).

236. *See* Dunn v. United States, 307 F.2d 883, 885–86 (5th Cir. 1962) (recognizing the inadequacies of curative instructions).

by instructing them to ignore the objectionable evidence or to limit its use during deliberations. However, the bulk of research studies suggest that jurors frequently fail to comply with admonitions to disregard certain evidence entirely or to limit the application of evidence to specific issues.[237] In fact, in many cases, admonitions actually *increase* the prejudicial impact of the presence or absence of evidence.[238]

The manner in which an appellate court reviews prosecutorial error compounds this problem.[239] Appellate judges typically consider a lower court's admonition to the jury to disregard improperly presented evidence an effective remedy, and therefore have been historically disinclined to overturn a decision if the error was "cured" at trial.[240] A prosecutor's knowledge of this tendency to disregard misconduct is concerning because it may increase his likelihood to introduce improper evidence or testimony that the jury cannot disregard. Yet, even though admonitions to disregard improper evidence may increase the prejudicial impact of evidence and raise the probability for conviction, defense attorneys must move for an admonition at trial in order to preserve the alleged error for appeal.[241] The defense may be forced to choose between damaging the client's chances of acquittal at trial and the possibility of waiving the right to appeal on the grounds of the perceived error.[242] This systemic problem thus reduces the likelihood that prosecutorial errors and misconduct will be remedied at the trial level.

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237. *See, e.g.*, Dale Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753–54 (1959) (describing a study conducted to measure the effect of limiting instructions on juries); J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 750 (1988) (arguing that jurors have difficulty following instructions to disregard evidence).

238. J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 86 (1990) ("If jurors are instructed to disregard incriminating evidence, they are more likely to find the defendant guilty; if instructed to disregard exculpatory evidence, they are more likely to acquit."); J. Alexander Tanford, *Thinking about Elephants: Admonitions, Empirical Research and Legal Policy*, 60 UMKC L. REV. 645, 652 (1992) (arguing that limiting instructions are more harmful than helpful); *see also* Paul Bergman, *Admonishing Jurors to Disregard What They Haven't Heard*, 25 LOY. L.A. L. REV. 689, 691–92 (1992) (discussing the concern that juries will naturally make impermissible inferences without an instruction to the contrary).

239. *See* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1000–02 (1985–1986) (describing the standards by which appellate courts review error).

240. Tanford, *The Law and Psychology of Jury Instructions*, *supra* note 238, at 99–100.

241. FED. R. EVID. 103 (permitting a party to appeal an error at trial only if he makes a timely objection). Under the procedural default doctrine, appellate courts do not usually evaluate an issue unless it was first raised to the trial court. Coleman v. Thompson, 501 U.S. 722, 733–34 (1991). If a party does not object and request an admonishment at trial, the appellant waives the right to appeal on that issue. *Id.*

242. Tanford, *The Law and Psychology of Jury Instructions*, *supra* note 238, at 99–100.

D. The Unintended Consequence of the Harmless Error Doctrine

As noted earlier, another obstacle to curbing prosecutorial misconduct is the harmless error doctrine, which effectively condones misconduct.[243] Given the vast deference that appellate courts grant to trial courts and their verdicts, the harmless error doctrine treats most prosecutorial trial errors as irrelevant.[244] Even if the appellate court clearly identifies misconduct, it will only overturn a conviction if the prosecutor's behavior was harmful error, or error that "affect[s] the substantial rights of the parties."[245] The purpose of the harmless error doctrine is to improve efficiency by preventing multiple trials to address minor errors.[246] For example, one study involving 2,131 California appellate cases alleging prosecutorial misconduct found misconduct in 444 cases, or twenty-one percent.[247] Of these 444 cases, the courts overturned the convictions in fifty-four. [248] The courts affirmed the convictions in the other 390 cases, reasoning that the misconduct was harmless.[249]

To overcome the harmless error standard in the context of an alleged *Brady* violation, the defendant must establish that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[250] More specifically, an appellate court will not overturn a conviction in cases in which the prosecutor fails to disclose exculpatory or impeaching evidence unless the court finds that the undisclosed evidence was "material," or so important that it "undermines confidence in the outcome of the trial."[251] Although it is common sense that a verdict should not be overturned unless the error made a difference to the decision, it is also important to recognize that prosecutors who engage in "harmless" error are not subject to meaningful judicial scrutiny and can continue to commit misconduct with impunity.

E. The Unintended Consequence of the Plain Error Rule

Much like the harmless error doctrine, the plain error rule unintentionally ignores, and thus implicitly condones, prosecutorial misconduct.[252] Because defense counsel's failure to object to misconduct at trial typically waives the

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243. Chapman v. California, 386 U.S. 18, 21 (1967).

244. *Id.* at 22.

245. 18 U.S.C. § 2111 (2006) (instructing federal appellate courts to review "the record without regard to errors or defects which do not affect the substantial rights of the parties").

246. *Preventable Error*, *supra* note 1, at 19.

247. CAL. FINAL REPORT, *supra* note 126, at 71.

248. *Id.*

249. *Id.*

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

251. *See Bagley*, 473 U.S. at 678.

252. FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention"); Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 124 (1998).

right to appeal unless the error is clear, appellate courts often overlook prosecutorial misconduct.[253] For instance, in cases involving *Brady* violations, courts generally review findings of fact for clear error.[254] If the objection is timely, the court will review the misconduct to determine whether the prosecutor violated a rule of trial practice and whether that violation prejudiced the jury.[255] However, if defense counsel does not object at trial, appellate courts use the much more deferential plain error standard.[256]

F. Immunity From Civil Liability

The law entitles prosecutors to absolute immunity for actions taken within the course and scope of their duties.[257] The breadth of prosecutorial immunity suggests to prosecutors that they may act without fear of sanction for misconduct.[258] While prosecutors may be disciplined or even disbarred for their misconduct, they are virtually free from civil liability.[259] Even exonerated individuals will rarely prevail against the prosecutors who wrongfully convicted them, and only in situations in which the prosecutor acted outside the scope of his position.[260]

Most recently, in *Connick v. Thompson*, the Supreme Court held that 42 U.S.C. § 1983 does not impose liability on prosecutors for a single *Brady* violation.[261] As a result, exonerated individuals now find it more difficult to obtain redress for their loss of liberty. In *Connick*, prosecutors conceded shortly before Thompson's execution date that they had violated *Brady* by failing to disclose a crime lab report that Thompson's attorneys had discovered.[262] Thompson was acquitted after a second trial, and he subsequently sued the prosecutor's office, alleging a *Brady* violation based on the office's failure to provide adequate training for its prosecutors to comply with *Brady* and other constitutional requirements.[263] The Court ruled in favor of the prosecutor's

253. *See* FED. R. EVID. 103 (requiring a timely objection at trial to argue an error on appeal).

254. Virgin Islands v. Fahie, 419 F.3d 249, 252 (3d Cir. 2005).

255. Bazelon, *supra* note 36, at 415 n.90; Gershman, *supra* note 252, at 124.

256. Bazelon, *supra* note 36, at 423–24; *see also* United States v. Frady, 456 U.S. 152, 163 & n.14 (1982) (noting that the plain error standard is used only in exceptional circumstances and only if the error is extremely obvious).

257. Rosen, *supra* note 13, at 731–32.

258. *Preventable Error*, *supra* note 1, at 75 ("Absolute immunity allows prosecutors to commit misconduct with impunity, knowing that they are immune from any consequences, even if they act intentionally, in bad faith, or with malice.").

259. *Id.* at 74 (explaining that prosecutors cannot be sued personally for actions taken within the scope of their duties).

260. Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (discussing liability for non-prosecutorial conduct); RIDOLFI & POSSLEY, *supra* note 1, at 66.

261. Connick v. Thompson, 131 S. Ct. 1350, 1356; *see also* Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 691–92 (1978) (discussing § 1983 liability more generally).

262. *Connick*, 131 S. Ct. at 1356–57.

263. Editorial, *Justice and Prosecutorial Misconduct*, N.Y. TIMES, Dec. 29, 2011, at A26.

office, justifying its holding by relying on the fact that prosecutors can be punished for ethical violations with professional discipline, including sanctions, suspension, and disbarment."[264] One commentator noted that this ruling gives prosecutors "nearly absolute immunity against civil suits."[265] Indeed, after *Connick*, a plaintiff who seeks relief under § 1983 must prove that "action pursuant to official municipal policy caused their injury."[266]

Official municipal policies require training programs for inexperienced prosecutors. To impose liability, failure to educate certain employees about their legal duties must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact."[267] Deliberate indifference requires policymakers to disregard the "known or obvious consequence[s]" of the deficiencies of their training programs, thereby leading employees to violate citizens' constitutional rights.[268] A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference.[269]

In *Canton v. Harris*, the Supreme Court hypothesized a "single-incident" liability, meaning that an "obvious" *Brady* violation can substitute for the pattern of violations "ordinarily necessary" to demonstrate deliberate indifference.[270] In *Connick*, the Court found that the failure to train prosecutors regarding *Brady* issues does not fall within the narrow range of "single-incident" liability because attorneys receive unique training in legal writing before entering the profession, must satisfy CLE requirements, often receive on-the-job training from more experienced attorneys, and have ethical obligations to understand the requirements *Brady* imposes and to perform legal research if they are uncertain about a matter.[271]

VI. PREVIOUS PROPOSALS TO ADDRESS PROSECUTORIAL MISCONDUCT

This Article is not the first (and certainly not the last) to propose a solution to the ongoing problem of prosecutorial misconduct. In particular, four previous articles have identified such misconduct and have set forth thoughtful proposals. This Article builds on the solid foundations offered by this previous scholarship.

Professor Richard Rosen proposes greater disciplinary sanctions to remedy rampant *Brady* violations. He acknowledges that, in one way or another, all fifty states have adopted a version of the ABA Model Rules to govern the conduct of

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264. *Connick*, 131 S. Ct. at 1363.

265. *Id.*

266. *Id.* at 1354; *Monell*, 436 U.S. at 691.

267. Canton v. Harris, 489 U.S. 378, 388 (1989).

268. Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown, 520 U.S. 397, 410–11 (1997) (discussing the standard for liability for civil suits against city officials).

269. *Id.* at 409.

270. *Id.* at 399–400.

271. *Connick*, 131 S. Ct. at 1361–62.

attorneys.[272] Rosen maintains that, although the Rules should deter prosecutors from acting in bad faith, the reality is that bar disciplinary bodies simply do not adequately fulfill their duties, rendering the Rules largely ineffective.[273]

Rosen suggests three ways to correct this problem: (1) granting state bars the authority to review cases for misconduct and to initiate disciplinary proceedings, independent of individually filed complaints;[274] (2) imposing harsher penalties for *Brady*-type misconduct;[275] and (3) reversing convictions based on bad-faith misconduct.[276] Rosen argues that the suggested bad-faith standard is easily based on the Fourth Amendment's exclusionary rule, arguing that, if the exclusionary rule can punish police officers, it can also punish prosecutors.[277]

Joseph Weeks, another author who has proposed methods of regulating the conduct of prosecutors, would hold prosecutors personally liable for damages sustained by the defendant if there is evidence of wrongful imprisonment.[278] Weeks argues that an extreme form of liability is necessary because there is currently no mechanism to prevent prosecutors from withholding exculpatory evidence other than the remote possibility that the conviction may be overturned.[279] Weeks dismisses civil suits as an effective form of deterrence because of the qualified immunity that protects public officials for unintentional constitutional violations.[280]

Through a fifty-state survey, Weeks demonstrates that criminal defendants have little to gain by seeking bar association review of a prosecutor's misconduct.[281] His survey establishes an utter lack of prosecutorial guidelines. Of nine cases involving *Brady* violations, courts imposed no punishment in three cases, imposed minor sanctions in four cases, suspended the prosecutor in one case, and removed the prosecutor from office in the final case.[282] Similarly, the

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272. Rosen, *supra* note 13, at 733, 735–36.

273. *Id.* at 731–32 ("Effectively insulated from disciplinary punishment and immune from civil suit, a prosecutor contemplating *Brady*-type misconduct knows that the only possible legal consequence of presenting false evidence or suppressing exculpatory evidence is that the defendant may be fortunate enough to discover the evidence and file for post-conviction relief.").

274. *Id.* at 697. Rosen posits that this mechanism is necessary because actually calling prosecutors before the disciplinary body for review is very difficult. *Id.* at 733.

275. *Id.* at 697. Rosen claims that the reluctance of the review boards and courts to impose strong sanctions in cases in which an individual alleges misconduct is evidence enough that change is necessary. *Id.* at 733.

276. *Id.* at 697. Courts should reverse convictions if the prosecutor intentionally suppressed exculpatory evidence or presented false evidence. *Id.* at 739.

277. *Id.* at 737. The court first invoked the exclusionary rule as a remedy for 4th Amendment violations. Weeks v. United States, 232 U.S. 383, 398 (1914).

278. 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, 928 (1997).

279. *Id.* at 931.

280. *Id.* at 871.

281. *Id.* at 898 (noting that criminal defendants generally seek only two remedies: reversal or a reduction in sentence).

282. *Id.* at 881.

state bar association had never filed a formal *Brady* complaint in thirty-five of the forty-one states that participated in the study.[283] As a result of this lack of accountability, Weeks suggest that defendants should be permitted to sue prosecutors directly, and that the state subsequently indemnify the prosecutor for any damages incurred.[284] He argues that this will allow the defendant to receive compensatory damages proportionate to the sentence imposed by his conviction.[285] While this proposal provides monetary relief to the defendant, a disciplinary scheme that imposes bar sanctions on prosecutors found personally liable for misconduct is still necessary.

Peter A. Joy suggests that prosecutorial misconduct largely results from three institutional conditions: (1) vague ethics rules; (2) vast discretionary authority with little to no transparency; and (3) inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct.[286] Joy argues for the adoption of the ABA Prosecution Function Standards, which "provide examples of the types of norms that should be considered in clearly defining the prosecutor's ethical duties."[287] The Standards require prosecutors to disclose exculpatory evidence to a grand jury, ensure that there is sufficient admissible evidence before filing charges, and disclose *Brady* material in a timely manner.[288] Conversely, the Standards prohibit prosecutors from cross-examining truthful witnesses to discredit or undermine their testimony, asking questions that imply the existence of a fact in which the prosecutor does not have a good faith belief; and making arguments to the jury that would divert them from deciding the case on the evidence.[289]

Although greater specificity regarding prosecutorial misconduct would provide better guidance, the provisions set forth in the Standards are well known to the criminal justice community.[290] Even though some ambiguity regarding *Brady* disclosures persists, the core of the *Brady* disclosure requirements is well established.[291]

Joy's second recommendation is to provide more transparent oversight of prosecutors' exercise of their vast discretionary power.[292] Drawing once more from the proposed Standards, Joy suggests the drafting of a "prosecutor's

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283. *Id.*

284. *Id.* at 929.

285. *Id.*

286. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for A Broken System*, 2006 WIS. L. REV. 399, 400–01 (2006).

287. *Id.* at 418.

288. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3 (1993).

289. *Id.* at § 3-5.

290. Joy, *supra* note 286, at 401.

291. *Id.* at 412.

292. *Id.* at 420–21.

handbook" to provide greater clarity and transparency.[293] Based on the version of the Standards in effect at the time of Joy's article, such a policy manual would be publicly accessible.[294] Joy argues that a clear policy manual would facilitate internal discipline, which would be a significant step in adequately punishing prosecutorial misconduct.[295]

Joy's final recommendation suggests a more proactive approach, which would require prosecutors' offices

> to implement a system of graduated discipline each time there is a finding by a trial judge or appellate court of prosecutorial misconduct. Bar disciplinary authorities should implement a system to review reported instances of prosecutorial misconduct and, when they deem it appropriate, conduct investigations or recommend discipline.[296]

Joy's proposal for greater transparency and clearer guidelines is essential to any proposal to address prosecutorial misconduct. As Joy argues, a more proactive approach that imposes tighter controls on prosecutors should be undertaken.

Finally, Ellen Yaroshefsky proposes improved internal practices and policies in prosecutors' offices, such as "clear, written disclosure standards" and "effective hiring, training, supervising, and monitoring" of prosecutors.[297] Additionally, Yaroshefsky highlights the problems that arise from a prosecutor's evaluation of possible *Brady* information, his determination of the information's materiality, and his decision of whether to disclose it.[298] Yaroshefsky warns that, because of "[c]ognitive biases such as tunnel vision and confirmation bias," a prosecutor's belief in a defendant's guilt is likely to impair his judgment regarding the information's materiality.[299] Materiality, therefore, should not play a role in the pretrial assessment of which information should be disclosed. Instead, prosecutors should err on the side of too much disclosure.[300] Yaroshefsky further suggests the creation of a Conviction Integrity Unit within the district attorney's office that would audit cases resulting in wrongful

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293. *Id.* at 421 (proposing a handbook that contains a "statement of (i) general policies to guide the exercise of prosecutorial discretion, and (ii) procedures of the office").

294. *Id.* at 422 (quoting NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS § 10.3 (1991)) (recommending that the policy manual "should be subject to access by the general public and/or law enforcement agencies or the defense bar").

295. *Id.* at 424.

296. *Id.* at 427.

297. Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 15 GEO. J. LEG. ETHICS 913, 936 (2012). Although Yaroshefsky focuses on the issues specifically affecting Orleans Parish in Louisiana, her suggestions for reform are more widely and generally applicable.

298. *Id.* at 936–37.

299. *Id.* at 937.

300. *Id.* at 937–38.

convictions to identify errors and subsequently institute new procedures to prevent similar future wrongful convictions.[301]

Yaroshefsky also advocates for open file discovery, which "requires the prosecutor to provide the complete investigative files, including any material obtained by law enforcement, to the defense before trial including investigators' notes, the required recordation of all oral statements, and any other information obtained during the investigation."[302]

Lastly, Yaroshefsky urges for the implementation of a system of external accountability, which would require greater and more effective supervision and discipline by the state bar association and the state supreme court.[303] She further calls on judges to take a more active role in the supervision of disclosure practices by conducting a pretrial conference to ensure that the parties understand and have fulfilled the disclosure and ethical obligations.[304]

In addition to Rosen, Weeks, Joy, and Yaroshefsky, a number of other commentators have suggested various other approaches to address prosecutorial misconduct.[305] Specifically, several commentators have proposed some form of commission dedicated solely to the oversight of prosecutors.[306]

VII. THE JUDICIAL COMMISSION MODEL

The various schemes designed to deal with prosecutorial misconduct and the various proposals advanced by academics over the years, coupled with the reality that prosecutorial misconduct is rarely reported, raise serious questions as to whether any scheme can be effective. Compounding this problem is the fact that, even if prosecutorial misconduct is reported, there is no viable body to investigate or discipline the guilty party. Nevertheless, the regulatory schemes currently in place to investigate and discipline judges may serve as helpful

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301. *Id.* at 938.

302. *Id.* at 939; Janet Moore, *Democracy and Criminal Discovery Reform after* Connick *and* Garcetti, 77 BROOKLYN L. REV. 1329, 1371–72 (2012) (noting that the Supreme Court has acknowledged the benefits of open file discovery). Ohio and North Carolina already implement this method. *See, e.g.*, N.C. GEN STAT. ANN. § 15A-903(a)(1) (West 2011).

303. Yaroshefsky, *supra* note 297, at 940–41.

304. *Id.* at 940.

305. *See, e.g.*, Gershman, *supra* note 21, at 453–55. Gershman builds on Steele's proposal of a committee modeling the Texas Statute for prosecutor misconduct commissions. *Id.* at 354. He suggests that prosecutors' distinct role, as well as their ability to exercise a "quasi-judicial" function, requires a commission to monitor their conduct and ensure that they fulfill their ethical duties. *Id.* He proposes modeling these commissions on the already existing independent judicial committees. *Id.* Another commentator recommends implementing a similar mechanism. Minsker, *supra* note 21. Another commentator recognizes the need for an independent prosecutorial commission (IPC), and expands on Gershman's proposal by suggesting that such a committee regulate, discipline, and disclose the prosecutors' names, the outcome of an investigation, and the discipline that was imposed. Morey, *supra* note 21, at 636, 639.

306. *See, e.g.*, Steele, *supra* note 21 at 982 (proposing that every state follow the Texas model of a commission solely dedicated to the policing and sanctioning of prosecutors).

models for future regulation of prosecutors.[307] All fifty states, the District of Columbia, and the federal government maintain judicial conduct commissions to protect and foster confidence in the criminal justice system.[308]

To effectively fulfill their duties, judges, like prosecutors, must be free to operate with autonomy within the bounds of their ethical and professional duties.[309] Any concern that an independent body monitoring the actions of the court may affect judges' independent authority has largely been laid to rest.[310] Given the similarly sensitive positions of both judges and prosecutors, the judicial commission model as a matrix for prosecutorial commissions may present a viable solution.

In 1960, California became the first jurisdiction to establish a judicial conduct commission. [311] The commission was part of a package of judicial administration reform legislation intended to provide "real protection against incompetency, misconduct or non-performance of duty" from judicial officials.[312] The purpose of the commission was not to sanction judges, but to protect the public.[313] The authority of the commission was limited to protecting the independence of the judiciary so that judges would remain free to make unpopular decisions without fear of discipline.[314] By 1981, every state and the District of Columbia followed California's example and established their own

307. *See generally* Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 21 JUST. SYS. J. 426 (2007) (discussing the procedure judges follow if they are accused of misconduct).

308. Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 405 (2007).

309. David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115, 121 (2008) (describing the importance of judicial autonomy).

310. *See* Sambhav N. Sankar, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233, 1239 (2000) (noting the general acceptance of independent oversight of judicial conduct, especially in state courts).

311. Jonathan Abel, *Testing Three Commonsense Intuitions About Judicial Conduct Commissions*, 64 STAN. L. REV. 1021, 1024 (2012). California voters approved the commission and voted for it by a margin of three to one. *Id.* at 1029.

312. *Meeting Agenda*, CAL. ASSEMBLY BUDGET SUBCOMM. NO. 4, at 2 (Mar. 24, 2004).

313. Gray, *supra* note 308, at 405.

314. *Id.* at 408 ("The power of conduct commissions is limited to protect the independence of the judiciary; a judge must feel free to make a decision that may provoke complaints without fearing that he or she will be disciplined by the commission.").

judicial conduct commissions.[315] Similarly, in 1980, the federal government established its own commission.[316]

Judicial conduct commissions are similar in structure. Each is a state administrative agency that receives complaints made by private citizens, investigates alleged misconduct, and submits cases of misconduct for adjudication within the commission.[317] However, judicial conduct commissions differ in two significant ways: the range of sanctions available to the commission, and whether the commission has final authority on sanctions.[318] Every state allows its commission to remove a judge for severe or willful misconduct.[319] Additionally, most commissions employ a range of less severe sanctions, including suspension, public censure, and a wide variety of private disciplinary measures.[320] However, California is the only jurisdiction in which the judicial commission has the authority to remove a judge from office on its own initiative.[321] While other state commissions can remove judges from office, the state supreme court must approve any censure or removal action.[322]

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315. *Id.* at 406 (noting that twenty-eight states established commissions by provisions in their constitutions, sixteen states established commissions by statute, and seven established commissions by court rule). The number of members of a judicial conduct commission varies by state. *Id.* At one extreme, Ohio's commission has twenty-eight members. *Id.* At the other, Montana's commission is comprised of only five members. *Id.* The commissions often include judges, attorneys, and private citizens. *Id.* (noting that a majority of commissioners California, Hawaii, Iowa, New Jersey, New Mexico, North Dakota, Washington, and Wisconsin are laypersons). In some states, judges are appointed to the board, based on the court in which they sit. *Id.* For example, the Arizona Constitution requires that the commission include two appellate court judges, one justice of the peace, one municipal court judge, two attorneys, and three private citizens. *Id.*

316. Judicial Code and Disability Act of 1980, 28 U.S.C. §§ 351–64 (2006).

317. Abel, *supra* note 311, at 1029. In Texas, for example, the commission consists of thirteen members, six judges appointed by the Texas Supreme Court, five citizen members appointed by the governor, and two attorneys appointed by the bar. STATE COMM'N ON JUDICIAL CONDUCT, SUNSET ADVISORY COMMISSION STAFF REPORT 10 (2012) [hereinafter SUNSET ADVISORY COMMISSION], *available at* http://www.scjc.state.tx.us/pdf/FinalSunsetStaffReport.pdf. The commission members serve six-year staggered terms and meet six times a year. *Id.*

318. Abel, *supra* note 311, at 1029–30.

319. *Id.* at 1030–31.

320. Gray, *supra* note 308, at 406 ("A judge commits willful misconduct if the judge violates the code of judicial conduct while acting in a judicial capacity and with malice or in bad faith.").

321. Abel, *supra* note 311, at 1029–30.

322. SUNSET ADVISORY COMMISSION, *supra* note 317, at 5. The Texas Sunset Advisory Commission on Judicial Conduct, in its 2012 annual report, was critical of the limited range of penalties available to judicial commissions following formal proceedings. The Advisory Commission maintained that such limitations deter the judicial commission from pursuing cases of public import in open proceedings. *Id.* The Advisory Commission further maintained that confidence in the judiciary rests on high-profile cases being heard openly. *Id.* The Texas advisory commissioners maintain that granting greater authority to sanction and opening hearings to the public would help alleviate two of the problems most judicial commissions struggle to address: public confidence in the court system through a balance of judicial independence and accountability and transparency in proceedings. *Id.*

There is also some variation in a commission's authority to impose sanctions on a judge once he has retired or otherwise left office. In some jurisdictions, the commission loses jurisdiction and the proceedings are considered moot.[323] However, most states allow commissions to impose sanctions even after a judge has left the bench.[324]

A. Triggering an Inquiry

Complaints against judges, which must be filed with the proper court office, can be filed by anyone.[325] There are few restrictions.[326] Any person can write a complaint letter to the commission,[327] and, in some states, complete a form available online.[328] Generally, a complaint letter must include the name of the judge or official, the name of the court on which the judge sits, a detailed explanation of alleged misconduct, the names and contact information of any witnesses, the date(s) of the alleged misconduct, the type of case in which the misconduct occurred, and the complainant's relationship to the case.[329]

B. An Initial Screening

Upon receipt of a complaint, a commission conducts an initial screening to determine whether sufficient evidence exists to warrant an investigation.[330] In preparation for this initial screening, a commission's legal staff is responsible for evaluating the complaint, researching relevant legal issues, and seeking any additional necessary information.[331] However, the legal staff does not conduct the investigation or contact the judge or court personnel. Rather, the commission reviews the complaint and the staff's evaluation, and then decides whether to dismiss the complaint or to authorize its staff to conduct a further inquiry.[332]

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323. Gray, *supra* note 308, at 409.

324. *Id.* One policy reason in support of sanctions following a judge after they have left the bench is the preservation of the integrity of the judicial system, because the alternative, silence, may be observed by the public as overlooking the wrongdoing, or, worse yet, condoning it. *Id.*

325. 28 U.S.C. § 351(a) (2006).

326. *Id.* (detailing the procedure to address possible misconduct); *see also* Helman, *supra* note 307, at 427. The process begins with the filing of a complaint about a judge with the clerk of the appropriate court (the court of appeals for that circuit). 28 U.S.C. § 351.

327. 28 U.S.C. § 3651(a).

328. *How to File a Complaint*, STATE OF CAL. COMM'N ON JUDICIAL PERFORMANCE, http://cjp.ca.gov/file_a_complaint.htm (last visited Jan. 24, 2014) (providing a link for a printable form).

329. *Id.*

330. Hellman, *supra* note 307, at 428 (describing the procedure one must follow to file a complaint against a judge).

331. *The Complaint Process*, STATE OF CAL. COMM'N ON JUDICIAL PERFORMANCE, http://cjp.ca.gov/complaint_process.htm (last visited Jan. 24, 2014).

332. *See, e.g.*, *id.*; *see also* 28 U.S.C. §§ 351–64 (2006). Cases filed by prisoners and litigants against judges are historically dismissed ninety-seven to ninety-eight percent of the time, whereas those filed by attorneys, court personnel or public officials are dismissed only thirty-seven percent of the time. Lara A. Bazelon, *Putting Mice the in Charge of the Cheese: Why Federal Judges*

Following a further inquiry, the commission can close or dismiss the complaint, issue an advisory letter, or commence a preliminary investigation.[333] In most jurisdictions, the commission will not notify the judge of a pending complaint until it has authorized a preliminary investigation.[334]

C. The Investigative Stage

During the investigation phase, a commission may contact witnesses, review court records and other documents, observe court proceedings, or oversee any other appropriate means of investigation.[335] After the initial investigation, the commission typically asks the judge to respond to the allegations of misconduct, after which it may decide to dismiss the complaint.[336] If dismissal is not warranted, the commission may issue notice of its intent to privately admonish the judge, issue notice of its intent to publicly admonish the judge, or institute formal proceedings against the judge.[337] If the commission chooses to admonish the judge, the judge has the right to contest the admonishment before the commission or to request a formal hearing.[338] If the judge demands an appearance before the commission, it will review the record, consider the judge's arguments, and determine whether to close the complaint, issue an advisory letter,[339] or go forward with a private[340] or public[341] admonishment.

Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It, 97 KY. L.J. 439, 468–69 (2009).

333. *See The Complaint Process*, *supra* note 331.

334. *See, e.g.*, *How to File a Complaint*, *supra* note 328.

335. *See* STATE OF CAL. COMM'N ON JUDICIAL PERFORMANCE, 2011 ANNUAL REPORT 2 (2011) [hereinafter CAL. 2011 ANNUAL REPORT], *available at* http://cjp.ca.gov/res/docs/annual_reports/2011_%20Annual_Report_03-29-12(1).puff.

336. *See, e.g.*, *id.*

337. *See, e.g.*, *id.* at 2.

338. *See, e.g.*, *id.* at 3–5.

339. *See, e.g.*, *id.* at 5. An advisory letter is a sanction available only after an investigation, following a staff inquiry or a preliminary investigation has been conducted and the opportunity of the judge to respond to the allegations. *Id.* Such sanction is proper when the commission determines that the judicial officer acted inappropriately but the misconduct was relatively minor. *Id.* This confidential letter advises the judge to use caution or expresses disapproval of the judge's conduct. *Id.*

340. *Id.* More serious misconduct may warrant a private admonishment. *Id.* The commission sends confidential notice to the judge describing the improper conduct and the conclusions reached by the commission. *Id.* The commission advises the complainant that it has taken corrective action, but it does not disclose specific details. *Id.* Pursuant to the California Constitution, the governor of any state, the president of the United States, or the Commission on Judicial Appointment may request the private admonishment or advisory letter for a judge who is under consideration for judicial appointment. *Id.*

341. *See, e.g.*, *id.* When misconduct warrants a more severe sanction than private discipline, including public admonishment or public censure, the commission notifies the judge and makes the sanction available to the complainant, the press, and the general public. *Id.* A public censure is appropriate after a hearing or without a hearing if the judge consents. *Id.* In cases involving

These options protect the judge from a formal proceeding; the commission conducts a hearing only if the judge requests it or, following a preliminary investigation, a hearing is necessary.[342]

D. The Hearing

Hearings are typically conducted before special masters appointed by the highest court in the jurisdiction.[343] At the hearing, the judge or justice is afforded counsel and, in most jurisdictions, the right to confront the individual or individuals who filed the complaint.[344] However, the complainant does not have the right to appear, and the extent to which he is involved in the proceedings is at the discretion of the special master.[345] The commission will only give the complainant the opportunity to testify if he has additional relevant evidence beyond what already exists.[346] Typically, the evidence must establish misconduct by clear and convincing evidence.[347] After the hearing, the special master reports his conclusion and recommendations to the commission.[348]

E. The Sanctions

A commission, in considering the special master's findings, can recommend to the jurisdiction's highest court that the judge be removed from office.[349] The commission can also impose a less serious punishment, including an advisory letter, public or private admonishment, or suspension with or without pay.[350] A commission will typically only remove a judge from office if his "conduct is fundamentally inconsistent with the responsibilities of judicial office."[351] In deciding what sanctions to apply, most states use the factors developed by the Washington Supreme Court in *In re Deming*:

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particularly severe misconduct, the commission may prevent the judge from taking further state court assignment. *Id.* The most serious sanction is removal, which requires a hearing. *Id.*

342. *See, e.g.*, *id.* at 5.

343. *See, e.g.*, *id.*

344. 28 U.S.C. § 358(b)(2) (2006).

345. 28 U.S.C. § 358(b)(3) (2006).

346. 28 U.S.C. § 358(b)(3) (stating that the complainant *may* be permitted to appear at hearings under certain circumstances).

347. 28 U.S.C. § 362 (2006); *see* Gray, *supra* note 308, at 413 ("In thirty-four states, if the commission finds probable cause to believe that a judge has committed misconduct justifying a formal disciplinary proceeding, confidentiality ceases, and the formal charges, the judges answer, and subsequent proceedings, including the hearing and the commission's decision, are public.").

348. CAL. 2011 ANNUAL REPORT, *supra* note 335, at 16.

As part of its determination, the special master, in addition to determining whether the complaint has merit, will determine whether the violation constituted "willful misconduct." 28 U.S.C. § 354 (2006).

349. *Id.*

350. CAL. 2011 ANNUAL REPORT, *supra* note 335, at 2.

351. James R. Wolf, *Judicial Discipline in Florida: The Cost of Misconduct*, 30 NOVA L. REV. 349, 357 (2006) (noting that removal is only considered in especially egregious circumstances).

> (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent and frequency of occurrence of the acts of misconduct; (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires.[352]

The judge has the right appeal the punishment to the jurisdiction's highest court.[353]

VIII. A NEW PROPOSAL: INDEPENDENT COMMISSIONS FOR PROSECUTORIAL OVERSIGHT

There are a number of ways to remedy the problems with the current disciplinary systems for prosecutorial misconduct. Clearer guidelines establishing prosecutors' duties and obligations would be beneficial.[354] Unfortunately, because much of the misconduct is of a knowing and deliberate nature, clearly defined parameters would most likely prove inconsequential. Some scholars suggest tightening internal security within prosecutors' offices as a corrective measure.[355] However, internal discipline has also proven ineffective.[356] One commentator proposes denying immunity to prosecutors who engage in unethical, deliberate and knowing conduct.[357] While the policy goals underlying prosecutorial immunity are no longer compelling, modifying the doctrine presents severe challenges. A more realistic approach is to reduce the standard for reversal from harmless error to reasonable possibility, which would motivate prosecutors to fulfill their ethical obligations to ensure that appellate courts will uphold the convictions they secure on appeal.[358]

However, these "remedies" remain at the periphery of the real concern. There must be measured and proportionate consequences for behavior that falls below the high standards that prosecutors are expected to meet. The cost of misconduct

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352. 736 P.2d 639, 659 (1987). When considering what sanctions to apply, the Florida courts, as well as the state commission, evaluate factors beyond the misconduct itself, such as past behavior, judicial experience, extenuating circumstances, pattern of behavior, motive, remorsefulness, repentance, rehabilitation effort in an individual case, and the judge's candor or lack thereof. Wolf, *supra* note 351, at 355–56.

353. CAL. 2011 ANNUAL REPORT, *supra* note 335, at 2.

354. Yaroshefsky, *supra* note 297, at 936–37.

355. *Id.* at 936.

356. *See id.* at 935–36.

357. Weeks, *supra* note 278, at 836.

358. *Id.* at 839–840.

is too great to both the integrity of the criminal justice system and to the individuals who suffer because of a prosecutor's misdeeds. Although some scholars have offered their proposals for some manner of state prosecutorial commissions, this Article proposes a specific plan for such commissions. A prosecutorial oversight commission should be designed to induce reporting of alleged prosecutorial misconduct, while at the same time preserving prosecutors' independence, autonomy, and discretionary authority. State-authorized prosecutorial commissions can accomplish for prosecutorial integrity and accountability what judicial commissions have accomplished for judicial integrity and accountability. This calls for a tiered response to all allegations of misconduct. A diverse make-up of commission members and enhanced reporting requirements would foster a transparent process that recognizes the need for prosecutorial independence, as well as investigative and adjudicatory procedures to ensure due process.

A. A Tiered Response

All initial claims of misconduct will be reviewed by a three-member screening committee, comprised of a retired judge, a retired criminal trial lawyer, and a layperson. The governor or the chief justice of the state's highest court will appoint all members of the committee. Most claims of prosecutorial error will likely be dismissed, just as most claims presented to judicial commissions are dismissed at the analogous phase.[359] However, should two of the three members believe by, a preponderance of the evidence, that error occurred, the committee would send the matter to the full commission for investigation, hearing, and, if necessary, determination of sanctions.

A special prosecutor will be appointed to investigate, and ultimately to prosecute, the claim before the full commission. The prosecutor accused of misconduct will have the right to counsel, whether retained or appointed. A two-thirds majority of the full commission will evaluate the claim using a clear and convincing standard. The commission will then make the following findings: whether misconduct occurred; second, whether the error was deliberate or inadvertent; and third, whether a reasonable probability exists that the error affected the criminal case. Requiring these separate findings allows the commission to recognize different levels of severity of the prosecutor's conduct, which the commission will take into account when determining the sanctions that will follow a finding of misconduct. Just as deliberate misconduct will draw harsher sanctions than inadvertent misconduct, misconduct that had a reasonable probability of affecting the jury will be considered a more significant error and will also draw harsher sanctions. The range of options available to the commission following a finding of misconduct should include public reprimand, fines, suspension, and disbarment.

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359. *See, e.g.*, Rosen, *supra* note 12, at 717 & n. 129 (citing the rate of dismissal in California).

B. A Diverse Commission

Commission membership should be evenly divided between experts in the field of criminal justice and laypersons. The experts—retired judges, former prosecutors, and seasoned defense attorneys—will be familiar with the requirements and practicalities of the prosecutorial function, and will thus be able to provide guidance for the laypersons. The inclusion of laypersons will lend credibility to the commissions' actions, partly by alleviating concerns that the experts are protecting their peers from the consequences of misconduct.

C. Enhanced Reporting

After states established judicial conduct commissions, complaints against judges increased significantly.[360] The reason for the increase in reporting is subject to different interpretations, but the creation of bodies specifically designed to address judicial misconduct must have had some bearing on the surge of complaints. Likewise, a body specifically tasked with the investigation of prosecutors is likely to motivate private citizens, as well as other lawyers and judges, to more readily report misconduct.[361] While state bar organizations have historically devoted little attention or effort to investigating—let alone disciplining—prosecutors, a prosecutorial commission would focus their energies exclusively on prosecutor misconduct.

Additionally, appellate review of all cases citing prosecutorial error would further encourage the reporting of prosecutorial. Under this proposal, an appellate court opinion citing prosecutorial misconduct will automatically come before the commission for review, regardless of the court's holding. Consequently, the harmless error or plain error doctrines will not preclude review of the misconduct.

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360. *The Complaint Process*, *supra* note 331. Before 1995, the Commission was only authorized to make recommendations to the California Supreme Court, which had the authority to discipline a judge for misconduct. *Public Discipline & Decisions 1961–Present*, STATE OF CAL. COMM'N ON JUDICIAL PERFORMANCE, http://www.cjp.ca.gov/pub_discipline_and_decisions.htm (last visited Jan. 24, 2014). Between 1961 and 1995, the California Supreme Court disciplined thirty-six judges: fifteen removals, including one contested retirement; twenty censures; and one uncontested involuntary retirement. *Id.* Since authorized to impose sanctions, the Commission has disciplined 131 judges. *Id.* Between 1988 and 1995, the Commission's authority to impose disciplinary measures was limited to public reprovals, which required the consent of the judge. *Id.* Reports indicate that the commission made seventeen public reprovals during these six years. *Id.* The 1995 amendments to the California Constitution shifted the authority to impose all disciplinary measures from the Supreme Court to the commission, including removal of a judge from the bench for unraveled misconduct. *Id.* The Supreme Court maintains only discretionary review of disciplinary actions. *Id.* The sanction of public reproval was replaced by the sanction of public admonishment. *Id.* Since 1995, the commission has made seventy-four public admonishments, twenty-nine public censures, and one private admonishment. *Id.*

361. CAL. 2011 ANNUAL REPORT, *supra* note 335, at 2.

D. A Transparent Process

The commission's process must strike a balance between the public's right to know when a public official is being investigated and a concern for the prosecutor's professional reputation. A prosecutorial commission should adopt the compromise of most judicial commissions: the commission will refrain from public disclosure during the preliminary investigation stage.[362] Because the overwhelming number of complaints against judges ultimately lack merit, there is no public benefit to disclosure at the beginning of the investigation.[363] However, once a complaint survives initial scrutiny, the public should has the right to notice of all proceedings and sanctions imposed.

E. Recognizing and Preserving Prosecutorial Independence

Prosecutor commissions, like judicial commissions, raise important concerns about interference with prosecutorial autonomy, which is critical to both prosecutors' and judges' abilities to perform their duties successfully. The experts on the commission, who will understand and value prosecutorial independence, will work to preserve autonomy and, if necessary, serve as a check on the lay commissioners, who may not fully appreciate its importance.

F. Investigative and Adjudicatory Procedures that Ensure Due Process

The structure and procedure the prosecutorial conduct commissions must ensure due process. The prosecutor under investigation must receive timely notice of the complaint. He must be afforded counsel at his request. The adjudicatory process must be before a competent and impartial body, and should there be a finding of misconduct a wholly separate body must mete out any sanctions.

IX. CONCLUSION

Establishing prosecutorial conduct commissions will receive scant support from legislatures reluctant to fight against the tide of public opinion, which views any efforts on behalf of convicted defendants as anti-law enforcement and pro-criminal. Yet, the wave of public awareness of wrongful convictions resulting from overzealous prosecutions should provide some shelter for those lawmakers with the courage and conviction to press for meaningful reform. Reining in prosecutorial misconduct should be viewed as a core societal concern. Our criminal justice system is at its fairest when all those who come within its sphere receive the full measure of their constitutional protection.

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362. *Id.*
363. *Id.*