

RETOOLING AND COORDINATING THE APPROACH TO PROSECUTORIAL MISCONDUCT

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Abstract

Prosecutorial misconduct has stubbornly remained a troubling feature of the American criminal justice system. Judges and scholars have bemoaned its persistence, and some have warned that it threatens to reach epidemic proportions. The problem is that the current approaches we deploy to surface, investigate, and stop such misconduct are inadequate to the task. Too often, the courts, scholars, and the public misread the scope of the problem. They want to treat responses to prosecutorial misconduct as a product of individual bad actors. These individual "bad apples" are viewed as outliers and disconnected from office leadership. But the misconduct is rarely just an individual failure and more often encompasses an array of key players throughout the prosecutor's office. Prosecutorial misconduct flows from an environment that tolerates it, oversees it, and encourages it. So, rooting out the problem of misconduct necessarily involves more than weeding out a few bad individuals; it requires new ways of defining the conduct and coordination of the responses to capture the scope of this misconduct.

This Article explores the dimensions of prosecutorial misconduct and challenges the prevailing notion that misconduct is a singular act by a corrupt individual. It contends, instead, that the chronic increase in instances of prosecutorial misbehavior stems from our failure to understand the scope and frequency of misconduct coupled with our tendency

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to minimize or cover up the behavior of prosecutors. This article proposes treating misconduct as obstruction of justice as a preliminary step toward recognizing and signaling the gravity of the stakes involved. It then calls for better coordination, more thorough data-gathering, and more focused state and federal intervention to investigate and deter misconduct.

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I. INTRODUCTION

Every year another instance of prosecutorial misconduct grabs national headlines. The media painstakingly exposes those incidents where prosecutors have withheld exculpatory evidence from the defense,¹ misrepresented witness accounts,² or deliberately concealed

1. See, e.g., Wade Goodwyn, *Free After 25 Years: A Tale of Murder and Injustice*, NPR (Apr. 28, 2012, 5:00 AM), <http://www.npr.org/2012/04/28/150996459/free-after-25-years-a-tale-of-murder-and-injustice> (describing the inconvenient evidence that prosecutors withheld during the murder trial leading to the wrongful conviction of

information because disclosing it would have made obtaining a conviction more difficult.³ These accounts momentarily garner attention, but then they quickly give way to other news stories. Too

Michael Morton); Molly Hennessy-Fiske, *Ex-Prosecutor Punished for Withholding Evidence in Murder Case*, L.A. TIMES (Nov. 8, 2013, 5:32 PM), <http://www.latimes.com/nation/la-na-texas-judge-20131109-story.html> (reporting sanctions imposed on former Texas judge and District Attorney Ken Anderson for his misconduct in the Morton case); Charlie Savage, *Court-Appointed Investigator Offers Scathing Report on Prosecution of Senator Stevens*, N.Y. TIMES (Nov. 21, 2011), <http://www.nytimes.com/2011/11/22/us/politics/no-charges-recommended-against-prosecutors-in-ted-stevens-case.html> (citing the 500-page investigative report that detailed findings of pervasive prosecutorial misconduct and concealment of significant exculpatory evidence in the case against Senator Ted Stevens).

2. See, e.g., Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System That Protects Them*, HUFFINGTON POST (Aug. 1, 2013, 2:18 PM), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html (describing the suppression of witness statements in the case against Shareef Cousin that led to his wrongful murder conviction); David Lohr, *Witnesses: DA Bullied Testimony That Put Rapper Away for 30 Years*, HUFFINGTON POST (Mar. 18, 2015, 9:18 AM), http://www.huffingtonpost.com/2015/03/18/mckinley-mac-phipps-wrongful-conviction_n_6612074.html (citing reports of coercive tactics employed by the St. Tammany Parish, Louisiana District Attorney's Office to compel numerous witnesses to identify rapper McKinley "Mac" Phipps as the killer in a nightclub shooting and describing the prosecutor's distortion of Phipps' rap lyrics during closing argument); Terrence McCoy & Craig Malisow, *The First 48 Makes Millions While the Innocent Have Their Lives Ruined*, HOUS. PRESS (Jan. 29, 2014, 4:00 AM), <http://www.houstonpress.com/news/the-first-48-makes-millions-while-the-innocent-have-their-lives-ruined-6600580> (recounting numerous instances of law enforcement misrepresenting witness statements and the withholding of exculpatory police reports by prosecutors).

3. See, e.g., Rachel Aviv, *Revenge Killing*, NEW YORKER (July 2015), <http://www.newyorker.com/magazine/2015/07/06/revenge-killing> (detailing an expert pathologist's misstatement of medical science and failure to conduct a basic test that would have revealed an alternate, non-inculpatory explanation for injuries suffered by the victim in Louisiana's capital case against Rodricus Crawford, who is currently on death row); Balko, *supra* note 2 (citing the resignation of Assistant District Attorney Jerry Glas in the Louisiana case against John Thompson, based on his belief that prosecutors had concealed critical evidence that would later prove Thompson's innocence); Kevin Sali, *The Cell Phone Evidence in Adnan Syed's Case Illustrates a Depressingly Common Problem*, HUFFINGTON POST (Feb. 12, 2016, 5:31 PM), http://www.huffingtonpost.com/kevin-sali/the-cell-phone-evidence-in-adnan-syeds-case_b_9202422.html (calling into question the veracity of key expert testimony in Adnan Syed's murder trial, in light of the prosecution's failure to alert its expert to a critical disclaimer accompanying the reliability of cell phone data); Alan Scher Zagier, *Convictions Tossed, Missouri Inmate Gains Freedom*, NEWS TRIB. (Nov. 14, 2012), <http://www.newstribune.com/news/news/story/2012/nov/14/convictions-tossed-missouri-inmate-gains-freedom/548333/> (describing the suppression of evidence and misconduct that led George Allen, Jr. to falsely confess to a murder for which he served nearly thirty years before his 2012 release).

often, the general public simply ignores the misconduct, dismissing it as troubling but somehow not worthy of sustained consideration. On those occasions when such misconduct has resulted in the lengthy imprisonment of wrongly convicted individuals⁴ or has led to a capital conviction with an individual awaiting execution on death row,⁵ we react with moral outrage and quickly condemn the behavior.⁶ But even this sort of misconduct rarely brings real consequences to the individual prosecutor or the prosecutors' office.⁷ In the end, media pundits⁸ wring

4. See, e.g., Francis X. Clines, *DNA Clears Virginia Man of 1982 Assault*, N.Y. TIMES (Dec. 10, 2001), <http://www.nytimes.com/2001/12/10/us/dna-clears-virginia-man-of-1982-assault.html> (reporting the exoneration of Marvin Anderson nineteen years after his wrongful rape conviction, which appeared to have been driven by racial animus); Goodwyn, *supra* note 1 (describing the twenty-five years Michael Morton served for the tragic murder of his wife before DNA evidence proved his innocence); Rich Schapiro & Christina Carrega-Woodby, *Man Wrongfully Convicted in 1991 Murder Where Victim Was Found in Brooklyn Handball Court Walks Free*, N.Y. DAILY NEWS, <http://www.nydailynews.com/new-york/brooklyn/man-wrongfully-convicted-91-brooklyn-murder-walk-free-article-1.2559747> (last updated Mar. 10, 2016, 5:51 PM) (describing the recent release of Andre Hatchett, who served more than twenty-five years for a wrongful murder conviction while exculpatory evidence was never disclosed to Hatchett's attorneys).

5. See, e.g., David Keenan et al., Essay, *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, 204–05 (2011) (citing the fourteen years John Thompson spent on death row while prosecutors withheld the exculpatory blood evidence that would later exonerate him); Scott Shane, *A Death Penalty Fight Comes Home*, N.Y. TIMES (Feb. 5, 2013), <http://www.nytimes.com/2013/02/06/us/exonerated-inmate-seeks-end-to-maryland-death-penalty.html> (highlighting the anti-death penalty advocacy of Kirk Bloodsworth, who was the first inmate in the United States to be sentenced to death and later exonerated by DNA evidence).

6. See, e.g., Andrew Cohen, *Prosecutors Shouldn't Be Hiding Evidence from Defendants*, ATLANTIC (May 13, 2013), <http://www.theatlantic.com/national/archive/2013/05/prosecutors-shouldnt-be-hiding-evidence-from-defendants/275754/> (calling for "swift and significant punishment" of Brady violations, in light of the ongoing prevalence of prosecutors hiding exculpatory evidence); Sidney Powell, *BREAKING: Judges Blast Department of Justice Over 'Shocking' Prosecutorial Misconduct*, OBSERVER (Aug. 19, 2015, 1:13 AM), <http://observer.com/2015/08/breaking-judges-blast-department-of-justice-over-shocking-prosecutorial-misconduct/> (describing the widely publicized and outrageous misconduct of the prosecutors in the Danziger Bridge shootings as symptomatic of a common problem).

7. See, e.g., H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 82–84 (2013) (conveying the reluctance of judges and defense attorneys to report instances of prosecutorial misconduct and citing the lack of sanctions and conviction reversals that accrue on those occasions when it is identified); Christopher R. Smith, *I Fought the Law and the Law Lost: The Case for Congressional Oversight Over Systemic Department of Justice Discovery Abuse in Criminal Cases*, 9 CARDOZO PUB. L. POLY & ETHICS J. 85, 93 (2010) (describing the failure of DOJ's Office of Professional Responsibility (OPR) to effectively self-regulate in light of discrepancies between judicial findings of misconduct and comparable findings by OPR); Keenan et al., *supra* note 5, at 211–12 (detailing numerous studies revealing the gross disparity between instances of prosecutorial misconduct and the imposition of disciplinary

their hands and decry these instances of misconduct. And scholars react by proposing conventional remedies to reduce the frequency of these incidents.⁹

We desperately want to believe that misconduct is, at best, a momentary oversight or, at worst, a single act committed by a single “miscreant prosecutor.”¹⁰ Indeed, courts have validated this view even in the face of contradictory data.¹¹ But anecdotal evidence suggests that

sanctions); Aditi Sherikar, Note, *Prosecuting Prosecutors: A Need for Uniform Sanctions*, 25 GEO. J. LEGAL ETHICS 1011, 1013 (2012) (citing the history by which courts have jettisoned remedies for victims of prosecutorial misconduct); Mark Godsey, *For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man*, HUFFINGTON POST (Nov. 11, 2013, 4:12 PM), http://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a_b_4221000.html (arguing that “[r]ogue cops and prosecutors going unpunished is the rule rather than the exception” and citing studies detailing the high incidence of largely unaddressed cases of misconduct).

8. See, e.g., Julia Brucculieri, *‘Making a Murderer’ Prosecutor Ken Kratz Knows He Was Kinda the Worst*, HUFFINGTON POST (Jan. 20, 2016, 4:10 PM), http://www.huffingtonpost.com/entry/ken-kratz-making-a-murderer_us_569fe1c1e4b0a7026bf9fed9 (echoing the media’s criticism of “Making a Murderer” prosecutor Ken Kratz following his interview with comedian Jenna Friedman); Josie Duffy, *The Horrifying Behavior of Anita Alvarez, Chicago’s Head Prosecutor*, DAILY KOS (Nov. 24, 2015, 6:49 PM), <http://www.dailykos.com/story/2015/11/24/1453982/-The-horrifying-behavior-of-Anita-Alvarez-Chicago-s-head-prosecutor> (making the case for why Alvarez is “one of the worst prosecutors in the country”).

9. See, e.g., Barry Scheck, *Four Reforms for the Twenty-First Century*, 96 JUDICATURE 323, 327–29 (2013) (calling for state and federal judges to issue an “ethical rule” order that would enhance and enforce prosecutors’ disclosure obligations); Alisha L. McKay, Comment, *Let the Master Answer: Why the Doctrine of Respondeat Superior Should Be Used to Address Egregious Prosecutorial Misconduct Resulting in Wrongful Convictions*, 2012 WIS. L. REV. 1215, 1234–36 (2012) (citing proposals to expand prosecutorial liability for misconduct); Evan Bernick, *It’s Time to End Prosecutorial Immunity*, HUFFINGTON POST (Aug. 12, 2015, 5:47 PM), http://www.huffingtonpost.com/evan-bernick/its-time-to-end-prosecuto_b_7979276.html (calling for accountability for ethical breaches by ending absolute immunity for prosecutors); Godsey, *supra* note 7 (promoting adoption of Scheck’s standing “ethical rule order”).

10. *Connick v. Thompson*, 563 U.S. 51, 76 (2011) (Scalia, J., concurring) (“The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan’s willful suppression of evidence he believed to be exculpatory.”); see also Sean Cockerham, *Justice Department: We Won’t Repeat Ted Stevens Mistake*, MCCLATCHY DC (Mar. 28, 2012, 7:22 PM), <http://www.mcclatchydc.com/news/politics-government/article24726910.html> (citing the Justice Department’s contention that its misconduct in the Ted Stevens case was an “isolated incident”).

11. See, e.g., *Connick*, 563 U.S. at 79 (Ginsburg, J., dissenting) (indicating that the trial record in Thompson’s case revealed that “the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical”); *Truvia v. Connick*, 577 F. App’x 317, 324 (5th Cir. 2014) (rejecting § 1983 claim brought by former inmates because, although

prosecutorial misconduct runs rampant and may be reaching “epidemic” proportions.¹² A recent case in the Ninth Circuit Court of Appeals, highlighting the misconduct of former Contra Costa County California prosecutor David Brown, is an excellent example.¹³ In that case, the court wrote: “This is the latest case arising out of a jury selected by David Brown, a prosecutor with a history of unconstitutional race-based peremptory strikes. We previously held that Brown violated the Constitution’s Equal Protection Clause”¹⁴

The *Currie* opinion is filled with the court’s finding that the misconduct that prosecutor Brown engaged in was egregious, repeated, and race-based.¹⁵ Yet that prosecutor’s office will try Currie for the third time because of Brown’s repeated misconduct, while Brown was not disciplined or investigated by the California Bar for his repeated misconduct.¹⁶

Perhaps increased attention, enabled by technology and social media, has simply raised public awareness of the volume of the acts of misconduct. Or perhaps the public is just seeing how widespread the conduct appears to be. But the problem has certainly not disappeared. Indeed, prosecutorial misconduct recurs largely because we make erroneous assumptions about the nature, scope, and breadth of the problem. When we regard prosecutorial misconduct as little more than individual lapses in judgment, and accept the premise that these are isolated episodes, we are likely to conclude that tightening internal and external controls will suffice. Thus, if states simply strengthen lawyer discipline, add layers of internal controls within prosecutor’s offices, and then augment those steps with external oversight, then the problem becomes manageable. Or so the standard argument goes.

However, the standard argument misses the point. These conventional approaches, while obviously well-intentioned, proceed

the plaintiffs had suffered wrongful murder convictions from *Brady* violations that led to their nearly thirty year imprisonment, they could not prove the validity of the *Brady* violations alleged against the New Orleans District Attorney’s Office in other cases during the relevant period), *cert. denied*, 135 S. Ct. 1550 (2015); *D’Ambrosio v. Marino*, 747 F.3d 378, 388 (6th Cir.), *cert. denied*, 135 S. Ct. 758 (2014) (acknowledging the unconstitutional conduct of the individual prosecutors in the plaintiff’s case but finding three prior instances of misconduct insufficient to sustain municipal liability).

12. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from the order denying the petition for rehearing *en banc*) (“There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.”).

13. *Currie v. McDowell*, 825 F.3d 603, 605 (9th Cir. 2016).

14. *Id.*

15. *See id.* at 605–06.

16. *See* Bob Egelko, *Murder Conviction Thrown Out Again over Race-Based Juror Strike*, SF GATE, <http://www.sfgate.com/crime/article/Murder-conviction-thrown-out-again-on-7971551.php> (last updated June 8, 2016, 3:49 PM).

from a faulty premise. We cleave to the view that prosecutorial misconduct occurs because a single bad person has made bad choices. But when we dig deeper into the “prosecutor’s” misconduct, it soon becomes apparent that we have misplaced an apostrophe. The misconduct is rarely just an individual failure and more often encompasses an array of key players throughout the prosecutors’ office. Prosecutorial misconduct flows from an environment that tolerates it, oversees it, and encourages it. So rooting out the problem of misconduct necessarily involves more than weeding out a few bad individuals; it requires new ways of defining the conduct. But more importantly, the response to that conduct needs to be deeper and broader.

Prosecutorial misconduct must be addressed as the obstruction of justice that it is. Typically, when we think of “obstruction of justice,” we define it somewhat narrowly, exempting the actions of government actors.¹⁷ But if one conceives of the fundamental tenets of an obstruction charge as seeking to address any individuals’ actions that interfere with the proper and fair operations of the court and the justice system, prosecutorial misconduct would seem to fall squarely within that conception. Thus, the prosecutor and members of the prosecutor’s office who withhold pertinent information from the defense or engage in acts that hinder the fair resolution of a criminal charge should be held accountable for those acts of obstruction.

Reframing the problem of prosecutorial misconduct as obstruction enables us not only to redefine what is occurring but also to signal and consider what is at stake. The interests that hang in the balance call for a rigorous and coordinated response that addresses both the individual conduct and the office-wide contribution to, and complicity in, that conduct. An inquiry into prosecutorial misconduct will need to examine not only the instances of misconduct but also the systemic reasons that

17. See Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 834 (2006) (noting that while obstruction of justice statutes have been used to hold defense attorneys, government employees, and judges accountable, there are no reported cases of using these statutes to punish prosecutors for misconduct). More commonly, obstruction of justice is prosecuted as a corporate crime. See, e.g., *Obstruction of Justice*, in EXECUTIVE LEGAL SUMMARY 90 (updated June 2017), Westlaw, EXECLSUM 90 (defining obstruction of justice as one of the most serious white-collar crimes and providing examples in the corporate context); Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 723, 729 (2013) (describing the expansion of obstruction of justice laws through the enactment of Sarbanes-Oxley as a congressional response to corporate scandals).

the behavior occurred. It will need to explore both the behavior of the prosecutor who engaged in the conduct and that of the supervisory colleagues who acquiesced or encouraged it, because they bear responsibility for establishing the tone and culture of the office. This is not meant to suggest that all instances of misconduct will always rise to the level of obstruction. In some instances, the misconduct may be more benign: prosecutors may be overwhelmed with caseloads and may simply miss reporting requirements. In other situations, prosecutors may legitimately disagree that evidence falls under their statutory obligation to disclose. But where prosecutors are acting illegally—making the choice to ignore disclosure obligations, conceal information, or misrepresent evidence—such conduct would be subject to prosecution. And liability might extend beyond the individual to others within the office who have been aware of the misconduct or who have tacitly accepted this illegal behavior.

The methods we currently use to surface, investigate, and address prosecutorial misconduct are wholly inadequate to the task. The choice to rely on bar discipline and self-policing is as ineffective as it is absurd. And since, to date, courts have either minimized the incidents of misconduct¹⁸ or avoided the inquiry altogether,¹⁹ a reliance on civil litigation seems equally pointless.²⁰ Prosecutorial misconduct has recurred and now threatens to spiral dangerously out of control because

18. See, e.g., Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 347 (2007) (describing the inherent flaws in using judicial review as a remedy for prosecutorial misconduct when judges are incentivized to find harmless error and avoid mistrials even under the most extreme instances of trial misconduct); Michael Lyon, Comment, *Avoiding the Wood Shed: The Third Circuit Examines Prosecutorial Misconduct in Closing Argument in United States v. Wood*, 53 VILL. L. REV. 689, 711 (2008) (analyzing *United States v. Wood*, 486 F.3d 781 (3rd Cir. 2007), a notable Third Circuit case, where the court upheld a conviction despite expressing “considerable disdain” for the prosecutor’s remarks during closing argument); Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1514 (2009) (describing the role of the harmless error doctrine in preventing even the most serious and deliberate forms of misconduct from yielding appellate remedies); Tara J. Tobin, Note, *Miscarriage of Justice During Closing Arguments by an Overzealous Prosecutor and a Timid Supreme Court in State v. Smith*, 45 S.D. L. REV. 186, 219–25 (2000) (citing the invited response, cured error, and harmless error doctrines as techniques courts use to avoid conviction reversals in the face of prosecutorial misconduct).

19. See Starr, *supra* note 18, at 1515–18 (describing the way trial courts have narrowed the scope of the applicable standard in response to strong automatic remedies established by the Supreme Court, such as those mandated by *Batson* violations; and citing the broader problem this avoidance strategy engenders when courts fail to recognize misconduct so as to circumvent the obligation to impose harsh sanctions).

20. See *id.* at 1518 (noting that even if the current rule of absolute prosecutorial immunity was changed, damages would not be an effective deterrent since criminal defendants make poor civil plaintiffs and damages would be difficult to quantify).

we have failed to take steps to define this behavior in terms that capture and convey the gravity of the issues at stake. And we have failed to address it as the criminal conduct that it is.

Part One of this Article will examine the frequency and scope of the problem of prosecutorial misconduct. Specifically, it will examine the apparent chronic increase in instances of prosecutorial misbehavior as well as the tendency of prosecutors' offices to cover up the misconduct of their lawyers. Part Two will analyze the inadequacies in the conventional responses to misconduct that look to use external reviews or internal office controls to unearth, address, and prevent misconduct. Part Three will recommend a fundamental re-framing of the response to prosecutorial misconduct. It will proffer an approach that calls for better coordination, more thorough data-gathering, and more focused state and federal intervention. Ultimately, this Article will examine the assumptions about prosecutorial misconduct and challenge the assumption that the bulk of misconduct comes at the hands of a "lone wolf." This Article will then examine the reality that multiple actors are frequently involved in all aspects of prosecutorial misconduct and that a different approach is necessary to reduce the increasing instances of this form of governmental abuse.

II. MISCONSTRUING PROSECUTORIAL MISCONDUCT: ABERRATION OR EPIDEMIC?

Defining prosecutorial misconduct as an individual lapse has become an all too familiar convention. But that narrow perspective wholly ignores the impact of misconduct on the justice system and the accused's experience of fairness from that system. When the legal system fundamentally misunderstands the nature, scope, and breadth of the problem of prosecutorial misconduct, the system will inevitably misjudge the steps it needs to take to redress the problem. Understanding the individual motivations of a prosecutor engaged in misconduct offers some insight, but what becomes equally important is recognizing the role of others within the prosecutor's office who fail to discipline or even acknowledge that misconduct operates as a fundamental threat to justice. The choice to turn a blind eye to the growing instances of misconduct is apparent when we look at the responses of those in leadership positions in prosecutors' offices who should monitor and discipline individuals for engaging in the misconduct. It is also apparent that state courts are more often than not

willing to perpetuate the myth that misconduct is not as serious as it actually is.

A. Evidence of the Epidemic: Office-Wide Cover-Up

On February 6, 1994, an assailant shot Rabbi Abraham Pollack to death as he was collecting rent in Williamsburg, Brooklyn.²¹ Police officers mounted an investigation that soon narrowed to a single suspect: Jabbar Collins.²² Just over a month after the shooting, Mr. Collins voluntarily appeared for questioning and faced second-degree murder charges.²³ Brooklyn District Attorney Charles Hynes assigned Assistant District Attorney Michael Vecchione to the case.²⁴ Even then, Vecchione seemed a rising star.²⁵ He would later assume the position of chief of the Homicide Bureau and Trial Division and would ultimately ascend to Chief of the Rackets Bureau.²⁶ At trial in the *Collins* case, Vecchione presented two witnesses, Adrian Diaz and Angel Santos, who testified that they saw Collins flee the shooting.²⁷ Santos further testified that he dialed 9-1-1 as Collins fled past him.²⁸ A third witness, Edwin Oliva, testified that Collins had confided in Oliva his plan to rob the rabbi as he was collecting rent.²⁹ Based on the evidence presented, Vecchione secured convictions against Collins for second-degree murder, attempted murder, robbery, assault, and weapons possession.³⁰ On April 4, 1995, Justice Egitto sentenced Collins to prison for a term of

21. Richard Perez-Pena, *Landlord Slain in a Robbery and Superintendent is Injured*, N.Y. TIMES (Feb. 7, 1994), <http://www.nytimes.com/1994/02/07/nyregion/landlord-slain-in-a-robbery-and-superintendent-is-injured.html>; Graham Rayman, *Brooklyn Deserves a New D.A.*, VILLAGE VOICE (Jan. 2, 2013), <http://www.villagevoice.com/news/brooklyn-deserves-a-new-da-6437136> (describing Vecchione's denial of any deal made with the witness and the subsequent discovery of a signed agreement leading to a plea deal for the witness by Marshall's lawyer).

22. *Collins v. City of New York*, 923 F. Supp. 2d 462, 466 (E.D.N.Y. 2013).

23. Michael Brick, *From Jail Cell, a Convict Challenges a Prosecutor*, N.Y. TIMES (Mar. 16, 2006), <http://www.nytimes.com/2006/03/16/nyregion/from-jail-cell-a-convict-challenges-a-prosecutor.html>; see also *Collins*, 923 F. Supp. 2d at 466 (indicating that Collins voluntarily appeared at the precinct for questioning after an anonymous phone call blamed him for the crime and that Collins was released after this initial encounter with law enforcement).

24. Brick, *supra* note 23.

25. *Id.*

26. *Id.*; see also Vivian Yee, *Under Fire, Brooklyn Deputy Prosecutor Will Retire*, N.Y. TIMES (Nov. 14, 2013), <http://www.nytimes.com/2013/11/15/nyregion/under-fire-brooklyn-deputy-prosecutor-will-retire.html>.

27. *People v. Collins*, No. 2884/94, 2007 WL 2492171, at *1 (N.Y. Sup. Ct. Sept. 5, 2007).

28. *Id.*

29. *Id.* at *2.

30. *Id.* at *3.

thirty-three years to life.³¹ On the surface, this seemed to bring the case to a close.

But this was only the beginning. Jabbar Collins, now imprisoned for what could have been the rest of his life, made up his mind to fight his conviction by learning all that he could about the witnesses and evidence.³² From prison and without revealing his identity, Collins contacted Adrian Diaz and Angel Santos to inquire about their stories.³³ Diaz indicated that he had agreed to supply false testimony in exchange for prosecutors dropping a probation violation against him.³⁴ Oliva told a similar story.³⁵ Edwin Oliva acknowledged that he had been a heavy drug user at the time and that the prosecutors had both threatened to charge him as an accomplice and coerced him into testifying.³⁶ With this information in hand, Collins then sought legal counsel.³⁷ Eventually, Collins and his lawyer uncovered additional evidence: a series of documents that had never been provided to Collin's original defense counsel.³⁸ This set the stage for an ensuing legal battle that would expose widespread misconduct in the Brooklyn District Attorney's office and would ultimately lead to Mr. Collins's exoneration after having served sixteen years in prison.³⁹

In March 2006, Jabbar Collins's defense counsel asked a state judge to overturn Collins's murder conviction on the grounds of newly discovered information that prosecutors should have disclosed to the defense.⁴⁰ In a sworn statement, counsel for Mr. Collins stated that the evidence "firmly documented gross misconduct at the highest levels of the D.A.'s office" and then requested a new trial outside Brooklyn.⁴¹ The request was denied.⁴² Collins then filed a motion in federal court, in the

31. Tara George, *33 to Life for Killer of Loved Landlord*, N.Y. DAILY NEWS (Apr. 4, 1995, 12:00 AM), <http://www.nydailynews.com/archives/boroughs/33-life-killer-loved-landlord-article-1.680345>.

32. See Sean Gardiner, *A Solitary Jailhouse Lawyer Argues His Way Out of Prison*, WALL ST. J., <http://www.wsj.com/articles/SB10001424052702304023804575566201554448476> (last updated Dec. 24, 2010, 12:01 AM).

33. *See id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.*

40. Brick, *supra* note 23.

41. *Id.*

42. *People v. Collins*, No. 2884/94, 2007 WL 2492171, at *1 (N.Y. Sup. Ct. Sept. 5,

Eastern District of New York, “seeking to overturn the conviction based on prosecutors’ ‘knowing presentation, at trial, of false or misleading testimony.’”⁴³ The motion also alleged that prosecutors on the case withheld evidence the defense could have used to discredit the government’s main witnesses.⁴⁴ But Assistant District Attorney Vecchione had signed an affidavit essentially denying all of the charges, stating, in part, that “he held himself and those who worked for him ‘to a high professional standard.’”⁴⁵ Vecchione further attested that claims that authorities had coerced witnesses or failed to turn over potentially exculpatory information were, “without exception, untrue.”⁴⁶ Mr. Vecchione’s signed, sworn affidavit flatly denied any wrongdoing, insisting “[n]o deals were made with witnesses that were not disclosed by me to the Court and the defense. No witness ever recanted a prior statement or grand jury testimony. No witness had to be threatened or forced to testify.”⁴⁷

These sworn statements would ultimately prove untrue. In March 2010, federal judge Dora Irizarry approved the defense request for additional material from prosecutors.⁴⁸ Documents furnished under that order suggested that Mr. Oliva had resisted cooperating with prosecutors.⁴⁹ Oliva had briefly recanted his statement implicating Collins.⁵⁰ According to those documents, “after he failed to cooperate with [the] D.A.’s office regarding a homicide,” his work release for a robbery conviction was revoked.⁵¹ He once again became willing to testify.⁵²

The disclosed documents put the District Attorney’s Office in a bind. “Four days before a scheduled hearing” in front of Judge Irizarry, the

2007) (denying Collins’s motion to vacate the judgment and all related motions without an evidentiary hearing).

43. Gardiner, *supra* note 32.

44. *Id.*

45. A.G. Sulzberger, *Facing Misconduct Claims, Brooklyn Prosecutor Agrees to Free Man Held 15 Years*, N.Y. TIMES (June 8, 2010) [hereinafter Sulzberger, *Facing Misconduct Claims*], http://www.nytimes.com/2010/06/09/nyregion/09vecchione.html?_r=0.

46. Gardiner, *supra* note 32.

47. *Actions of a Top Aide of Brooklyn DA Charles Hynes Come Under Serious Questioning*, N.Y. DAILY NEWS (Nov. 24, 2012, 4:10 AM), <http://www.nydailynews.com/opinion/investigate-da-article-1.1206083>; Sulzberger, *Facing Misconduct Claims*, *supra* note 45. A full text of Vecchione’s 2006 affidavit is available at https://archive.org/stream/703176-mike-vecchione-affidavit-in-collins-state-appeal/703176-mike-vecchione-affidavit-in-collins-state-appeal_djvu.txt.

48. Gardiner, *supra* note 32.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

office took a different tack, offering “to reduce the charge against Collins to manslaughter” and to release him immediately.⁵³ Collins rejected the offer.⁵⁴ Prosecutors then informed the court that they would not fight Collins’s effort to overturn his conviction, but they still planned to retry him in state court.⁵⁵ In May 2010, Judge Irizarry indicated that she would vacate Collins’s conviction due to concerns about prosecutorial misconduct, saying, “The whole history of this case is quite troubling.”⁵⁶ But she postponed a formal decision to grant Collins’s habeas corpus petition challenging his conviction, pending an evidentiary hearing that she would use to determine whether to permit Collins to be retried in state court or to be released unconditionally.⁵⁷ At that point, Collins was seeking to have the District Attorney’s Office barred from retrying him.⁵⁸

The District Attorney’s Office became actively engaged in defending the actions of Vecchione. District Attorney Hynes appointed Kevin Richardson, one of Vecchione’s own team members and former co-counsel, to help handle the Collins case motions.⁵⁹ A month later, Richardson would reveal that it had come to his office’s attention that Oliva had, in fact, recanted his story prior to Collins’s trial.⁶⁰ Richardson essentially conceded the defense point.⁶¹ However, rather than addressing the inconsistencies in the Vecchione affidavit or the perceived misconduct in the case, Richardson instead argued that this meant there was no need for an evidentiary hearing.⁶² But, to her

53. *Id.*; see also A.G. Sulzberger, *Murder Conviction in Trouble over Prosecutors’ Conduct*, N.Y. TIMES (May 25, 2010) [hereinafter Sulzberger, *Murder Conviction in Trouble*], <http://www.nytimes.com/2010/05/26/nyregion/26habeas.html>.

54. Gardiner, *supra* note 32; Sulzberger, *Murder Conviction in Trouble*, *supra* note 53.

55. Sulzberger, *Murder Conviction in Trouble*, *supra* note 53; see also Joaquin Sapien, *A Prosecutor, a Wrongful Conviction and a Question of Justice*, PROPUBLICA (May 23, 2013, 9:00 AM), <http://www.propublica.org/article/a-prosecutor-a-wrongful-conviction-and-a-question-of-justice>.

56. Sulzberger, *Murder Conviction in Trouble*, *supra* note 53; see also Tom Robbins, *A Jailhouse Lawyer Says a Top Brooklyn Prosecutor Rigged His Murder Conviction*, VILLAGE VOICE (June 1, 2010), <http://www.villagevoice.com/news/a-jailhouse-lawyer-says-a-top-brooklyn-prosecutor-rigged-his-murder-conviction-6394173>.

57. Sulzberger, *Murder Conviction in Trouble*, *supra* note 53.

58. Gardiner, *supra* note 32.

59. Complaint at ¶¶ 320–23, *Collins v. City of New York*, 923 F. Supp. 2d 462 (E.D.N.Y. 2013) (No. 1:11CV00766).

60. *Id.* ¶¶ 324–25.

61. *Id.* ¶ 328.

62. *Id.* ¶ 330.

credit, Judge Irizarry saw the issues differently. She ordered the hearing because, in her opinion, the allegations were “extremely troubling,” and she acknowledged that she would need to decide whether the case should be dismissed with prejudice, essentially prohibiting Collins’s retrial.⁶³

During the evidentiary hearing, the details of the misconduct began to emerge. Angel Santos testified that he had been a heavy drug user when the murder occurred and that he told Vecchione he did not want to testify at the trial.⁶⁴ According to Santos, Vecchione threatened to hit him in the head with a coffee table or jail him for perjury.⁶⁵ When he still refused, Santos said that Vecchione threatened him with prosecution and then had him jailed.⁶⁶ Only once he agreed to testify was he released and transferred to a Holiday Inn.⁶⁷ This information was never disclosed to the defense.⁶⁸ Santos further testified that his voice was not on the 9-1-1 tape.⁶⁹ In the end, Santos was the first and only witness to testify at this hearing.⁷⁰ Vecchione never testified in court.⁷¹ Richardson, acting on behalf of District Attorney Hynes, “consented to an order vacating [Collins’s] conviction[s], prohibiting any retrial, and dismissing the indictment ‘with prejudice’” on June 8, 2010.⁷² The office said that “we can no longer secure against him a conviction beyond a reasonable doubt” but that it continued to believe in Collins’s guilt.⁷³ In making this agreement, the deal spared Vecchione “from being compelled to testify about the allegations of misconduct during [the] *habeas corpus* hearing.”⁷⁴

Despite the evidence and the concession that failing to disclose information about Oliva to the defense constituted a violation under

63. *Id.* ¶ 331.

64. Gardiner, *supra* note 32.

65. Complaint, *supra* note 59, ¶ 335; Robbins, *supra* note 56; *see also* John Eligon, *Freed Man’s Suit Accuses Brooklyn Prosecutors of Misconduct*, N.Y. TIMES (Feb. 16, 2011), http://www.nytimes.com/2011/02/17/nyregion/17brooklyn.html?_r=0.

66. Complaint, *supra* note 59, ¶¶ 335–36; Eligon, *supra* note 65.

67. Gardiner, *supra* note 32; Robbins, *supra* note 56.

68. Robbins, *supra* note 56.

69. Complaint, *supra* note 59, ¶ 333.

70. Sulzberger, *Facing Misconduct Claims*, *supra* note 45.

71. *See id.*

72. Complaint, *supra* note 59, ¶ 342; *see also* Sulzberger, *Facing Misconduct Claims*, *supra* note 45.

73. Janon Fisher, *Judge Nixes Slay Rap with Slam at DA*, N.Y. POST (June 9, 2010, 4:00 AM), <http://nypost.com/2010/06/09/judge-nixes-slay-rap-with-slam-at-da/>; *see also* Transcript of Civil Cause for Hearing at 125, *Collins v. Ercole*, No. 08-CV-1359 (E.D.N.Y. June 8, 2010) [hereinafter *Transcript of Habeas Hearing*] (documenting Richardson’s articulation of the District Attorney’s Office’s continued belief in Collins’s guilt in response to Judge Irizarry’s admonition that she did not “want to hear any more denials”).

74. Sulzberger, *Facing Misconduct Claims*, *supra* note 45 (emphasis added).

Brady v. Maryland,⁷⁵ Richardson continued to deny that the withholding of the evidence was intentional.⁷⁶ He declared in party stipulations:

This Office stands behind the conduct of former Assistant District Attorney Posnor and Fisconia [sic] and current Assistant District Attorney Vecchione, who prosecuted the defendant at his trial, along with the Office's staff and detective investigators who assisted them, and we deny each and every one of the allegations leveled against them, and against the trial court that conducted the trial, and the police officers who investigated the homicide, and who testified against the defendant.⁷⁷

He even defended the failure to disclose Santos's drug addiction and possible inability to perceive the events, stating, "[N]ever has it been my understanding of the Brady rule that I would be required to turn over a witness's status as a person who uses drugs or alcohol, unless that drug use or alcohol use was in some way relative to what that witness witnessed."⁷⁸ But Judge Irizarry explicitly disagreed with this proposition.⁷⁹

In granting Mr. Collins's Petition for Habeas Corpus Relief on June 9, 2010, Judge Irizarry found that Vecchione and the District Attorney's Office engaged in misconduct that was "shameful."⁸⁰ She found that Mr. Oliva did recant his statement implicating Mr. Collins prior to trial and that the State's failure to disclose this to the defense violated its obligations under *Brady* and violated Mr. Collins's constitutional rights.⁸¹ The court made clear that it did not credit the Vecchione affidavit.⁸² Judge Irizarry found that the State withheld information about Mr. Santos's drug addiction prior to and during trial, again in violation of its disclosure obligations under *Giglio v. United States*.⁸³ She observed that intoxication is relevant to credibility and is therefore

75. 373 U.S. 83 (1963).

76. Complaint, *supra* note 59, ¶ 349.

77. *Id.* ¶ 350 (alterations omitted).

78. *Id.* ¶ 352.

79. *Id.* ¶ 355.

80. Transcript of Habeas Hearing, *supra* note 73, at 133.

81. *Id.* at 135–38.

82. *Id.* at 121–22.

83. *Id.* at 132–33; *see also* *Giglio v. United States*, 405 U.S. 150 (1972).

material to the credibility of witnesses.⁸⁴ Judge Irizarry went on to note that she did not believe Mr. Vecchione was unaware of his misconduct, stating that “[i]t defies credulity to believe that [Mr. Vecchione] did not know about the recanted witness; and as a more senior prosecutor he, certainly, should have been aware of all of the obligations to disclose a witness’ addiction, material witness order, and to follow all of the appropriate procedures.”⁸⁵ Finally, Judge Irizarry expressed her great disappointment with Mr. Vecchione, Mr. Hynes, and the Brooklyn District Attorneys’ Office, stating that “[i]t is really sad that the D.A.’s Office persists in standing firm and saying they did nothing wrong here.”⁸⁶ She added that she could “only hope that . . . the D.A.’s office . . . [would] emphasize to the prosecutors in that office the importance of Brady.”⁸⁷

Even in the face of these clear findings, Hynes refused to acknowledge any misconduct or to censure Vecchione. In fact, he publicly asserted that Vecchione was “a ‘very principled lawyer,’ ‘was not guilty of any misconduct,’ and would face no disciplinary action.”⁸⁸ He announced that he would conduct absolutely no investigation into Vecchione’s or other prosecutors’ behavior in the case.⁸⁹ Ultimately, Hynes himself would be the focus of a criminal investigation for his own malfeasance.⁹⁰

A civil suit ensued in which Mr. Collins sued the city for damages dues to his wrongful conviction.⁹¹ In one of the hearings convened in the case, U.S. District Judge Frederic Block expressed shock that District Attorney Hynes had not punished Mr. Vecchione, saying that he was “puzzled why the district attorney did not take any action against Vecchione To the contrary, he seems to [have] ignore[d] everything

84. Transcript of Habeas Hearing, *supra* note 73, at 132. It also appears that she agreed with Mr. Collins that Mr. Santos’s 9-1-1 tape should have been turned over to the defense. *See id.*

85. *Id.* at 124.

86. *Id.* at 122.

87. *Id.* at 138.

88. Complaint, *supra* note 59, ¶ 360; *see also* Gardiner, *supra* note 32; John Marzulli, *Brooklyn DA Charles Hynes in Hot Seat for Protecting Prosecutor Who Imprisoned Innocent Man*, N.Y. DAILY NEWS (Nov. 16, 2012, 3:51 PM) [hereinafter Marzulli, *Brooklyn DA*], <http://www.nydailynews.com/new-york/b-klyn-da-charles-hynes-hot-seat-wrongful-conviction-article-1.1203342>.

89. *Collins v. City of New York*, 923 F. Supp. 2d 462, 469 (E.D.N.Y. 2013); Complaint, *supra* note 59, ¶ 360.

90. *See, e.g.*, Stephanie Clifford, *Inquiry Widens into Hynes’s Spending as Prosecutor*, N.Y. TIMES (June 17, 2014), <http://www.nytimes.com/2014/06/18/nyregion/us-attorneys-join-inquiry-into-spending-of-prosecutor.html>.

91. Complaint, *supra* note 59, ¶¶ 1, 3.

that happened. And an innocent man has been in jail for 16 years.”⁹² Judge Block also inquired with a city lawyer about why “Hynes hasn’t treated it seriously,” asking, “What has he done? Name one thing he’s done in light of Vecchione’s aberrational behavior.”⁹³ Judge Block added that “[t]his was horrific behavior on the part of Vecchione.”⁹⁴

As outrageous as this behavior proved to be, this was not the first time that allegations of misconduct had surfaced about Vecchione.⁹⁵ Vecchione’s career had been “dogged by allegations of impropriety from defense lawyers, and former colleagues who say his eye for the spotlight and willingness to cut corners to win convictions have caused some cases to fall apart, including the high-profile murder trial of Roy Lindley DeVecchio, a former F.B.I. agent.”⁹⁶ The District Attorney’s Office was forced to dismiss the charges in the case in 2007 when tapes surfaced at trial revealing its star witness contradicting the claims she had made on the witness stand.⁹⁷ Earlier, in 2003, similar allegations against Vecchione resulted in the early release of a man who was convicted in another murder case.⁹⁸ Jeffrey Marshall, who was serving a twelve-and-a-half to twenty-five-year sentence on two counts of first-degree robbery for his role in a deadly liquor store heist, had his sentence reduced by five years.⁹⁹ Marshall had alleged that Vecchione failed to correct a false statement made by a witness (who had testified that Marshall’s alibi was false) and that Vecchione failed to disclose plea talks with the witness; at an earlier evidentiary hearing, Vecchione had denied there was any deal pending.¹⁰⁰ Because the judge’s order contained no reason for the sentence reduction, the deal averted further probing into misconduct allegations against Vecchione.¹⁰¹ As in Collins’s

92. Sapien, *supra* note 55.

93. Marzulli, *Brooklyn DA*, *supra* note 88.

94. *Id.*

95. See Sulzberger, *Facing Misconduct Claims*, *supra* note 45.

96. *Id.*

97. Scott Shifrel et al., *Case Against Accused Lindley DeVecchio to be Thrown Out*, N.Y. DAILY NEWS (Nov. 1, 2007, 12:26 PM), <http://www.nydailynews.com/news/crime/case-accused-lindley-devecchio-thrown-article-1.259370>; see also Joaquin Sapien, *Polarizing Brooklyn Prosecutor Retires Amid Scrutiny*, PROPUBLICA (Nov. 15, 2013, 4:25 PM), <https://www.propublica.org/article/polarizing-brooklyn-prosecutor-retires-amid-scrutiny>.

98. John Marzulli, *Con Gets 5-yr. Break and His Prosecutor Won’t Face the Heat*, N.Y. DAILY NEWS (Feb. 20, 2003, 12:00 AM), <http://www.nydailynews.com/archives/news/5-yr-break-prosecutor-won-face-heat-article-1.671769>.

99. *Id.*

100. *Id.*; see also Rayman, *supra* note 21.

101. See Marzulli, *Brooklyn DA*, *supra* note 88.

case, the judge in the Marshall case raised doubts about Vecchione's conduct, while District Attorney Hynes maintained that Vecchione upheld professional standards.¹⁰²

The pattern of misconduct that Vecchione's career reveals suggests that he was indeed unethical in his approach to his work and his obligations.¹⁰³ He behaved in ways that indicated that he was inclined to secure a conviction at any cost. He coerced witnesses; he withheld evidence. We may never know his motives for engaging in this conduct because he continues to deny any wrongdoing. But independent review of his behavior suggests that he was culpable. And yet he has never suffered any consequences. While the misconduct was both recurring and increasing in severity, the office did nothing. In addition, it seemed that the behavior was common knowledge, and no Kings County District Attorney raised an issue about the conduct. Perhaps most disturbing is the acquiescence or involvement of other members of the office. Even in the face of misconduct, his colleague, the new attorney assigned to handle the matter, was loath to acknowledge it. He agreed that pertinent *Brady* evidence was withheld but never accepted responsibility on behalf of the office. And the chief district attorney himself never censured, reprimanded, or did anything other than stand by his man.

The standard response to misconduct would expect the office to investigate and discipline the actor. For obvious reasons, that response is wholly inadequate. It is very difficult to police your own office. Relationships in the office make this difficult. Assistant District Attorneys must rely on their colleagues in the day-to-day functioning of the office. They often work as part of the same teams, backing each other at trial and in other stressful circumstances. Asking one set of lawyers to point the finger of blame at another set misunderstands the dynamics and collegiality of the office.

Some lawyers believe that the ends justify the means. Prosecutors often choose this work to prosecute "bad" people. When convinced of the guilt of the person charged, sometimes the "rules" that govern conduct seem to pale in comparison to the mandate to secure a conviction. We

102. Editorial, *Probe Warranted: Brooklyn District Attorney Joe Hynes Needs to Check Top Aide*, N.Y. DAILY NEWS (June 20, 2010, 8:10 PM), <http://www.nydailynews.com/opinion/probe-warranted-brooklyn-district-attorney-joe-hynes-check-top-aide-article-1.183640>; see also Graham Rayman, *Brooklyn D.A. Charles Hynes Responds to Voice Cover Story; We (Still) Rest Our Case*, VILLAGE VOICE (Jan. 17, 2013), <http://www.villagevoice.com/news/brooklyn-da-charles-hynes-responds-to-voice-cover-story-we-still-rest-our-case-6712321> (citing Hynes's letter to the *Village Voice*, in which he refuted the allegations leveled against Vecchione in the Marshall case and accused the magazine of mischaracterizing Vecchione in its reporting of Collins's story).

103. See discussion *supra* Section I.A.

know that internal monitoring is fraught with problems, yet we claim that it is all that is necessary to govern behavior of individual prosecutors. Even external discipline yields an unsatisfactory response. Here, we see that Vecchione never lost his license to practice despite recurring acts of misconduct and considerable publicity. This misconduct also cost the city large sums in settling civil suits arising from Vecchione's acts, and still Vecchione faced no charges or personal loss. In the end, this method for addressing this behavior takes far too long to root out, and the stakes are too high. Even when someone's life or liberty hangs in the balance, the office often defends the misconduct as the only way to conduct business.

B. Conventional Responses Miss the Mark: Prosecutorial Misconduct on the Rise?

Prosecutorial misconduct appears to have been on the rise by both state and federal prosecutors over the last twenty years. Beginning in the 1990s, complaints about prosecutorial misconduct surged, corresponding with the country's push toward mass incarceration. In the culture of control that dominated criminal justice policy for the latter part of the twentieth century and the beginning of the twenty-first,¹⁰⁴ prosecutors, not judges, became "the most powerful actors in the criminal justice system."¹⁰⁵ Professor Bennett Gershman notes that prosecutorial power has grown steadily since the 1970s.¹⁰⁶ He attributes this rise to increasingly complex criminal organizations, prosecutions of white-collar crime and drug crime, and the political popularity of being tough on crime.¹⁰⁷ Gershman points to the growing roles of the prosecutor—and the judiciary's acceptance of that expansion—including

104. See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

105. Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 398 (2010); see also Stephanos Bibas, *Prosecutorial Regulations Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor."); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1061 (2009) ("Prosecutors are the most powerful actors in the American criminal justice system.").

106. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393 (1992).

107. *Id.* at 393–94. Gershman describes the contemporary criminal justice model as one that "emphasizes crime control over protecting individual rights." *Id.* at 457.

greater freedom to engage in investigatory and undercover operations as evidence of their increase in power.¹⁰⁸

Undergirding that power has all too often been an aggressive, winner-take-all culture that has come to pervade many prosecutors' offices.¹⁰⁹ The mindset that the state needs to win at all costs, coupled with the pressure for results, has made misconduct a rather predictable outcome.¹¹⁰ Scholars have come to recognize prosecutorial misconduct as a widespread problem. They are virtually unanimous in the view that unchecked power will inevitably lead to misconduct out of ignorance, time constraints, or—less often—a deep desire to win.¹¹¹

There is also widespread scholarly agreement that this misconduct poses a significant problem in the criminal justice system and requires reform of some kind.¹¹² Although scholars acknowledge that prosecutors

108. *Id.* at 395–97.

109. See Robert J. Meadows, *Misconduct in Prosecutorial Leadership and Decision Making*, in 20 COLLECTIVE EFFICACY: INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LEADERSHIP 325, 329–31 (Anthony H. Normore & Nancy Erbe eds. 2013) (examining high profile examples of prosecutor decisions influenced by the possibility of political gain, including the Duke lacrosse scandal and the case against former Senator Ted Stevens); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 45–46 (2009) (describing the institutional and professional incentives as well as the psychological pressures that lead prosecutor's offices to place excessive focus on obtaining convictions); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388–91 (2001) (highlighting the institutional culture that generates pressure on prosecutors to “win” over all else).

110. See Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 16 (2009) (“[T]he pressure to produce wins has led to a ‘win-at-all-costs’ mentality, which pushes prosecutors toward misconduct as a means to an end.”).

111. See, e.g., Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400 (2006) (“[P]rosecutorial misconduct is largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct.”); Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513, 539 (2012) (arguing that time constraints and lack of oversight result in “inadvertent prosecutorial misconduct” (citing Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 263 (2011))); Elizabeth Rosenwasser, Comment, *A Troubling Collision: Overbroad Coercion Statutes and Unchecked State Prosecutors*, 65 EMORY L.J. 619, 636 (2015) (“The recent growth of prosecutorial charging power has sparked a wave of criticism by legal academia, and in the last twenty years there has been a proliferation of scholarship focused on this concern.”).

112. See Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 56–59 (2012) (providing examples from academic literature on how scholars propose to address and control abuses of prosecutorial discretion); Rosenwasser, *supra* note 111, at 639–41

have many opportunities to wield power, Professor Angela Davis points to the power and discretion in bringing charges to be the most significant elements of a prosecutor's power.¹¹³ Charging power, coupled with the power to negotiate plea bargains, has a massive impact on the criminal justice system.¹¹⁴ Prosecutors have a "large menu" of crimes from which to choose, and are "almost completely unregulated by external authorities" in making these decisions.¹¹⁵ With a wide array of potent statutes at their disposal, "[p]rosecutors can charge bargain, add, or subtract offenses in order to reach the prison sentence they desire."¹¹⁶ These charges and the discretion to apply them with few standards and little oversight means that prosecutors can determine the outcome of cases.¹¹⁷

Courts tend not to challenge the exercise of discretion in deference to separation of powers and to prosecutors themselves.¹¹⁸ Because courts lack access to the precise information prosecutors possess, courts

(citing a number of proposals by academics to solve the problems generated by excessive prosecutorial power).

113. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007) [hereinafter DAVIS, *ARBITRARY JUSTICE*] ("Even elected prosecutors, who presumably answer to the electorate, escape accountability, in part because *their most important responsibilities—particularly the charging and plea bargaining decisions*—are shielded from public view." (emphasis added)); see also Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) [hereinafter Davis, *The American Prosecutor*] ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.").

114. See DAVIS, *ARBITRARY JUSTICE*, *supra* note 113, at 5.

115. Corn & Gershowitz, *supra* note 105, at 398.

116. *Id.* at 399.

117. See *id.* at 400–01.

118. *E.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, so 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."); Gershman, *supra* note 106, at 406 ("The presumption that prosecutors act in good faith has made the charging power virtually immune from judicial review."); see also *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379–80 (2d Cir. 1973) ("Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." (quoting *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965))).

have proven extremely reticent to overturn sentencing discretion “even [when] that decision has been shown to be demonstrably unfair.”¹¹⁹ As others have observed, this power provides the precondition for prosecutorial misconduct.¹²⁰ Additionally, the inherent difficulty posed by the supervision and training of prosecutors in their day-to-day work and a lack of rigorous external review contribute to the problem.¹²¹ Few would debate that external checks on prosecutorial power—criminal, civil, professional, or judicial—are currently ineffective. Scholars disagree, however, over whether strengthening these checks or seeking alternative methods of regulation would better address misconduct. Some scholars call for greater willingness to use criminal sanctions,¹²² a more robust professional board of ethics,¹²³ the extension of liability to supervisors and offices under either a military command model,¹²⁴ or the doctrine of *respondeat superior*.¹²⁵

In the midst of the debate, some courts are beginning to sound the alarm. Over twenty years ago, in *United States v. Foster*, Judge Schroeder indicated that the prosecutorial misconduct at issue in that case was “not an isolated incident,” and expressed concern that “appropriate steps be taken to assure a high level of professional advocacy for prosecutors.”¹²⁶ In the same year, in *United States v. Kojayan*, Chief Judge Kozinski wrote, “One of the most important responsibilities of the United States Attorney and his senior deputies is ensuring that line attorneys are aware of the special ethical responsibilities of prosecutors, and that they resist the temptation to overreach.”¹²⁷ But, twenty years after his initial discussion of misconduct, Judge Kozinski now embraces more critical views. He considers the current state of prosecutorial misconduct, specifically with respect to *Brady* violations, an “epidemic.”¹²⁸ He contends that current

119. Gershman, *supra* note 106, at 408.

120. *See id.* at 409.

121. Corn & Gershowitz, *supra* note 105, at 403–04 (“Misconduct does not usually occur because prosecutors are evil, overly results oriented, or intentionally seeking to cheat. Misconduct often happens inadvertently because there is too much for prosecutors to know and insufficient ethics training to avoid misconduct.”).

122. Moore, *supra* note 17, at 808.

123. *See* DAVIS, ARBITRARY JUSTICE, *supra* note 113, at 180–81.

124. *See* Corn & Gershowitz, *supra* note 105, at 396–98.

125. *See* McKay, *supra* note 9, at 1215.

126. *United States v. Foster*, 985 F.2d 466, 469 (9th Cir. 1993), *amended by* 17 F.3d 1256 (9th Cir. 1994); *see also* *United States v. Kallin*, 50 F.3d 689, 695 (9th Cir. 1995) (citing the concerns expressed by Judge Schroeder in *Foster* in light of a “similarly inexcusable” instance of prosecutorial misconduct).

127. *United States v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993).

128. *See* *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from the order denying the petition for rehearing en banc) (“I wish I could say

efforts to control misconduct have proved ineffective and, in his view, “[o]nly judges can put a stop to it.”¹²⁹ Judge Kozinski has recently opined that prosecutors will continue to commit misconduct because “they have state judges who are willing to look the other way.”¹³⁰

Sitting at the root of the problem is perhaps a lack of moral outrage. If one believes in the guilt of the accused, a highly politicized legal system may be less vigilant about excesses that led to that individual’s conviction.¹³¹ Courts and elected officials have turned a blind eye to this conduct, in part, because of the belief of the guilt of the accused no matter what conduct prosecutors engage in to achieve a conviction.¹³² Racial and class dynamics contribute to this moral blindness. The victims of prosecutorial misconduct tend to be the least powerful in the criminal justice system—poor people and people of color charged with crimes.¹³³ So their misfortune, while problematic, can all too often escape notice. And when it does garner attention, it rarely leads to efforts to correct the system. Similarly, prosecutors who engage in the acts of misconduct tend to be white and by virtue of race and place can escape scrutiny, judgment, and punishment.¹³⁴

The resulting system is one that is rife with racial bias—the victims of this official misconduct are often people of color, while the

that the prosecutor’s unprofessionalism here is the exception, that his propensity for shortcuts and indifference to his ethical and legal responsibilities is a rare blemish and source of embarrassment to an otherwise diligent and scrupulous corps of attorneys staffing prosecutors’ offices across the country. But it wouldn’t be true. *Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.”).

129. *Id.* at 626.

130. Maura Dolan, *U.S. Judges See ‘Epidemic’ of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015, 7:20 PM), <http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html>.

131. *See id.*

132. *See id.*

133. *See* V.A. Richelle, Commentary, *Racism as a Strategic Tool at Trial: Appealing Race-Based Prosecutorial Misconduct*, 67 TUL. L. REV. 2357, 2358 (1993); Arthur L. Rizer III, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845, 856–57 (2003).

134. *Report Highlights Lack of Racial Diversity Among U.S. Prosecutors*, NPR (July 7, 2015, 4:35 PM), <http://www.npr.org/2015/07/07/420913863/report-highlights-lack-of-racial-diversity-among-u-s-prosecutors> (reporting that ninety-five percent of elected U.S. prosecutors are white); *see also* Terry Nagel, *Stanford Criminal Justice Center Finds California Prosecutors Do Not Reflect the State’s Diversity*, STAN. LAW SCHOOL (July 28, 2015), <https://law.stanford.edu/press/stanford-criminal-justice-center-report-finds-california-prosecutors-do-not-reflect-the-states-diversity/>.

perpetrators are often white—and there is no obvious impetus to correct the system.

Even where there is absolute proof of misconduct, courts have been unwilling to hold individuals accountable or to report instances of misconduct to the bar.¹³⁵ If courts are not willing to take seriously the behavior of an individual who engages in misconduct, then it is not surprising that they rarely do more than wring their hands when others in the prosecutor's office's chain of command misbehave. Judges sometimes overlook or misunderstand the collective culpability of all participants in the misconduct.¹³⁶ Too often, courts approach the issue of prosecutorial misconduct as an aberration from the general practices of a prosecutor's office.¹³⁷ But the evidence makes plain that the problem extends beyond "a few bad apples."¹³⁸ As the Vecchione case demonstrates, what becomes apparent when one delves into the misconduct that occurs is that subsequent prosecutors sometimes fail to address the original prosecutors' misconduct. Instead, colleagues see their jobs as defending the prosecutor and protecting the office, rather than as unearthing and addressing any misconduct that might have occurred.¹³⁹ The pressure to protect manifests both internally and externally.¹⁴⁰ Internally, it manifests as the need to protect the conviction and the prosecutor, as well as the belief in the guilt of the defendant trumping all other issues. Externally, the political pressure

135. See Corn & Gershowitz, *supra* note 105, at 407 n.82 (citing Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 292 (2007)).

136. See *id.* at 407.

137. See *id.*

138. See Dahlia Lithwick, *You're All Out*, SLATE (May 28, 2015, 1:38 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethals_takes_district_attorney.html (citing the court order disqualifying the entire Orange County District Attorney's Office from continuing to prosecute the Scott Dekraai case, in light of pervasive prosecutorial misconduct).

139. See *Probe Warranted*, *supra* note 102.

140. See *People v. Velasco-Palacios*, 185 Cal. Rptr. 3d 286, 289–291, 295 (Ct. App. 2015) (affirming trial court's dismissal of the state's case after finding that the prosecutor had inserted a fabricated confession into the transcript of the defendant's police interrogation; the State initially responded by claiming that the false confession was placed there "in jest" and later unsuccessfully argued that the misconduct was not outrageous enough to prejudice the defendant's constitutional rights because it did not involve physical brutality); Ken Armstrong & Maurice Possley, *Trial & Error: Part 5: Break Rules, Be Promoted*, CHI. TRIB. (Jan. 14, 1999) [hereinafter Armstrong & Possley, *Part 5*], <http://www.chicagotribune.com/news/watchdog/chi-020103trial5-story.html> (discussing the "[s]helter of anonymity" that prosecutors enjoy even when found to have engaged in flagrant misconduct, and the way that prosecutorial culture yields strong professional rewards for winning convictions while conveying only negligible risks for wrongdoing).

on the elected district attorney to cultivate a tough-on-crime image can lead the district attorney protecting the actions of lawyers under her command at all costs.¹⁴¹ Indeed, a number of cases have made clear that prosecutorial misconduct can extend upward through the hierarchy within the office.¹⁴²

The judicial response to prosecutorial misconduct often amounts to little more than a punt, despite the enormous consequences that hang in the balance. Courts seem content to believe that enough is being done to address misconduct. Law schools train lawyers to operate in accordance with their professional responsibilities and in compliance with state codes of conduct.¹⁴³ Prosecutors include ethical training in their in-office training.¹⁴⁴ So with those foundations in place, some judges believe that nothing more needs to occur to address misconduct.¹⁴⁵ However, those individuals involved in the day-to-day operations of the criminal justice system paint a different picture. Federal district court and circuit court judges who routinely hear habeas corpus petitions see a fundamentally different culture that is developing,¹⁴⁶ particularly in the daily execution of a prosecutor's

141. See *Armstrong & Possley, Part 5, supra* note 140.

142. See Jim McGee, *Prosecutor Oversight is Often Hidden from Sight*, WASH. POST (Jan. 15, 1993), <https://www.washingtonpost.com/archive/politics/1993/01/15/prosecutor-oversight-is-often-hidden-from-sight/cdeea800-37c1-4080-bae0-d33c7b730475/> (discussing a 1992 report by the General Accounting Office (GAO), which found that the OPR at the Department of Justice often failed to conduct thorough investigations, frequently reached conclusions without pursuing all relevant leads, and dismissed the vast majority of cases against Justice Department lawyers, thus creating a system that the supervising auditor described as one that “could not be better for sweeping things under the rug”); Robert David Sullivan, *Reducing Prison Population is a Bad Career Move for DAs*, AM.: THE JESUIT REV. (Feb. 9, 2015, 10:22 AM), <https://www.americamagazine.org/content/unconventional-wisdom/reducing-prison-population-bad-career-move-das>.

143. See STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2016–2017 standard 302(c) (AM. BAR ASS'N 2016).

144. See, e.g., U.S. ATTORNEYS' MANUAL § 1-4.100 (U.S. DEPT OF JUST. 2010), <https://www.justice.gov/usam/usam-1-4000-standards-conduct#1-4.100>.

145. See *Connick v. Thompson*, 563 U.S. 51, 67 (2011) (finding that district attorneys are entitled to rely on prosecutor's extensive legal and professional training and that prosecutor's judgments regarding *Brady* material do not present a “highly predictable” constitutional danger” that warrants imposing municipal liability for individual *Brady* violations); *Hatchett v. City of Detroit*, 714 F. Supp. 2d 708, 724–26 (E.D. Mich. 2010) (rejecting a § 1983 claim brought against Macomb County and its former county prosecutor on a failure to train theory, despite “reprehensible” misconduct, because a “municipality need not train prosecutors about that which they already know, including their duties under *Brady*”).

146. See *United States v. Bartko*, 728 F.3d 327, 342 (4th Cir. 2013), *cert. denied*, 134 S.

obligation under *Brady v. Maryland*.¹⁴⁷ In *Brady*, the Supreme Court imposed on prosecutors a duty to disclose to criminal defendants all exculpatory evidence,¹⁴⁸ and in *Giglio v. United States*, the Court imposed the same duty to disclose impeachment material in the government's possession.¹⁴⁹ In addition, the Supreme Court has imposed on prosecutors the duty to search for exculpatory or impeachment evidence not known to or possessed by the prosecution but known to others acting on the government's behalf in a particular case.¹⁵⁰ Uncovering a prosecutor's failure to comply with these obligations often proves quite difficult; because prosecutorial misconduct is often never exposed, it remains nearly impossible to regulate after the fact.¹⁵¹ Moreover, where misconduct is identified, litigation, such as bringing criminal charges against the prosecutor or bringing a civil suit, is time-consuming, expensive, and involves high

Ct. 1043 (2014) (affirming denial of habeas petition but directing the Clerk of Court to serve a copy of the court's opinion to the Attorney General and to OPR because "[s]omething must be done" about prosecutorial misconduct and the way that the prosecutor's office is able to successfully bet "on the probability that reams of condemning evidence will shield defendants' convictions on appeal such that at the trial stage, it can permissibly withhold discoverable materials and ignore false testimony" and admonishing the U.S. Attorney's Office in the district for its indifference to discovery abuses); Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 AM. J. CRIM. L. 207, 214–16 (2007) (noting that most death row exonerations have emerged during habeas proceedings, where lawyers have discovered evidence of innocence, prosecutorial misconduct, ineffective assistance of counsel, or other exculpatory or unreliable evidence, and citing Circuit Judge Gilbert Merritt for his views on the importance of habeas corpus).

147. See, e.g., *Milke v. Ryan*, 711 F.3d 998, 1019 (9th Cir. 2013) (concluding that the defendant was entitled to habeas relief for numerous *Brady/Giglio* violations after spending twenty-two years on death row); *Simmons v. Beard*, 590 F.3d 223, 238–39 (3d Cir. 2009) (affirming District Court's grant of defendant's habeas petition on the basis of multiple *Brady* violations whose cumulative effect undermined confidence in the conviction); *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 834 (10th Cir. 1995) (holding that "the cumulative effect of the prosecution's nondisclosures" undermined confidence in the conviction); *Watkins v. Miller*, 92 F. Supp. 2d 824, 856 (S.D. Ind. 2000) (granting habeas relief due to *Brady* violations that were "so numerous and complete as to have been systematic").

148. 373 U.S. 83, 87–88 (1963).

149. 405 U.S. 150, 153–55 (1972).

150. See *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995). Stanley Fisher argues that the Supreme Court's line of *Brady* cases should be codified in ethical rules so that prosecutors have an ethical, as well as a constitutional, obligation "to learn of and disclose exculpatory evidence known to other members of the prosecution team, including law enforcement agents." Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1422–23 (2000).

151. E.g., Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2090 (2010) ("Most violations never come to light, and when they do, individual actors responsible for the misconduct rarely face any consequences.").

standards of proof. These constraints inhibit their use when seeking to address frequent misconduct.¹⁵²

III. UNDERESTIMATING THE PROBLEM: THE LIMITS OF CONVENTIONAL APPROACHES

The conventional responses to misconduct tend to operate less as a coordinated system of checks and balances and more as independent but weak compliance mechanisms. Courts have tended to recommend that state bar associations address individual acts of misconduct through professional discipline.¹⁵³ While such external controls make sense on paper, the actual operation of bar discipline proceedings has done little if anything to stem the tide of misconduct.¹⁵⁴ Despite the inadequacy of this response, courts continue to insist that bar referrals constitute a sufficient check.¹⁵⁵ At the same time, district attorneys' offices have been making the claim that external controls are unnecessary.¹⁵⁶ They contend that through internal controls, such as training and internal discipline, they can govern the conduct of their lawyers.¹⁵⁷ As is so often the case when entities attempt to police

152. See Bibas, *supra* note 105, at 970–74 (citing the discovery hurdles, separation of powers concerns, and shortcomings of damage suits and judicial regulation in addressing systemic misconduct); John P. Taddei, Note, *Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits*, 106 NW. U. L. REV. 1883, 1896 (2012) (noting the way that even intentional misconduct that generates a constitutional injury to a defendant cannot be redressed through civil actions under the *Imbler* regime of absolute prosecutorial immunity, so long as the prosecutor was acting within the scope of his or her adversarial functions (citing *Imbler v. Patchman*, 424 U.S. 409 (1976))).

153. See Bibas, *supra* note 105, at 975 (citing *Imbler*, 424 U.S. at 429); Kevin J. Breer, *Prosecutorial Misconduct During Trial: Lessons Learned from State v. Pabst and Other Recent Cases*, 72-MAR J. KAN. B. ASS'N 34, 41 n.79 (2003) (citing cases from several jurisdictions where courts have sought or suggested referring instances of prosecutorial misconduct to state disciplinary offices).

154. *Id.*

155. See Joaquin Sapien et al., *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013, 5:30 AM), <https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody>.

156. See *id.* (“New York City’s district attorneys say concerns about misconduct—heightened by several recent high-profile cases—are largely misplaced.”).

157. See, e.g., Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 874 (2012) (providing examples of the anti-regulatory rhetoric that persists in many prosecutor’s offices); Sapien et al., *supra* note 155 (citing claims by top New York City prosecutors that concerns about misconduct are largely unfounded and that their offices have taken steps to address and manage it internally).

themselves, the results have been less than satisfying. Only rarely will a district attorney reprimand or censure an individual prosecutor.¹⁵⁸ More often, the leadership within a prosecutor's office will do little more than back its own.¹⁵⁹ In the end, we have independently operating systems, both external and internal, that do little to tackle the individual instances of misconduct and do even less to decrease the number of prosecutors and prosecutors' offices engaging in misconduct that threatens the integrity of the justice system.

A. *External Controls Lack Teeth*

External review seems, at least in theory, offer an effective response to prosecutorial misconduct. Unfortunately, in practice, the standard mechanism for review—bar discipline—has proven ineffective. The U.S. Supreme Court has led the charge, suggesting that the proper forum for resolving acts of misconduct is not the court but the state bar.¹⁶⁰ Justice Thomas, writing for the majority in *Connick v. Thompson*, opined that “[a]n attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.”¹⁶¹ But what triggers these disciplinary reviews and responses is a referral to the bar by judges, attorneys or interested parties, and such referrals happen infrequently.¹⁶² Since most bar associations only investigate potential prosecutorial misconduct following a referral, this can make the system useless before it has even begun.¹⁶³

158. See Sapien et al., *supra* note 155; Jordan Smith, *Panel Emphasizes Need for Prosecutorial Oversight*, AUSTIN CHRON. (Apr. 6, 2012), <http://www.austinchronicle.com/news/2012-04-06/panel-emphasizes-need-for-prosecutorial-oversight/> (indicating that not a single prosecutor was disciplined in the ninety-one cases where prosecutorial misconduct was identified by the courts in Texas between 2004 and 2008).

159. See Sapien et al., *supra* note 155.

160. See *Connick v. Thompson*, 563 U.S. 51, 64–67 (2011).

161. *Id.* at 66.

162. See, e.g., *Crossing the Line: Responding to Prosecutorial Misconduct*, A.B.A. SEC. OF LITIG. ANN. CONF. 1 (Apr. 16–18, 2008), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17388> (describing the “disturbing” statistical disparity between findings of prosecutorial misconduct and actual referrals to the California State Bar, which are mandated by California law, in a 2007 report issued by the California Commission on the Fair Administration of Justice); Cicchini, *supra* note 18, at 366 (citing a lack of referrals among a sample of federal reversals rooted in a finding of misconduct).

163. See Keenan et al., *supra* note 5, at 234–36 (describing the operative system for processing complaints in most states, in which disciplinary agencies tend not to initiate investigations absent referrals by those personally affected by lawyer misconduct, and citing the way that some jurisdictions actively discourage complainants from filing claims). Although these procedural “deficiencies” are not germane to prosecutorial misconduct, the authors indicate that “their significance is heightened in that context

One might expect bar referrals from defense lawyers who witness or catch prosecutors overstepping legal and ethical boundaries, but this tends not to be the practice, in part because of a fear of retaliation against them personally or against subsequent clients.¹⁶⁴ Once a defense lawyer refers opposing counsel for disciplinary action, that defense lawyer may be concerned about her own actions then being subject to additional scrutiny by prosecutors, so she may choose to overlook the misconduct.¹⁶⁵ Additionally, the lack of referrals from criminal defense attorneys often results from the recurring institutional roles of repeat players in a system.¹⁶⁶ Defense lawyers know that they will have to work with the same prosecutor's office regularly in the future, so they may be reluctant to expose the prosecutor to criticism or scrutiny for fear that the prosecutors will make it more difficult to get favorable treatment for subsequent clients.¹⁶⁷ Reporting misconduct to the state bar could negatively affect the cases of the defense attorney's future clients.¹⁶⁸ Indeed, statistics show that even if the referral occurs, it is unlikely to lead to subsequent disciplinary action.¹⁶⁹

Perhaps the reason that professional ethics boards have done little to regulate prosecutorial misconduct can be traced to the fact that professional rules are not tailored to the prosecutor's unique set of responsibilities.¹⁷⁰ Because authorities only enforce direct violations of

given the potential liberty interests involved." *Id.* at 234.

164. *Id.* at 209–11.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 211 (citing *People v. Green*, 274 N.W.2d 448, 464 (Mich. 1979) (Levin, J., dissenting) ("It flies in the face of reason to expect a defendant to risk a prosecutor's actual or imagined displeasure by instituting proceedings that cannot directly benefit him.")).

169. *Id.* at 234, 239, 259; see also Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 *YALE L.J.* 2150, 2159 (2013) ("Although prosecutors are, in theory, bound by the ethics rules promulgated by each state, the reality is that disciplinary measures are almost never imposed on prosecutors."); Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, *HUFFINGTON POST* (Feb. 11, 2016, 4:16 PM), http://www.huffingtonpost.com/entry/prosecutor-misconduct-justice_us_56bce00fe4b0c3c55050748a (citing a 2013 report from the Center for Prosecutor Integrity, which indicates that only two percent of over 3600 cases of identified prosecutorial misconduct between the years 1963 and 2013 have resulted in official sanctions).

170. See DAVIS, *ARBITRARY JUSTICE*, *supra* note 113, at 128 ("The Supreme Court's decision to avoid the problem and pass it on to state bar authorities has proven totally ineffective."); *Green*, *supra* note 157, at 873 n.4 (citing DAVIS, *ARBITRARY JUSTICE*, *supra*

their professional codes, much of prosecutorial misconduct does not result in a disciplinable offense.¹⁷¹ Prosecutorial involvement in police misconduct, such as entrapment, erroneous investigation, and searches that result in evidence being excluded, are not addressed within the professional codes.¹⁷² Many forms of prosecutorial misconduct are not specified in professional rules.¹⁷³ So some acts, such as abuses in “plea bargaining and sentencing” or intimidating both witnesses and defendants by charging them, will go unpunished by disciplinary authorities.¹⁷⁴

To date, the criminal law has proven an ineffective mechanism to address and curb individual acts of misconduct by prosecutors. Criminal charges are very seldom brought against prosecutors, and many scholars do not consider this a promising path to take.¹⁷⁵ Proving mens rea is often difficult.¹⁷⁶ For the most part, courts consider much misconduct technical error and are reluctant to attribute to prosecutors the kind of moral culpability needed for a robust criminal law response.¹⁷⁷ But, as I argue below, the criminal law may be useful as a deterrent for the most egregious forms of prosecutorial misconduct that are notably unregulated today.¹⁷⁸

note 113, at 150–51); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725–28 (2001) [hereinafter Zacharias, *The Professional Discipline*].

171. Zacharias, *supra* note 170, at 734; see also Green, *supra* note 157, at 874.

172. Zacharias, *supra* note 170, at 734–35.

173. *Id.* at 735.

174. *Id.*

175. See, e.g., Barkow, *supra* note 151, at 2094 (“Although federal prosecutors can bring criminal actions against prosecutors who willfully violate a defendant’s constitutional rights under 18 U.S.C. § 242, those actions are almost never brought . . .”); George A. Weiss, *Prosecutorial Accountability After Connick v. Thompson*, 60 DRAKE L. REV. 199, 221 (2011) (describing the difficulties in increasing prosecutions of prosecutors, and indicating that “criminal measures are probably overkill in many cases”). But see Brandon Buskey, Opinion, *How to Prosecute Abusive Prosecutors*, N.Y. TIMES (Nov. 27, 2015), <http://www.nytimes.com/2015/11/27/opinion/how-to-prosecute-abusive-prosecutors.html> (citing the rarity in which § 242 is invoked against prosecutors but arguing for its application against “state judges and prosecutors who flout the law”); Sidney Powell, Opinion, *Breaking: Ninth Circuit Panel Suggests Perjury Prosecution For Lying Prosecutors*, OBSERVER (Jan. 20, 2015, 10:26 PM), <http://observer.com/2015/01/breaking-ninth-circuit-panel-suggests-perjury-prosecution-for-lying-prosecutors/> (“[T]he court strongly suggests that the lying prosecutor himself be prosecuted for perjury.”).

176. Corn & Gershowitz, *supra* note 105, at 405; Weiss, *supra* note 175, at 221.

177. See Weiss, *supra* note 175, at 221 (“[C]harging prosecutors with criminal sanctions that require intent would be inapplicable for unintentional misconduct.”).

178. See, e.g., Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 276 (2004) (citing Bennett Gershman’s treatise on prosecutorial misconduct and other studies demonstrating the “disciplinary double standard” that manifests when prosecutors receive no more than a “slap on the wrist” for even the most egregious misconduct (citation omitted)).

There is an equally erroneous and dangerous perception that prosecutorial misconduct happens in a vacuum.¹⁷⁹ Too often, courts and other external reviewers view the actions of individual prosecutors as unconnected to the culture of the office.¹⁸⁰ The Supreme Court's opinion in *Connick v. Thompson* correctly noted that attorneys who work in district attorneys' offices learn from the other more experienced attorneys around them.¹⁸¹ But that accurate observation did not lead the Court to an accurate conclusion.¹⁸² The Court wholly missed that the lesson younger prosecutors learn in a number of offices around the country is that prosecutorial misconduct pays.¹⁸³ Research conducted by a number of news outlets investigating and reporting on prosecutorial misconduct has concluded that those lawyers who engage in misconduct are rarely discovered.¹⁸⁴ And that research shows that the choice to "win at all costs" tends to end in promotion rather than dismissal or discipline.¹⁸⁵

Two newspaper series highlight this fact. The *Pittsburgh Post-Gazette* and *Chicago Tribune* both conducted in-depth investigations of prosecutorial misconduct.¹⁸⁶ The Pittsburgh series, entitled "Win at All Costs," acknowledged that prosecutorial misconduct is an inevitable by-product of the desire to win.¹⁸⁷ That study found a stunning number of

179. Halina Schiffman-Shilo, *The Prosecutor's Impunity: Part II*, N.Y. L. SCH.: LEGAL AS SHE IS SPOKE (Oct. 16, 2013), <http://www.lasisblog.com/2013/10/16/the-prosecutors-impunity-part-ii/#more-7294> ("Prosecutorial misconduct doesn't occur in a vacuum; it happens because there is an enabling environment that allows it to continue.").

180. See *Connick v. Thompson*, 563 U.S. 51, 65 (2011) (describing how junior prosecutors are trained by senior prosecutors); Bibas, *supra* note 105, at 997–1000.

181. *Connick*, 563 U.S. at 65.

182. See *id.* at 79–80, 109 (Ginsburg, J., dissenting).

183. See *id.* at 91, 109.

184. For two multi-part investigations on prosecutorial misconduct, see Bill Moushey, *Win at All Costs*, PITT. POST-GAZETTE (Nov. 22–Dec. 13, 1998) [hereinafter Moushey, *Introduction*], http://www.usa-the-republic.com/items%20of%20interest/Win_At_All_Cost/Win_at_all_costs.htm; Maurice Possley & Ken Armstrong, *Trial & Error*, CHI. TRIB. (Jan. 11–14, 1999) [hereinafter Possley & Armstrong, *Introduction*], <http://www.chicagotribune.com/chi-020103trial-gallery-storygallery.html>.

185. Moushey, *Introduction*, *supra* note 184.

186. Moushey, *Introduction*, *supra* note 184; Possley & Armstrong, *Introduction*, *supra* note 184; John T. Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsylvania Eight*, 12 WIDENER L. REV. 359, 440 (2006) (describing Moushey's investigation and findings).

187. Moushey, *Introduction*, *supra* note 184. Interestingly, a reaction piece to the series, written by then-Deputy Attorney General Eric Holder, was submitted to the paper and published. Holder disagreed with many of Moushey's factual allegations and with the

prosecutors engaging in misconduct who were never subjected to any punishment.¹⁸⁸ The investigation researched more than 1500 complaints of misconduct and uncovered hundreds of examples of overzealous prosecution leading to rule breaking, with almost no subsequent examples of discipline.¹⁸⁹ The prevalence of misconduct seems inexorably linked to a structure that provides high incentives for misconduct coupled with small and rarely applied costs.¹⁹⁰ Furthermore, a significant number of the *Post-Gazette's* examples involved large-scale, office-wide prosecutions, and operations where individual misconduct was not the culprit.¹⁹¹

Similarly, the *Chicago Tribune* series, "Trial and Error," examined 381 homicide convictions that were reversed on appeal.¹⁹² The fifth and final part of the series—titled "Break rules, be promoted"—took a comprehensive look at the potentially perverse incentive structure at work in prosecutors' offices.¹⁹³ The *Chicago Tribune* reporters used the examples of three Cook County prosecutors who individually committed serious misconduct and who, together, generated nine cases that were granted new trials on appeal.¹⁹⁴ Four of those cases involved homicide convictions.¹⁹⁵ Despite documented evidence of misconduct, all three of these prosecutors received promotions to supervisory positions. Each then sought and won elections as judges, only to be entrusted with the

way the cases were presented, arguing that "the series wrongly suggests that we do not punish prosecutors when misconduct is proven." Eric Holder, *'Win at All Costs': The Justice Department Responds*, PITT. POST-GAZETTE (Jan. 3, 1999), http://www.usa-the-republic.com/items%20of%20interest/Win_At_All_Cost/Justice_Department_Responds.htm; see also DOJ's "Grotesque Prosecutorial Misconduct" *Upends Civil Rights Convictions*, JUD. WATCH: CORRUPTION CHRON. (Sept. 30, 2013), <https://www.judicialwatch.org/blog/2013/09/dojs-grotesque-prosecutorial-misconduct-upends-civil-rights-convictions/>.

188. See Moushey, *Introduction*, *supra* note 184.

189. Bill Moushey, *Hiding the Facts*, PITT. POST-GAZETTE (Nov. 24, 1998) [hereinafter Moushey, *Part 3*], http://www.usa-the-republic.com/items%20of%20interest/Win_At_All_Cost/Hiding_the_facts.htm.

190. Bill Moushey, *The Damage of Lies*, PITT. POST-GAZETTE (Nov. 29, 1998), http://www.usa-the-republic.com/items%20of%20interest/Win_At_All_Cost/The_damage_of_lies.htm ("Lying has become a significant problem in federal court cases because the rewards to federal law enforcement officers can be so great and the consequences so minimal. Perjurers are seldom punished; neither are the law enforcement officers who ignore or accept their lies.").

191. *E.g.*, Bill Moushey, *Out of Control*, PITT. POST-GAZETTE (Nov. 22, 1998), http://www.usa-the-republic.com/items%20of%20interest/Win_At_All_Cost/Out_of_control.htm.

192. Possley & Armstrong, *Introduction*, *supra* note 184.

193. Armstrong & Possley, *Part 5*, *supra* note 140.

194. *Id.*

195. *Id.* The Illinois Appellate Court described each instance of misconduct as alternatively "inexcusable," "[a]n insult to the court and to the dignity of the trial bar," and "obfuscating." *Id.*

inevitable task of reviewing and judging prosecutors' actions and potential misconduct.¹⁹⁶ "In an environment where prosecutors recite conviction rates like boxers touting won-loss records, the risks are negligible for those who break the rules of a fair trial."¹⁹⁷

Case law rarely, if ever, poses or answers the question about why this misconduct occurs, persists or pervades offices. First, courts are reluctant to blame the individual prosecutor. Many of the published opinions in cases where courts vacate or overturn describe prosecutorial misconduct in great detail without ever questioning why the prosecutor acted so improperly.¹⁹⁸ Even in circumstances where the misconduct is egregious, courts tend to address the act as though it is entirely disconnected from the individual prosecutor or that prosecutor's office.¹⁹⁹ When the link between the act and the individual prosecutor's

196. See *id.* Apparently this is not a surprise, as the *Chicago Tribune's* analysis produced the names of thirty-nine other prosecutors who had cases reversed for misconduct but who later became judges in various jurisdictions. *Id.* This obviously raises a different concern: the very judges upon whom the public largely depends to police prosecutor conduct are themselves former prosecutors who committed misconduct while on the job. Not only would they likely share a prosecutor's aggressive mindset once on the bench, but they would, furthermore, have a difficult time even identifying misconduct. See *id.* It is, however, worth noting that it is voters in Illinois, and not a prosecutor's supervisors, that are responsible for judicial selections in the state. See *Judicial Selection in the States: Illinois*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/index.cfm?state=IL (last visited May 1, 2017).

197. Armstrong & Possley, *Part 5*, *supra* note 140.

198. See, e.g., *Stumbo v. Seabold*, 704 F.2d 910, 911 (6th Cir. 1983) (documenting the egregious misconduct that warranted a new trial where the prosecutor's behavior was viewed by every reviewing court as highly improper); *Milke v. Mroz*, 339 P.3d 659, 666 (Ariz. Ct. App. 2014), *petition for rev. denied*, No.1 CA-SA 14-0108 (Ariz. Ct. App. Mar. 17, 2015) (applying double jeopardy bar to prevent prosecution from retrying a defendant where the court was "unable to conclude that the long course of *Brady/Giglio* violations in this case are anything but a severe stain on the Arizona justice system," but indicating that such conduct would "hopefully remain unique in the history of Arizona law"); *Cook v. State*, 940 S.W.2d 623, 627 (Tex. Crim. App. 1996) (reversing conviction where court found that "[p]rosecutorial and police misconduct has tainted this entire matter from the outset" and detailing the specifics of the prosecutorial misconduct).

199. See, e.g., Am. Bar Ass'n, Transcript, *Judging Justly? Judicial Responsibility for Addressing Incompetent Counsel and Prosecutorial Misconduct in Death Penalty Cases*, 20 T.M. COOLEY L. REV. 21, 26 (2003) ("What happens most often when an appellate court is dealing with allegations of prosecutorial misconduct is that it uses generic references when talking about the prosecutor. It will refer to the assistant state's attorney, district attorney, or commonwealth attorney but, in effect, grant the person in question anonymity by refusing to identify him." (statement of Ken Armstrong, *Chicago Tribune*)); *Connick v. Thompson*, 563 U.S. 51, 76 (2011) (Scalia, J., concurring) ("The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors

ambition is easily seen, courts are still loath to name that as the cause.²⁰⁰ Perhaps courts consider the cause of the misconduct immaterial because the vast majority of cases that raise questions of prosecutorial misconduct determine what happens to the criminal *defendant* rather than what happens to the prosecutor.²⁰¹ Second, and perhaps even more importantly, there seems to be no mechanism in place to examine the systemic foundations of the misconduct. This obvious flaw has led some commentators to suggest that prosecutors' offices should be treated as one attorney in order to investigate whether there is a pattern of prosecutorial misconduct.²⁰²

Even where judges are expected to examine a prosecutor's behavior—such as in the case of a *Brady* violation—they are often reluctant to make a finding that points the finger of blame at an individual or at the prosecutor's office. This reluctance seems to stem from at least three potential sources: First, judges “simply have no appetite for directly imposing personal or professional penalties on the prosecutors with whom they regularly interact.”²⁰³ They may have a desire to maintain institutional comity in a system that depends on repeat institutional players. Second, even if judges suspect improper conduct within a prosecutor's office, they may be reluctant to take on the role of accuser and investigator particularly when, in the end, they will need to render the ultimate decision regarding whether there has been a *Brady* violation.²⁰⁴ Third, in some jurisdictions, judges may fear retaliation from the prosecutor's office. Some prosecutors may withhold election support for elected judges or might choose to put forth candidates from within their offices to oppose a judge who has ruled against them.²⁰⁵ Or retaliation may take yet another form—requests to disqualify the judge for any cases from that office.²⁰⁶ For example, in a

specific training, but by miscreant prosecutor Gerry Deegan's willful suppression of evidence . . .”).

200. See, e.g., *McGhee v. Pottawattamie Cty.*, 514 F.3d 739, 742, 747–48 (8th Cir. 2008) (alluding to the County prosecutor's political campaign amidst a murder investigation that ultimately led to the defendants' convictions being vacated due to a *Brady* violation but failing to make the explicit link).

201. See, e.g., *McGrier v. United States*, 597 A.2d 36, 40 (D.C. 1991) (“[F]rom our standpoint the prosecutor's motive is essentially irrelevant. What matters instead is the effect of the disputed comment on the verdict.”).

202. Zacharias, *supra* note 170, at 766–67.

203. Barkow, *supra* note 151, at 2096 (quoting Starr, *supra* note 18, at 1517).

204. See Green, *supra* note 157, at 894–96 (describing a Queens County District Attorney's efforts to preempt a state trial court from examining a prosecutor's professional conduct).

205. Barkow, *supra* note 151, at 2096.

206. See Christopher Goffard, *O.C. Prosecutors Steering Cases Away from Judge Thomas Goethals*, L.A. TIMES (Mar. 13, 2015, 6:22 PM), <http://www.latimes.com/local/>

case of misconduct in Orange County, California, Judge Goethals ruled that the Orange County District Attorney's Office would be barred from continuing to prosecute a high profile death penalty case.²⁰⁷ After that ruling, the District Attorney's Office filed motions to disqualify Goethals in fifty-seven cases, according to court records.²⁰⁸ In the three years preceding his ruling, prosecutors made disqualification requests against Goethals just five times.²⁰⁹

In the civil arena, prosecutors have even less to fear for their misconduct. In *Imbler v. Pachtman*, the Supreme Court upheld absolute immunity for prosecutors against private rights of action.²¹⁰ Subsequent holdings have reinforced this ruling and have extended the immunity prosecutors enjoy to misconduct that flows from problems with supervision or lapses in training.²¹¹ In the end, whether we use professional reviewers or civil or criminal courts, the response is the same; few, if any, consequences flow from engaging in prosecutorial misconduct.

B. *The Problems of Policing Themselves*

On its surface, office-based reform provides some promise. The attraction to the self-policing model among prosecutors is, of course, understandable. Most organizations would prefer to keep investigations internal rather than airing dirty laundry publicly or ceding control of sensitive questions to entities that may not understand the weight of the prosecutorial role.²¹² Quite obviously, a prosecutor's office that takes

orangecounty/la-me-jailhouse-snitch-20150314-story.html.

207. Lithwick, *supra* note 138 ("In tossing the entire DA's office off the [Scott] Dekraai case, Judge Goethals wrote that 'certain aspects of the district attorney's performance in this case might be described as a comedy of errors but for the fact that it has been so sadly deficient . . . There is nothing funny about that.'").

208. Goffard, *supra* note 206.

209. *Id.*

210. 424 U.S. 409, 447 (1976); *see also* Barkow, *supra* note 151, at 2094 ("The hurdles for a victim who wishes to bring a civil suit are typically insurmountable.").

211. *See* Van de Kamp v. Goldstein, 555 U.S. 335, 335 (2009); Prentice L. White, *Absolute Immunity: A License to Rape Justice at Will*, 17 WASH. & LEE J. C.R. & SOC. JUST. 333, 339 (2011) (arguing that the Court's treatment of *Van de Kamp* "has given rogue prosecutors the necessary ammunition they need to implement whatever trial strategy they deem appropriate to secure a conviction").

212. Barkow, *supra* note 151, at 2091 n.6 ("Particularly where cases generate public attention, the prosecutors' office may be reluctant to appear ameliorative." (quoting Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV.

seriously the view that it should prevent and police any form of misconduct is more likely to consider the tone it sets and the culture it creates to avoid misconduct. But even with those good intentions, the actual practice of self-policing is fraught with problems. The mere act of choosing to investigate a colleague's conduct when you see yourselves as allied in a common fight presents personal difficulties. That professional association and alignment can affect the decision to investigate and the intensity of the inquiry.²¹³ And if misconduct surfaces, that camaraderie may affect the type of response that investigators will recommend.²¹⁴ The cycle of minimizing and backing one's own not only becomes a method of responding to misconduct, but it also sets a tone in the office.²¹⁵ It is perhaps not surprising then that while much misconduct goes unreported, the available evidence demonstrates that misconduct clusters in certain prosecutors' offices.²¹⁶

Let's take a closer look at some of the problems inherent in a self-policing scheme. First, in exploring the root causes of misconduct, a prosecutor's office would likely gravitate toward simpler explanations. It is far easier to assert that most misconduct occurs inadvertently while the remainder results from the blind ambition of an isolated few bad apples.²¹⁷ Some academics have supported and advanced this view.²¹⁸ They recognize that prosecutors succumb to the pressure to win and become so blinded by the need to win that they may intentionally

669, 668 (1992))).

213. See *id.* at 2093 ("Offices with in-it-to-win-it cultures are likely to have more international nondisclosures.").

214. See *id.*

215. *Id.* at 2095.

216. *Id.* at 2093; see also Balko, *supra* note 2 (indicating that between 1973 and 2002, prosecutors in Orleans Parish, Louisiana sent thirty-six individuals to death row; four of these convictions later resulted in exonerations and nine were overturned due to *Brady* violations); Thomas J. McCabe, *The Foul Blow: Prosecutorial Misconduct in Idaho*, 55-FEB ADVOCATE 16, 16 (2012) (citing a review of decisions issued by the Idaho appellate courts over the last several years that revealed that a disproportionate number of cases in which prosecutorial misconduct was identified arose from the same prosecutor's office).

217. See *Watchdog: Holder Lets Prosecutors Get Away with Misconduct*, NEWSMAX (Mar. 14, 2014, 7:15 AM), <http://www.newsmax.com/Newsfront/eric-holder-prosecutorial-misconduct-discipline/2014/03/14/id/559524/>.

218. See Warren Diepraam, *Prosecutorial Misconduct: It Is Not the Prosecutor's Way*, 47 S. TEX. L. REV. 773, 780 (2006) (arguing that the old adage "if it ain't broke, don't fix it" should apply to the field of prosecutorial misconduct, and challenging the idea that prosecutorial misconduct is really as pervasive as recent studies suggest); Gershowitz, *supra* note 105, at 1061-62 ("Taking a glass-half-full approach, we can take solace in the fact that much prosecutorial misconduct is inadvertent and not prejudicial enough to necessitate reversing a defendant's conviction." (footnotes omitted)); Gershowitz & Killinger, *supra* note 111, at 263 ("[M]ost prosecutorial misconduct is accidental.").

withhold evidence they know to be exculpatory.²¹⁹ But they then assert that “likely most” instances of misconduct flow from inadvertence or negligence.²²⁰ While that is a comforting assertion, there is no inferential basis for it. The suggestion seems to hinge on the fact that “[p]rosecutors’ offices have large caseloads and are often poorly funded and understaffed, with many offices experiencing high turnover rates.”²²¹ Again, both contentions may be true. Still, it is far from evident that these facts explain what the evidence reveals—that offices systematically engage in misconduct, such as *Brady* violations. When researchers have taken in-depth looks at the occurrence of *Brady* violations within offices, they have discovered that these types of offenses occur in clusters.²²² So, while a few mishaps resulting in a failure to disclose evidence may be attributable to over-burdened prosecutors, it remains to be seen how that accounts for the systemic and repeated violations that continue to occur.²²³

The clusters of misconduct defy easy answers. More importantly, neat explanations, while superficially appealing, may actually obscure the more complex dynamics leading to misconduct. For a variety of intersecting and reinforcing reasons—politics, ambition, personal rationales to reach a desired outcome—offices develop cultures and methods of practice that condone and sustain misconduct.²²⁴ The tone is often set at the top and is tolerated at all levels.²²⁵ This makes rooting out the problem all the more difficult. In many ways, the poster child for prosecutorial misconduct is the Orleans Parish District Attorney’s Office.²²⁶ Over time, that office has engaged in misconduct that has

219. Barkow, *supra* note 151, at 2091–92.

220. *Id.* (explaining that there are two main reasons that *Brady* violations occur: the pressure to win and inadvertence or negligence, but arguing that the latter is responsible for failures to disclose exculpatory evidence “[i]n many (likely most) cases”).

221. *Id.* at 2092; *see also* Gershowitz & Killinger, *supra* note 111, at 282 (arguing that excessive caseloads lead prosecutors to commit inadvertent misconduct).

222. Barkow, *supra* note 151, at 2093 (citing a 2007 report on prosecutorial misconduct by the California Commission on the Fair Administration of Justice).

223. *But see* Connick v. Thompson, 563 U.S. 51, 62–63 (2011) (finding that four prior conviction reversals could not have put Connick on notice that his office’s *Brady* training was deficient because those cases did not involve a failure to disclose blood evidence, crime lab reports, or other physical or scientific evidence such as the kind at issue in Thompson’s case).

224. *See* Ellen Yaroshesky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS 913, 929, 931 (2012).

225. *See id.* at 932–33.

226. *See id.* at 913–14; INNOCENCE PROJECT NEW ORLEANS, EVIDENCE SUPPRESSION

pervaded every level of the organization and has persisted through successive terms of different District Attorneys.²²⁷ The practice within that office, under District Attorney Connick, “was to be as restrictive as possible with *Brady* information. The policy was when in doubt, don’t give it up.”²²⁸ One study found that a quarter of the death sentences under District Attorney Connick were ultimately overturned because of *Brady* violations.²²⁹ Leon Cannizzaro became the District Attorney for New Orleans in 2009.²³⁰ In New Orleans, Cannizzaro insisted that his office acted properly when it waited until the middle of trial to inform the defense about its deal with the victim and lone eyewitness in a December 2010 shooting.²³¹ His explanation for the Office’s failure to disclose this *Brady* material was that the defense lawyer “never asked.”²³² He claimed, with breathtaking inaccuracy, that “[t]he defense attorney has to request it, and if he doesn’t, we’re not obligated to give it to him.”²³³ Not only is case law settled in this area, but one of the leading U.S. Supreme Court precedents originated in Orleans Parish.²³⁴ The Court made clear that the government must turn over such “impeachment” evidence on its own.²³⁵ And, of course, that blatant

REPORT 1, <http://pdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/IPNO%20Study%20on%20the%20Orleans%20DA's%20Office.pdf>.

227. See Yaroshefsky, *supra* note 224, at 921–24.

228. *Id.* at 927 n.95 (alteration in original) (quoting the affidavit of former Assistant District Attorney Bill Campbell, Brief for the Orleans Public Defenders Office as Amicus Curiae Supporting Petitioner ¶ 1, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145), 2011 WL 3706111, at *6 n.3). *But see* *Truvia v. Connick*, 577 F. App’x 317, 323 (5th Cir. 2014) (holding that the district court properly excluded Campbell’s affidavit for hearsay and lack of personal knowledge during the relevant period by granting summary judgment to the defendants in the § 1983, § 1985, and § 1988 claims against the City of New Orleans, and, *inter alia*, several former district attorneys, including Harry Connick, after the plaintiffs’ convictions were vacated for *Brady* violations committed during their trial).

229. See INNOCENCE PROJECT NEW ORLEANS, *supra* note 226, at 1 (“According to available records, favorable evidence was withheld from 9 of the 36 (25%) men sentenced to death in Orleans Parish from 1973-2002.”); accord Balko, *supra* note 2; see also *Kyles v. Whitley*, 514 U.S. 419, 421–22 (1995); *State v. Bright*, 875 So. 2d 37, 44 (La. 2004); *State v. Cousin*, 710 So. 2d 1065, 1066 n.2 (La. 1998); *State v. Thompson*, 825 So. 2d 552, 553 (La. Ct. App. 2002).

230. Emily Bazelon, *Playing Dirty in the Big Easy*, SLATE (Apr. 18, 2012, 4:56 PM), http://www.slate.com/articles/news_and_politics/crime/2012/04/new_orleans_district_attorney_leon_cannizzaro_is_being_questioned_for_his_ethics_in_pursuing_convictions.html.

231. John Simerman, *DA Leon Cannizzaro is Subpoenaed to Testify about Deals for Murder Witnesses*, TIMES-PICAYUNE (GREATER NEW ORLEANS) (Nov. 14, 2011, 8:00 PM), http://www.nola.com/crime/index.ssf/2011/11/da_leon_cannizzaro_is_subpoena.html.

232. *Id.*

233. *Id.*

234. See *Kyles*, 514 U.S. at 421–22.

235. *Id.* at 421 (holding that the prosecution is responsible for gauging the cumulative effect of evidence favorable to the defense under *Brady*, regardless of whether the police bring such favorable evidence to the prosecution’s attention).

disregard for *Brady* obligations at the top of the organization is not limited to New Orleans.²³⁶

Still, some academics hold out hope that strong leadership within the prosecutor's office can curtail misconduct by guiding, shaping, and changing organizational culture.²³⁷ They separately hypothesize that strong leadership in a prosecutor's office, like any workplace, can precipitate a substantial shift in the compliance of line prosecutors.²³⁸ Professor Rachel Barkow recommends incorporating compliance practices similar to those that prosecutors themselves designed for corporations,²³⁹ and Professor Stephanos Bibas emphasizes restructuring office hierarchy to follow corporate best practice trends.²⁴⁰ Both stress the value of recasting office values and designing training to reflect a disapproval of misconduct.²⁴¹ But this reliance on existing leadership may be misplaced. These recommendations presuppose that the existing leadership is not involved in or is not tolerant of the office's misconduct. Where leadership is willing to turn a blind eye to misconduct in the service of office goals or broader ambitions, it may not be the most likely change-agent in this process. While there is room to believe that all leaders of prosecutors' offices do not condone misconduct, the widespread nature of the problem suggests that faith in the underlying good will or ability of the leadership to address this problem alone may be misplaced.

A second problem with self-policing is that it puts prosecutors in the untenable position of having to investigate and accuse their own colleagues. The discomfort with that task often leads internal reviewers to adopt processes that, in the end, protect individual prosecutors

236. Gershowitz, *supra* note 105, at 1070–73.

237. See, e.g., Barkow, *supra* note 151, at 2106 (“If corporate culture can be changed, so, too, can the ethos inside a prosecutor’s office.”); Bibas, *supra* note 105, at 997 (“Perhaps the most potent regulatory force is one that is easy to overlook: the ethos or professional culture of a prosecutor’s office.”).

238. Barkow, *supra* note 151, at 2106 (“[I]f high-level officials within a prosecutor’s office seek to change the norms within it, line prosecutors are likely to be highly susceptible to making the shift. That norm shifting could, in turn, go a long way toward mitigating violations.”); see also Bibas, *supra* note 105, at 1000 (arguing that “rhetoric from the top” matters in influencing and changing the culture of a prosecutor’s office); Corn & Gershowitz, *supra* note 105, at 431 (noting that accountable leadership “will provide a powerful incentive for establishing a culture of commitment to ethical standards, the first step in preventing [prosecutorial] violations.” (footnote omitted)).

239. See Barkow, *supra* note 151, at 2105–07.

240. See Bibas, *supra* note 105, at 1000–02.

241. See *id.* at 1000–02; Barkow, *supra* note 151, at 2105–07.

rather than expose them to the reputational damage that could result from an investigation into, or a finding of, wrongdoing.²⁴² For example, the U.S. Department of Justice has created the Office of Professional Responsibility to police itself, but it has made the procedural choice to extend anonymity to prosecutors who engage in misconduct.²⁴³ In 2014, the Department of Justice refused to release any names of prosecutors involved in more than 650 instances of misconduct documented by an independent watchdog organization.²⁴⁴ These acts of misconduct ranged from “intentional” to “reckless.”²⁴⁵ Then-Attorney General Eric Holder called the hundreds of prosecutors some “bad apples” rather than accepting that this might be part of a larger-scale problem.²⁴⁶ Similar efforts to conceal the identity of individual prosecutors occur at the state level. For example, in Cook County, the newspaper series “Trial and Error” documented that even when prosecutors actually faced discipline, the disciplinary agencies and courts hid their names so as not to cause them professional embarrassment.²⁴⁷ The choice to shield those names from public scrutiny not only dilutes the effectiveness of the disciplinary response (if there is one), but it also powerfully reinforces the lesson that we protect our own.²⁴⁸

In addition, when allegations of impropriety surface, the prosecutor’s office will typically assign a colleague to investigate. The subsequent prosecutor tends to support the actions and conclusions of the initial prosecutors or at least find ways to minimize the conduct.²⁴⁹

242. See Jim McElhatton, *Justice Department Refuses Info on Hundreds of Prosecutor Misconduct Cases*, WASH. TIMES (Mar. 13, 2014), <http://www.washingtontimes.com/news/2014/mar/13/justice-department-refuses-info-on-hundreds-of-pro/>.

243. *Id.*

244. *Id.*

245. *Id.*; see also *Watchdog: Holder Lets Prosecutors Get Away with Misconduct*, NEWSMAX, (Mar. 14, 2014, 7:15 AM), <http://www.newsmax.com/Newsfront/eric-holder-prosecutorial-misconduct-discipline/2014/03/14/id/559524/>.

246. *Watchdog*, *supra* note 245.

247. Armstrong & Possley, *Part 5*, *supra* note 140.

248. See McElhatton, *supra* note 242. After the DOJ report was released, Senators from both parties proposed changes to the review process for federal prosecutorial malfeasance, which would include giving the Justice Department’s independent inspector general the authority to investigate misconduct. That bill is still pending in the Senate Committee on the Judiciary. See *All Bill Information (Except Text) for S.618 – Inspector General Access Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/618/all-info> (last visited May 1, 2017).

249. See *People v. Velasco-Palacios*, 235 Cal. App. 4th 439, 442 (Ct. App. 2015) (appealing dismissal of a charge based on the court’s finding of outrageous government misconduct when prosecutor fabricated a confession, and arguing that the misconduct did not cause prejudice); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 227–29 (2005) (describing the personal concerns and potential embarrassment that tends to undermine a prosecutor’s inclination to take action

This doubling-down has the potential to turn even single instances of misconduct into long running affairs that implicate not just the prosecutor whose behavior was initially wrong but also his or her replacements and coworkers. While these practices at both the federal and state levels are perhaps a natural by-product of wanting to treat one's colleagues delicately, they have cascading effects. Both the U.S. Supreme Court and academic commentators who have examined misconduct have cited the need to send a deterrent message.²⁵⁰ Withholding the names of prosecutors guilty of misconduct wholly ignores that goal. And expecting colleagues to call out misconduct of their predecessors on a case often invites efforts to bury it further.

Third, processes have not been put in place to protect the individual prosecutor who sees misconduct to report it without risk. For example, there is no whistleblower protection for individual prosecutors who choose to reveal misconduct. *Garcetti v. Ceballos*²⁵¹ offers a rather disturbing insight into possible ramifications for surfacing misconduct in a criminal case. There, Los Angeles Deputy District Attorney Richard Ceballos reviewed a case at the request of defense counsel to determine whether the Sheriff's Office had made misrepresentations in order to obtain a search warrant.²⁵² Ceballos conducted an independent review into the facts alleged in the affidavit in support of the search warrant and found "serious misrepresentations."²⁵³ Ceballos then relayed his findings to his supervisor in a disposition memorandum and recommended dismissal of the case.²⁵⁴ After a heated exchange about how Ceballos had handled this, the supervisor chose to allow the case to proceed to trial over Ceballos's objection.²⁵⁵ Prior to trial, the defense moved to challenge the affidavit and called Ceballos as a witness to testify regarding his findings.²⁵⁶

Following these events, Ceballos endured retaliatory harassment. His supervisors reassigned him from his deputy position in charge of the calendar to a trial deputy position.²⁵⁷ The office removed him from a

when a conviction is called into question).

250. See *Velasco-Palacios*, 235 Cal. App. 4th at 442; Zacharias, *The Professional Discipline*, *supra* note 170, at 768.

251. 547 U.S. 410 (2006).

252. *Id.* at 413-14.

253. *Id.* at 414.

254. *Id.*

255. *Id.*

256. *Id.* at 414-15.

257. *Id.* at 415.

murder case that he had been handling and reassigned it to a junior colleague without any homicide experience.²⁵⁸ His supervisors transferred Ceballos to another more remote courthouse.²⁵⁹ And, finally, he was denied a promotion.²⁶⁰ He sued the State in federal court.²⁶¹ The Ninth Circuit ultimately held that Ceballos's memorandum, as a matter of "public concern," should be afforded First Amendment speech protections.²⁶² However, the U.S. Supreme Court overturned the Ninth Circuit decision.²⁶³ The Court noted that the First Amendment does not protect a government employee from discipline based on speech made during her official duties.²⁶⁴ Justice Souter, writing in dissent, urged that public employees who speak on matters of official wrongdoing and threats to health and safety should be eligible for First Amendment protections even if they speak in the course of their duties.²⁶⁵ But, the Court was willing to ignore the view that First Amendment protection ought to apply even given the stakes that hung in the balance.²⁶⁶ In the end, "*Garcetti* sends a chilling message that prosecutors may be damned if they do disclose beneficial evidence to the defense."²⁶⁷ Without a full guarantee of freedom from reprisal, prosecutors, understandably, will be reluctant to report any misconduct.

In another California office, the District Attorney in the Orange County District Attorney's Office (OCDA) used his power to promote and fire in order to build loyalty for himself and drive home the consequences of disloyalty.²⁶⁸ Running campaigns for re-election are costly, but District Attorney Tony Rackauckas found a way to add to his campaign coffers: he clearly expected attorneys in the office to support his campaign by promoting those attorneys who had contributed to his re-election.²⁶⁹ When a longtime homicide prosecutor in the office expressed concern about the pressure to contribute and attempted to go

258. *Id.* at 443 n.14 (Souter, J., dissenting).

259. *Id.*

260. *Id.*

261. *Id.* at 415 (Kennedy, J.).

262. *Id.* at 415–16.

263. *Id.* at 417.

264. *Id.* at 426 ("We reject . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.")

265. *Id.* at 428 (Souter, J., dissenting).

266. *Id.* at 426.

267. See Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1332 (2012).

268. See Daniel Yi, *O.C. Prosecutor Draws Fire Over Staff Moves*, L.A. TIMES (June 4, 1999), <http://articles.latimes.com/1999/jun/04/local/me-44119> (citing Rackauckas's denial that the contributions played a role in his decisions, though ten of twelve promotions made by Rackauckas went to staff members that had donated to his election campaign).

269. See *id.*

to the State Attorney General's Office to open an investigation into the way Rackauckas was running the OCDA, he was terminated.²⁷⁰ Jacobs, the prosecutor that was fired, is hardly a poster child for appropriate prosecutorial conduct. He was responsible for sending one man to death and for delivering a lengthy prison sentence to another in a murder and rape case, where he both hid exculpatory evidence from the defense and argued two inconsistent, conflicting theories to get the defendants convicted in separate trials.²⁷¹ Throughout his time in office, Rackauckas had used promotion and firing as more of a political tool than one based on merit.²⁷² This form of employment vulnerability is yet another way that prosecutor's offices can set a tone that we back each other or risk the loss of employment.

Fourth, elected district attorneys are often politically motivated in the choices they make.²⁷³ So counting on an elected official to lay bare her failings or somehow to exercise better leadership when that choice may undermine her political positioning may be little more than wishful thinking. The desire to win favor among constituents or to distinguish oneself in a re-election campaign can lead elected prosecutors to engage in practices that could encourage at best questionable conduct.²⁷⁴ Take, for example, former Colorado prosecutor Carol Chambers, who served the Eighteenth Judicial District of Colorado.²⁷⁵ When the rates of convictions in her office began to fall, Chambers offered her line prosecutors financial bonuses for convictions

270. Stuart Pfeifer & Jerry Hicks, *O.C. Prosecutor Placed on Leave; Move Irks Critics of Rackauckas*, L.A. TIMES (Apr. 3, 2001), <http://articles.latimes.com/2001/apr/03/local/me-46141>. An arbitrator later ordered Rackauckas to reinstate the prosecutor, Mike Jacobs. Jacobs's complaints against the office led the Orange County Grand Jury to issue a report recommending that Rackauckas no longer be allowed to make personnel decisions, a recommendation that Rackauckas ignored. See Stuart Pfeifer, *Prosecutor Fired by D.A. to Return*, L.A. TIMES (Mar. 21, 2003), <http://articles.latimes.com/2003/mar/21/local/me-tony21>.

271. R. Scott Moxley, *Recent Proof of Prosecutorial Misconduct Mirrors OCDA's Bad Old Days*, OC WEEKLY (May 6, 2015, 2:02 PM), <http://www.ocweekly.com/news/recent-proof-of-prosecutorial-misconduct-mirrors-ocdas-bad-old-days-6477637>.

272. See Pfeifer & Hicks, *supra* note 270.

273. See Molly McDonough, *DA Offers Cash Rewards for Prosecutors Who Hit Conviction Goals*, ABA J. (Mar. 25, 2011, 4:08 PM), http://www.abajournal.com/news/article/da_offers_cash_rewards_for_prosecutors_who_hit_conviction_goals/.

274. See *id.*

275. This district covers Arapahoe, Douglas, Elbert, and Lincoln Counties in Colorado. See *18th Judicial District*, COLO. JUD. BRANCH, https://www.courts.state.co.us/Courts/District/Index.cfm?District_ID=18 (last visited May 1, 2017).

in felony cases.²⁷⁶ Specifically, in 2010, Chambers instituted a program awarding prosecutors an \$1100 bonus if they took at least five cases to trial per year and won convictions in at least seventy percent of those trials.²⁷⁷ Those attorneys who did not fulfill the criteria did not receive a monetary bonus at the end of the year.²⁷⁸ The goal of the program was to raise the Office's statistics.²⁷⁹

But at what cost? The program was controversial from the start. District attorneys from other jurisdictions criticized the policy because it dangerously distilled the work of the office to the pursuit of convictions at the expense of other vital prosecutorial functions.²⁸⁰ Defense lawyers in Colorado were equally critical. They expressed concern that incentives were created that would encourage prosecutors to avoid reasonable resolutions of matters because they were under professional and financial pressure to try cases.²⁸¹ They pointed to a prosecutor's duty, as articulated by the American Bar Association, to seek justice first and convictions second.²⁸² If there are pressures to win generally, when one adds financial rewards, a prosecutor will likely do whatever it takes to win. A variety of other critics joined the fray. County commissioners expressed concern about the use of state funds for bonuses during a difficult budgetary period.²⁸³ And the Denver District Attorney, Mitch Morrissey, expressed concern that the incentive structure might lead to lawyers factoring in the bonuses when this consideration is inappropriate for a prosecutor to consider in the discharge of her duty.²⁸⁴

So given the inherent challenges, is self-policing worth the effort?

276. See McDonough, *supra* note 273.

277. Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors Who Hit Conviction Targets*, DENVER POST (Mar. 23, 2011, 4:11 PM), <http://www.denverpost.com/2011/03/23/da-chambers-offers-bonuses-for-prosecutors-who-hit-conviction-targets/>.

278. *Id.*

279. *Id.*

280. *Id.*; see also Matt Stensland, *Failed Negotiations Lead to Trials, with Mixed Success in Colorado's 14th Judicial District*, STEAMBOAT TODAY (Mar. 2, 2014), <http://www.steamboattoday.com/news/2014/mar/02/failed-negotiations-lead-trials-mixed-success-14th/> (citing the criticism of Denver District Attorney Brett Barkey, who said that focusing on conviction rates "misses the complexity of what DAs do" and that he would never want his office to have a 100 percent conviction rate).

281. Fender, *supra* note 277; see also Kenneth F. Eichner, *Prosecutors Get Money for Criminal Convictions Near Denver*, HUFFINGTON POST (Mar. 28, 2011, 4:55 PM), http://www.huffingtonpost.com/kenneth-f-eichner/prosecutors-get-money-for_b_841644.html ("Adding a monetary incentive might very well be the tipping point that leads to potential misconduct.").

282. Fender, *supra* note 277; see also Eichner, *supra* note 281.

283. *Performing CO Prosecutors Get Bonuses*, DENVER POST (Mar. 25, 2011, 4:58 AM), <http://www.denverpost.com/2011/03/25/performing-co-prosecutors-get-bonuses/>.

284. Fender, *supra* note 277.

For all the above reasons, it may not be sufficient to curb misconduct by itself. But prosecutors' offices can and should try to learn from those efforts that seem to hold the most potential for stemming the tide of misconduct: Conviction Integrity Units.

C. Building on the Potential: Conviction Integrity Units

Many prosecutors have developed Conviction Integrity Units (CIUs) as a means of addressing and correcting wrongful convictions.²⁸⁵ These "error correction" mechanisms seek to discover miscarriages of justice, and they maintain the authority to refer cases for further internal review or even judicial review.²⁸⁶ Such units have emerged largely in response to the growing number of post-conviction requests for DNA testing as individuals seek to have their convictions reversed based on forensic evidence.²⁸⁷ Generally, it has been within the discretion of prosecutors and police to initiate a post-conviction investigation of new evidence.²⁸⁸ But in light of the rising number of post-conviction exonerations based on scientific evidence, the ABA's Model Rules now mandate a prosecutorial response to new, credible, and material evidence that creates a reasonable likelihood of a defendant's innocence.²⁸⁹ So CIUs have been established in various jurisdictions.²⁹⁰

285. E.g., Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2217–18 (2010).

286. Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT L. REV. 89, 91–92 (2010); see also David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1041 (2010).

287. Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545, 578 (2014); see also Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 631 (noting the way Dallas's CIU focused initially on DNA cases, which enabled the District Attorney's office to achieve clear results and quickly change office culture).

288. Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 493–94 (2009).

289. Marla L. Mitchell-Cichon, *What's Justice Got to Do with It? When the Prosecutor Has an Ethical Duty to Agree to Post-Conviction DNA Testing*, 16 T.M. COOLEY J. PRAC. & CLINICAL L. 95, 98–99 (2014) (citing MODEL CODE OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2016)); Wayne D. Garris, Jr., Note, *Model Rule of Professional Conduct 3.8: The ABA Takes A Stand Against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829, 836 (2009). However, this duty arguably long precedes the ABA's adoption. As Barry Scheck explains, in *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court first espoused a

And, of all the internal mechanisms, this one potentially offers the most promise.

The problem, though, is that many CIUs limit review to those cases in which forensic evidence is available for testing.²⁹¹ This means that CIUs do not typically address prosecutorial misconduct. This is particularly problematic given that research reveals that official misconduct (including misconduct by prosecutors) is the second-highest contributing factor to exonerations nationwide.²⁹² And, while CIUs have been helpful in shining a light on conviction errors generally, scholars worry that subjectivity among the standards governing CIUs will likely minimize the possibility that these units will be able to identify prosecutorial flaws and prevent habitual mistakes.²⁹³ Still, when designed and operated well, CIUs engage in a painstaking inquiry and investigation of the evidence leading to a conviction. If directed toward misconduct, such a process could prove useful. What follows is an examination of the prevailing models.

prosecutor's duty to correct wrongful convictions. See Scheck, *supra* note 285, at 2249 (indicating that the Court, from early on, clearly saw the responsibility to correct wrongful convictions as an integral part of the prosecutor's office).

290. See, e.g., Rachel Dissell, *New Conviction Integrity Unit Will Review Innocence Claims, Cuyahoga County Prosecutor Timothy J. McGinty Announces*, CLEVELAND.COM (Apr. 19, 2014, 2:00 PM), http://www.cleveland.com/court-justice/index.ssf/2014/04/new_conviction_integrity_unit.html (highlighting the 2014 opening of the Cuyahoga County CIU); David Greenwald, *Santa Clara DA's Conviction Integrity Unit Draws Praise From Reform Advocates*, DAVIS VANGUARD (Mar. 12, 2013), <http://www.davisvanguard.org/2013/03/santa-clara-das-conviction-integrity-unit-draws-praise-from-reform-advocates/> (citing the 2011 opening of the Santa Clara, California CIU); *Cook County State's Attorney's Office Opens Conviction Integrity Unit*, INNOCENCE PROJECT (Feb. 3, 2012), <http://www.innocenceproject.org/cook-county-states-attorneys-office-opens-conviction-integrity-unit/> (describing the 2012 opening of Chicago's Cook County unit); *Philadelphia District Attorney Announces Conviction Review Unit*, INNOCENCE PROJECT (Apr. 16, 2014), <http://www.innocenceproject.org/philadelphia-district-attorney-announces-conviction-review-unit/>.

291. See Medwed, *supra* note 109, at 62.

292. See % *Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last visited May 1, 2017) (reporting that official misconduct contributed to fifty-one percent, or 975 out of 1914 wrongful convictions since 1989); see also Garris, Jr., *supra* note 289, at 837 (citing studies that indicate that "[p]rosecutorial misconduct is one of the most common causes of wrongful convictions").

293. See Boehm, *supra* note 287, at 657 (indicating that the efficiency and accuracy of CIUs rely entirely on the discretion of prosecutors, who often employ a "you know it when you see it" standard of review whose subjectivity underscores the very errors in judgment that may have led to wrongful convictions in the first place); Phil Locke, *Conviction Integrity Units – A Skeptic's Perspective*, WRONGFUL CONVICTIONS BLOG (Mar. 4, 2015), <http://wrongfulconvictionsblog.org/2015/03/04/a-skeptics-perspective-on-conviction-integrity-units/> (arguing that conviction review must be separated from the prosecutor's office in order "to achieve true objectivity, fairness, and impartiality").

1. Dallas District Attorney's Office CIU: A National Model

The Dallas District Attorney's Office created a CIU in 2007.²⁹⁴ It was not the first unit created in the country, but it has received national and global recognition for the process it developed.²⁹⁵ It has set the standard for autopsying a conviction. By way of background, Dallas had exceeded the volume of post-conviction DNA exonerations of any other county in the United States.²⁹⁶ When Craig Watkins ran for District Attorney, his platform promised to restore integrity to the office.²⁹⁷ Once elected, Watkins and his first assistant, Terri Moore,²⁹⁸ examined cases “working backward from the wrongful conviction”²⁹⁹ to determine the point of malfunction—with an eye toward identifying whether these exonerations were aberrations or part of a systemic

294. *Conviction Integrity Unit*, DALL. CTY. DIST. ATT'Y, https://www.dallascounty.org/departments/da/conviction_integrity.php (last visited Nov. 12, 2016).

295. See Scheck, *supra* note 285, at 2250; NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014 (2015), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf.

296. Boehm, *supra* note 287, at 628 n.54; Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y. L. SCH. L. REV. 1033, 1035, 1039 (2012) (noting that three more exonerations came during Craig Watkins's first few weeks in office, yielding “an undisputed twelve cases where highly reliable post-conviction forensic testing definitively established that the wrong person had been convicted of a heinous crime” and resulting in a public relations embarrassment for the county).

297. Medwed, *supra* note 109, at 63 (“Dallas's atrocious history of wrongful convictions created a fertile political environment in which someone like Watkins could be elected and his idea for a post-conviction unit could bloom.”); see also Roger A. Fairfax, Jr., *The “Smart on Crime” Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 911–12 (2012) (quoting Watkins, who cites “prosecutorial misconduct . . . mistaken eyewitness identification, and . . . ‘pure incompetence’ as giving rise to questions of veracity underlying the development of the Dallas CIU”). However, Watkins is also no longer with the office, having been defeated by current District Attorney Susan Hawk in the 2014 election. Watkins may have been involved with certain incidents that raised questions about his ethics; these incidents could be responsible for his declining voter popularity. See Gromer Jeffers Jr., *Susan Hawk Ousts Craig Watkins in Heated Race for Dallas County DA*, DALL. NEWS (Nov. 2014), <http://www.dallasnews.com/news/politics/local-politics/20141105-susan-hawk-ousts-craig-watkins-in-heated-race-for-dallas-county-da.ece> (citing Watkins's reluctance to investigate two Dallas County constables accused of misdeeds as contributing to his declining public perception).

298. According to Moore, “Among the catalysts for establishing the conviction integrity unit was the recognition by prosecutors of the numerous shortcomings in the criminal justice system, including an admission that human beings are not infallible.” Terri Moore, *Prosecutors Reinvestigate Questionable Evidence*, 26-FALL CRIM. JUST. 4, 4 (2011).

299. Boehm, *supra* note 287, at 628.

failure.³⁰⁰

From the start, the Dallas CIU made clear that it took this task seriously. The District Attorney's Office engaged in collaboration with the Dallas County Public Defender's Office and local innocence projects, seeking to bring transparency and an outside perspective to the CIU's review processes.³⁰¹ Procedurally, the office would disclose the prosecution's entire file, including the work product, "upon a showing of a plausible claim of innocence."³⁰² The office also adopted a practice that allowed inmates access to prosecution files upon request, with some limitations; the trial file would generally be made available when the allegations related to prosecutorial misconduct.³⁰³ In addition, to avoid any potential bias, the original prosecutor played only a marginal role in the review process, although if allegations of a *Brady* violation surfaced, the prosecutor would likely be consulted about disclosures that she had made.³⁰⁴ The CIU's policy of reviewing *all* innocence claims, irrespective of the defendant's eligibility for a judicial remedy, lent added credibility to the effort.³⁰⁵

District Attorney Watkins made this effort a centerpiece of the office. The CIU was integrated with office divisions that were likely to have overlapping cases, and each division reported to the head of the CIU, who was number three in the District Attorney's Office, reporting directly to the District Attorney.³⁰⁶ Watkins hired an innocence project attorney and formed a unit comprised of two prosecutors, an investigator, and a paralegal, all of whom were dedicated full-time to the CIU.³⁰⁷ He also reversed the office's long-standing opposition to post-conviction DNA testing, and in the two years following, nine people were exonerated.³⁰⁸

As of 2014, the Dallas CIU had reviewed over 1000 cases, exonerated thirty-three individuals,³⁰⁹ and provided post-conviction

300. *See id.*; Ware, *supra* note 296, at 1039. Mike Ware was on the team that collaborated with Watkins and Moore to create the Dallas CIU. *Id.* at 1034.

301. Ware, *supra* note 296, at 1040.

302. Boehm, *supra* note 287, at 629.

303. *Id.*

304. *Id.* at 630.

305. *Id.* at 628–29.

306. *Id.* at 630–31. This structure was intended to assure that the CIU was not marginalized in the office. *See id.*

307. *Id.* at 628; *see also* Ware, *supra* note 296, at 1040.

308. Boehm, *supra* note 287, at 629. Boehm notes that Dallas's rapid reform may be at least partially attributed to the office's initial focus on DNA testing, which can produce quick, clear-cut and irrefutable exonerations. *Id.* at 631.

309. Yamiche Alcindor, *Brooklyn 'Ground Central' for Wrongful Conviction Claims*, USA TODAY (July 26, 2014, 7:03 AM), <http://www.usatoday.com/story/news/nation/2014/07/26/brooklyn-ground-central-for-wrongful-conviction-claims/12930509/>.

relief for *Brady* violations to at least three defendants.³¹⁰ When an exoneration was confirmed, the prosecuting attorney would be notified if she still worked with the District Attorney's Office, and steps to reform relevant procedures might then be taken.³¹¹ According to Mike Ware, who was on the team that created the unit, he rarely felt overt resentment from his colleagues in the Dallas District Attorney, but he once received a call from a former prosecutor who did not hesitate to express his discontent upon finding out that one of his former convictions had been overturned.³¹²

Barry Scheck, co-founder of the Innocence Project, has been a vocal proponent of CIUs but has criticized the approach taken by a number of district attorney's offices.³¹³ Scheck contends that the unlikely sanctioning of prosecutors for common forms of misconduct, such as *Brady* violations, make CIUs particularly urgent as a check on prosecutorial power.³¹⁴ Using the Dallas CIU, which he describes as the most effective model, Scheck has identified a number of best practices.³¹⁵ These include:

1. Making the prosecutor's entire file, including work product, available to the party making the claim of innocence;
2. Ensuring that the CIU is willing to pursue leads identified by the party claiming innocence that the CIU is uniquely positioned to investigate;
3. Simultaneously allowing the Innocence Project or other

310. Ware, *supra* note 296, at 1041.

311. Boehm, *supra* note 287, at 630 & n.73. Russell Wilson, CIU Chief in the Dallas office, indicated that the majority of wrongful convictions were the result of mistaken eyewitness identification or similar errors that were often attributable to inadequate prior office procedures that Watkins had remedied during his tenure. *Id.* Wilson stated that no prosecutor currently with the Dallas office had a wrongful conviction that was the result of prosecutorial misconduct. *Id.*

312. Marisa Gerber, *L.A. County D.A. to Create Unit to Review Wrongful-Conviction Claims*, L.A. TIMES (Apr. 22, 2015, 6:23 PM), <http://www.latimes.com/local/lanow/la-me-ln-conviction-review-unit-20150422-story.html>.

313. *See id.* (reporting Scheck's skepticism that CIUs might become a "fashion accessory," creating a mere façade of change, in the context of Los Angeles County's announcement that it will implement a unit starting in 2016). In another instance, he expressed hope that the Manhattan District Attorney will maintain the transparency that is needed to make its CIU work successfully; these practices "don't come easily" to district attorney's offices, according to Scheck. *See Alcindor, supra* note 309.

314. Scheck, *supra* note 285, at 2215.

315. *Id.* at 2250.

- defense lawyers to pursue leads that they are uniquely poised to investigate;
4. Maintaining a close relationship with the public defender's office to enable joint investigations;
 5. Adopting ABA Model Rule 3.8 as official policy;
 6. Creating a structure whereby the CIU reports directly to the district attorney, who in turn supports the mission of the CIU as critical to the District Attorney's agenda; and
 7. Appointing a fair and trustworthy CIU leader who is respected by prosecutors and defense attorneys alike.³¹⁶

On this last point, Scheck suggests that “[t]he successful CIUs have been ones where the person who has supervisory responsibility is a former defense lawyer.”³¹⁷ Because it is so hard to “de-bias people who are working within [prosecutors’] offices,” Scheck argues that an independent perspective is necessary to maximize the objectivity of the review process.³¹⁸

The Innocence Project has created its own set of guidelines that also emphasize the need for cooperation with defense lawyers or innocence organizations.³¹⁹ The Innocence Project report points out that the best CIUs have either been run by full-time defense attorneys or defense attorneys that work part-time while exercising significant oversight authority and that this may be the single most important factor to ensuring a unit's effectiveness and credibility.³²⁰ While acknowledging that full-time prosecutors involvement is critical, those who worked on the original case should not be responsible for its re-investigation.³²¹ This position is contrary to that taken by a number of district attorneys' offices, which maintain a veteran prosecutor to head a CIU as a means

316. Scheck, *supra* note 285, at 2250–51; *see also* Garris, Jr., *supra* note 289, for a discussion of ABA Rule 3.8.

317. Brooke L. Williams, *Are DAs Doing Enough to Overturn Wrongful Convictions?*, *GOTHAM GAZETTE* (July 13, 2015), <http://www.gothamgazette.com/index.php/government/5802-are-das-doing-enough-to-overturn-wrongful-convictions>.

318. *Id.*

319. *See* INNOCENCE PROJECT, *CONVICTION INTEGRITY UNIT BEST PRACTICES 2* (2015) [hereinafter *CIU BEST PRACTICES*], <http://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf>. For a similar argument, *see* COURTNEY OLIVA ET AL., *CTR. ON THE ADMIN. OF CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES 7–8* (2012) [hereinafter *CONVICTION INTEGRITY PROGRAM REPORT*], http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf (promoting partnerships between prosecutors and the defense bar that can involve issuing joint statements of support for new reforms).

320. *See* *CONVICTION INTEGRITY PROGRAM REPORT*, *supra* note 319, at 3.

321. *See id.*

of promoting good will among the CIU team while attempting to send a message to the profession that the District Attorney is taking conviction integrity seriously.³²² The Innocence Project also recommends that CIUs maintain an open-file policy that includes work product, with reasonable exceptions such as danger to witnesses.³²³ Finally, “[c]ases involving substantial, non-conclusory allegations of prosecutorial misconduct involving prior or former members of the office should be referred to an independent authority for investigation and review.”³²⁴

2. Manhattan and Brooklyn Conviction Integrity Units: Less Effective Knock-Offs

In 2010, Manhattan District Attorney Cyrus R. Vance, Jr., established his version of the Conviction Integrity Program, comprised of a Conviction Integrity Chief, Conviction Integrity Committee, and an external Conviction Integrity Policy Advisory Panel.³²⁵ The Conviction Integrity Committee includes ten senior assistant district attorneys who review office procedures relating to training and investigation practices.³²⁶ They also seek to minimize errors that lead to wrongful convictions.³²⁷ The Policy Advisory Panel is an independent body made up of legal scholars and criminal justice representatives who propose ways to address wrongful conviction issues.³²⁸ The Manhattan design differs radically from the original Dallas model.

In designing and implementing his CIU, Vance faced internal challenges from his own staff.³²⁹ Indeed, Vance’s senior colleagues initially told him that he was “trying to fix something that wasn’t broke.”³³⁰ Thus, Vance’s goal in developing the program was to build a CIU that reaffirmed the traditions of the District Attorney’s Office

322. *See id.* at 7.

323. *See id.* at 2.

324. *Id.* at 3 (citations omitted).

325. *See Conviction Integrity Program*, N.Y. CTY. DIST. ATT’Y’S OFF., <http://manhattanda.org/wrongful-conviction> (last visited May 1, 2017).

326. *Id.*

327. *See id.*

328. *See id.*

329. Cyrus R. Vance, Jr., Address at the Conviction Integrity Conference Speech (Dec. 6, 2011) [hereinafter Vance Address], http://manhattanda.org/sites/default/files/12.6.11%20NYU%20Conviction%20Integrity%20Remarks_0.pdf.

330. *Id.*

rather than transforming them.³³¹ This ultimately would inform its design and scope.³³² Vance appointed Bonnie Sard, a senior Manhattan district attorney, as Conviction Integrity Chief.³³³ Sard's role is to coordinate the Conviction Integrity Committee, perform an initial review of all post-conviction claims of actual innocence, and lead the re-investigation of any case that appears to present a plausible claim of actual innocence.³³⁴ If she did not find a miscarriage of justice, she would recommend to the District Attorney that the case should not be re-opened.³³⁵ If she decided that re-investigation was not warranted, Vance alone reviewed her decision.³³⁶ Manhattan only reviewed cases in which a defendant held to the same theory of innocence as that maintained at trial.³³⁷

There are two major differences in the review process as it is undertaken in Manhattan and Dallas. First, unlike Dallas, the original Manhattan prosecutor played a role in review of the claim and was usually consulted by Sard during her initial evaluation.³³⁸ This portion of the process seems to undermine both the independent nature of the CIU and the tendency for offices to support their attorneys and the conviction. Second, and perhaps more importantly, the district attorneys who investigated a claim of innocence in Manhattan were not dedicated full-time to the CIU and thus performed that role on top of their regular caseload.³³⁹ The program will only review claims of actual innocence.³⁴⁰ Moreover, the Manhattan unit, unlike Dallas, had no external involvement from outside agencies.³⁴¹

Following on the heels of the Manhattan Office's experiences, the Brooklyn District Attorney, Charles Hynes, created his own conviction review panel in 2011.³⁴² The context for Hynes's choice was that the Brooklyn office had come under considerable pressure to add a layer of review into more than fifty cases handled by disgraced

331. *See id.*

332. *Id.*

333. *See Boehm, supra* note 287, at 636.

334. *See id.* at 636–37.

335. *See id.* at 637.

336. *See Evelyn L. Malave & Yotam Barkai, Conviction Integrity Units: Toward Prosecutorial Self-Regulation?, in WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 193 (Marvin Zalman & Julia Carrano eds., 2014).*

337. *See id.* at 194; *Conviction Integrity Units: Vanguard of Criminal Justice Reform 7 (Ctr. for Prosecutor Integrity, White Paper, 2014)*, <http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Conviction-Integrity-Units.pdf>.

338. *Boehm, supra* note 287, at 637.

339. *Id.*

340. *Id.* at 636.

341. *Malave & Barkai, supra* note 336, at 193–94; *see also Williams, supra* note 317.

342. *See Alcindor, supra* note 309.

N.Y.P.D. Detective Louis Scarcella.³⁴³ The review panel included “respected members of New York City’s legal community and several of Mr. Hynes’s closest friends.”³⁴⁴ Robert G. M. Keating, an adjunct law professor at Pace University, led the panel.³⁴⁵ In his 1990 book, Mr. Hynes “called Mr. Keating one of his ‘closest friends’” and described their daily three-mile jogs.³⁴⁶ Indeed, critics suggested that Hynes packed the committee with his friends and allies as political cover rather than setting up a process that would investigate and uncover the problems leading to wrongful convictions.³⁴⁷ Hynes’s unit never found any *Brady* violations.³⁴⁸

When Hynes lost his reelection bid in 2014 to District Attorney Kenneth Thompson,³⁴⁹ Thompson took a new tack. Thompson had expressed his disapproval of his predecessor’s panel from the beginning, maintaining that Hynes was incapable of looking into the validity of

343. See Frances Robles & N.R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES (May 11, 2013), <http://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html?pagewanted=all>; Sharon D. Toomer, *DA Hynes Seeks 7th Term, Legacy Under Attack*, VOICES OF N.Y. (Aug. 6, 2013), <http://voicesofny.org/2013/08/da-hynes-seeks-7th-term-legacy-under-attack>.

344. Frances Robles, *Panel to Review Up to 50 Trial Convictions Involving a Discredited Detective*, N.Y. TIMES (July 1, 2013), <http://www.nytimes.com/2013/07/02/nyregion/panel-to-review-up-to-50-trial-convictions-involving-a-discredited-brooklyn-detective.html>.

345. *Id.*

346. *Id.*

347. See Toomer, *supra* note 343.

348. See *Exonerations Produced by Conviction Integrity Units to Date*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7bFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7d&FilterField1=Group&FilterValue1=CIU> (last visited May 1, 2017) (documenting all exonerations produced by the Brooklyn CIU since its inception). Of the twenty-two exonerations that the Brooklyn District Attorney’s Office has generated to date, only two took place under Hynes’s tenure. Williams, *supra* note 317. One of these was the case of David Ranta, whose murder conviction had been wrongfully procured under the misconduct of Detective Scarcella and whose case prompted the panel that led to the review of Scarcella’s more than fifty homicide cases. Frances Robles, *Man Framed by Detective Will Get \$6.4 Million From New York City After Serving 23 Years for Murder*, N.Y. TIMES (Feb. 20, 2014), <http://www.nytimes.com/2014/02/21/nyregion/man-framed-by-new-york-detective-to-get-6-4-million-without-filing-suit.html>. The other was Lawrence Williams, whose wrongful conviction was attributed to mistaken eyewitness testimony. Mosi Secret, *Exoneration for a Man in Prison for 2 Years*, N.Y. TIMES (Oct. 26, 2012), <http://www.nytimes.com/2012/10/27/nyregion/lawrence-williams-convicted-of-assault-is-exonerated.html>.

349. Vivan Yee, *Thompson Defeats Hynes, Again, for Brooklyn District Attorney*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/nyregion/thompson-claims-victory-over-hynes-again-for-brooklyn-district-attorney.html>.

convictions that were procured during his own tenure.³⁵⁰ He argued for the need for CIUs to utilize independent review processes.³⁵¹ When he assumed the office, Thompson increased the CIU's budget to \$1.1 million per year to investigate potential wrongful convictions.³⁵² Brooklyn is unusual in that the majority of wrongful conviction claims that the CIU has reviewed concern police misconduct, and some may also implicate prosecutorial wrongdoing.³⁵³ The Brooklyn CIU utilizes an independent panel comprised of attorneys who are not employed by the Brooklyn District Attorney's Office that "makes non-binding recommendations to the district attorney's office regarding wrongful conviction claims."³⁵⁴ Thompson also changed the name to the Conviction Review Unit, believing that the District Attorney's program lacked the integrity it purported to bear.³⁵⁵ Brooklyn has secured at least seventeen exonerations during Thompson's tenure.³⁵⁶

However, even the Brooklyn District Attorney has been criticized for focusing on low hanging fruit, choosing to investigate claims that are "politically easy" and are not tied to constitutional rights.³⁵⁷ John Giuca, who was convicted with another man of the brutal murder of a college student in 2003, filed a petition with the Brooklyn CIU in 2014 that contained allegations of prosecutorial misconduct.³⁵⁸ The alleged misconduct included the prosecutor's failure to disclose her appearance

350. See Williams, *supra* note 317.

351. See Kenneth Thompson, *Brooklyn DA Hines Must Admit Role in Wrongful Conviction, Submit to Independent Review by State Attorney General*, HUFFINGTON POST BLOG (Apr. 1, 2013, 1:55 PM), http://www.huffingtonpost.com/kenneththompson/brooklyn-da-hynes-wrongful-convictions_b_2993481.html.

352. See Williams, *supra* note 317.

353. Alcindor, *supra* note 309; Vivian Yee, *As 2 Go Free, Brooklyn Conviction Challenges Keep Pouring In*, N.Y. TIMES (Feb. 6, 2014), <http://www.nytimes.com/2014/02/07/nyregion/at-new-brooklyn-district-attorneys-door-a-tidal-wave-of-wrongful-conviction-cases.html> ("[I]n many of the Brooklyn cases, potential police or prosecutorial misconduct that may have violated defendants' due process rights, not physical evidence, is casting doubt on convictions.").

354. Williams, *supra* note 317.

355. *Id.*

356. Juan A. Lozano, *Report Finds Record Number of U.S. Exonerations in 2015*, BROOK. DAILY EAGLE (Feb. 3, 2016, 2:47 PM), <http://www.brooklyneagle.com/articles/2016/2/3/report-finds-record-number-us-exonerations-2015>; see also *Exonerations Produced by Conviction Integrity Units to Date*, *supra* note 348 (showing at least twenty exonerations since Thompson took office).

357. See Hella Winston, *Brooklyn DA Ken Thompson Passes on a Chance to Right a Potential Wrongful Conviction*, OBSERVER (July 10, 2015, 10:34 AM), <http://observer.com/2015/07/brooklyn-da-ken-thompson-passes-on-a-chance-to-right-a-potential-wrongful-conviction/>.

358. *Id.* The author argues that the district attorney's position in the Giuca case is indicative of "an instinct common to even the most enlightened prosecutors to protect those prosecutions whose flaws emanate from the conduct of their own." *Id.*

in a key witness's case and the nature of the witness's cooperation agreement to the defense, along with the prosecutor's mocking of the defense lawyer during a conference with the judge when he expressed his skepticism about the witness's testimony.³⁵⁹ But the District Attorney stood by the conviction, finding that there was no evidence of actual innocence.³⁶⁰

While CIUs could potentially serve as a mechanism to uncover and address prosecutorial misconduct, some problems remain. Typically, their missions do not include addressing prosecutorial misconduct in the first place.³⁶¹ Other CIUs fail to address misconduct because their mandate only extends to the review of cases involving DNA or forensic evidence.³⁶² Prosecutor's offices should work to implement procedures for identifying potentially viable post-conviction claims that warrant re-investigation.³⁶³ This is especially important given that ninety to ninety-five percent of all convictions do not involve DNA.³⁶⁴

There is also significant variation in the construction and operation of CIUs across the country.³⁶⁵ Perhaps the most inconsistent variable in their design is the extent to which they authorize the original prosecutor who tried the case to participate in its review.³⁶⁶ Dallas and Brooklyn appear to be two of the relatively few offices that deliberately minimize the initial prosecutor's involvement in the CIU.³⁶⁷ Because

359. *Id.*

360. *Id.*; see also Stephanie Clifford, *Brooklyn District Attorney Affirms Conviction in 2003 Killing of Student*, N.Y. TIMES (Jan. 12, 2015), http://www.nytimes.com/2015/01/13/nyregion/brooklyn-prosecutor-affirms-conviction-in-2003-murder-of-fairfield-university-student.html?_r=0.

361. See CIU BEST PRACTICES, *supra* note 319, at 3; Hella Winston, *Wrongful Convictions: Can Prosecutors Reform Themselves?*, CRIME REP. (Mar. 27, 2014) [hereinafter Winston, *Wrongful Convictions*], <http://www.thecrimereport.org/news/articles/2014-03-wrongful-convictions-can-prosecutors-reform-themselv>.

362. *Conviction Integrity Units: Vanguard of Criminal Justice Reform*, *supra* note 337, at 6–7.

363. See CONVICTION INTEGRITY PROGRAM REPORT, *supra* note 319, at 5; Winston, *Wrongful Convictions*, *supra* note 361 (citing the remarks of defense attorney Bob Gottlieb, who was appointed to the New York State Bar Association's Task Force on Wrongful Convictions and who argued that in the current structure it is impossible to prevail on a claim that is grounded in faulty eyewitness testimony, perjured testimony, or other non-DNA bases due to the institutional bias that strives to preserve prior conviction).

364. Malave & Barkai, *supra* note 336, at 195.

365. See *id.* at 194–95.

366. See Boehm, *supra* note 287, at 637.

367. *Id.*; Williams, *supra* note 317.

Brooklyn has not articulated a set of standards governing the CIUs, their policy on this issue is not entirely clear.³⁶⁸ One scholar has argued that empirical research is necessary to determine if innocence claims have different cumulative outcomes in CIUs that utilize defense attorneys and do not allow review by the original district attorney assigned to the case.³⁶⁹ Arguably, this might best occur if offices would completely outsource post-conviction prosecutorial functions instead of merely utilizing separate internal units of the same district attorney, which would ensure that the reviewing prosecutor does not have any loyalty to colleagues in maintaining the validity of a conviction.³⁷⁰ A wholly independent CIU has yet to exist.³⁷¹

The standards that prosecutors employ to decide whether a claim will be re-investigated are by no means objective. Some might argue that they are as elusive as the mandate to “do justice.” Prosecutors have used expressions such as “you know it when you see it,” “when it keeps you up at night,” and “no scientific formula” to describe their decision-making processes, suggesting that the criteria is more a matter of intuition than procedure.³⁷² Some district attorneys acknowledge that they have not yet devised a formula to address this issue, and deciding whether to substitute the prosecutor’s current view for that of the jury ultimately comes down to a subjective inquiry.³⁷³

Finally, there is significant disagreement about whether experienced prosecutors from within the District Attorney’s Office should undertake CIU leadership. Keeping such units internal to the office has the danger of minimizing the perception that the CIU operates as a watchdog. An independent attorney who brings an outside

368. Winston, *Wrongful Convictions*, *supra* note 361.

369. See Rachel Pecker, Note, *Quasi-Judicial Prosecutors and Post-Conviction Claims of Innocence: Granting Recusals to Make Impartiality a Reality*, 34 *CARDOZO L. REV.* 1609, 1632–33 (2013).

370. *Id.* at 1633. Another concern is that prosecutors working in CIUs may be constrained by their loyalty to police officers, with whom they often work closely, and that prosecutors may thus develop a degree of tunnel vision in their inherent desire to avoid undermining their relationship with law enforcement. For a discussion of these and other constraints, see Malave & Barkai, *supra* note 336, at 202.

371. See Winston, *Wrongful Convictions*, *supra* note 361 (citing the remarks of Bob Gottlieb, who argues that district attorneys cannot legitimately claim that CIUs are independent entities absent independent staff and that a CIU should be led by an inspector general-type prosecutor who has no connection to the prior procedures that are under review).

372. Boehm, *supra* note 287, at 657.

373. See Vance Address, *supra* note 329, at 5 (describing the inquiry that the Manhattan District Attorney’s Office undertakes in reviewing a post-conviction claim of innocence, which ultimately hinges on the question of whether the reviewing prosecutors “believe, or at least strongly suspect, that the defendant is actually innocent”).

perspective to the office may actually help to promote the mission of the CIU. Either way, there is at least consensus that transparency has played a significant role in making Dallas's CIU so successful.³⁷⁴ But true transparency may prove impossible to achieve unless district attorneys become more willing to subordinate the risk of exposing an office's own flaws to the imperative to undertake an authentically objective review.³⁷⁵

IV. REFRAMING THE RESPONSE: COORDINATION AT THE LOCAL, STATE AND FEDERAL LEVELS

Too often, we have chosen to look at the acts of misconduct through a narrow prism that has distorted our sense of the nature and scope of this problem.³⁷⁶ As a consequence, conventional responses to redress misconduct have lacked teeth, ignored the larger systemic implications, and, in the end, been tepid at best. Re-conceiving misconduct as obstruction of justice could signal a shift in perception about these acts. But until we coordinate the myriad responses to misconduct, such incidents will continue to prove difficult to unearth and halt. Conventional responses have tended to operate as distinct and disconnected efforts. Quite predictably, that lack of coordination has enabled misconduct both to fall through the cracks and to recur even within the same office. A multi-faceted response to prosecutorial misconduct seems a more rational and effective approach. By devising a comprehensive scheme that puts triggers in place to prompt investigations *in tandem*, we might better discover, track, and thwart misconduct.

374. See CONVICTION INTEGRITY PROGRAM REPORT, *supra* note 319, at 6–7; Winston, *Wrongful Convictions*, *supra* note 361.

375. See, e.g., Malave & Barkai, *supra* note 336, at 201 (discussing the mixed incentives that district attorneys face to convey the impression that CIUs are taking concrete action on the one hand but that the district attorney is not convicting too many innocent people on the other). For additional criticism of the objectivity of CIUs, see Winston, *Wrongful Convictions*, *supra* note 361 (discussing the remarks of defense attorney Ron Kuby, who worked with the CIUs in Manhattan, Brooklyn, and Nassau County, and who believes the Dallas model is “far superior”). Kuby contrasts the transparency and open-ended approach between CIU prosecutors and defense attorneys in the Dallas model with the inclination of prosecutors in other CIUs to look for evidence to support convictions. *Id.* Kuby stated that he would never bring another case to the Manhattan CIU and would prefer to go to court to challenge a conviction. *Id.*

376. See Moore, *supra* note 17, at 809.

A. *The Opportunity and Challenge of Using an Obstruction of Justice Framework*

Reframing prosecutorial misconduct as obstruction of justice better captures and conveys both the severity of the conduct and the devastating blow it delivers to the fairness and integrity of our criminal justice system.³⁷⁷ Of course, one might fairly ask whether such reframing really needs to occur. After all, simply using a different term might not change the general attitudes about these acts. But we know from other contexts that labels matter. And stigma certainly attaches to conduct that we deem criminal.³⁷⁸ As importantly, the term “obstruction of justice” carries with it the connotation that such conduct is grave, whereas misconduct conjures up notions of misbehavior that we may be willing to tolerate. Too often, reviewing courts and units that operate within prosecutors’ offices have been content to treat misconduct by prosecutors as relatively unimportant.³⁷⁹ But reframing this as a criminal act might trigger a different response.³⁸⁰

Starting from a premise that offers a more accurate and consequential accounting of the conduct could send an important signal to prosecutors and others within the justice system. Criminalizing the conduct would underscore the weight of the acts, and the attendant penalties would drive home the momentous effect of engaging in behavior that could impede justice.³⁸¹ Indeed, by recognizing its impact and the potential stakes involved, an obstruction of justice charge would more clearly convey that this is serious criminal conduct with often profound consequences for all involved.³⁸²

Such a redefinition seems plausible. Prosecutorial misconduct certainly fits within our common understanding of obstruction of justice.³⁸³ Obstruction of justice involves interference through words or actions with the proper operations of a court or officers of the court.³⁸⁴ Prosecutorial misconduct impedes the ability to seek the truth and a just result by improperly limiting information given to the tribunal.³⁸⁵

377. *See id.* at 810.

378. *See* Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 85 (2005).

379. *See* *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

380. *See* Dunahoe, *supra* note 378, at 78.

381. *See* Moore, *supra* note 17, at 802.

382. *See id.* at 847–48.

383. *See id.* at 808.

384. *See* Jamie Quinn & Rail Seoane, *Obstruction of Justice*, 50 AM. CRIM. L. REV. 1299, 1300–01 (2013).

385. *See* Bennett Gershman, *How to Hold Bad Prosecutors Accountable: The Case for a*

By hiding material, failing to make required disclosures to the defense, or dissuading witnesses from testifying truthfully, prosecutors engage in conduct that fatally infects the transparency and accuracy of the criminal justice process and obstructs the ultimate goal of seeking justice.³⁸⁶ So categorizing misconduct as obstruction of justice could provide an important—and familiar—framework for assessing the prosecutors' actions and intent.

To put the point differently, the formal obstruction charge provides an important investigative roadmap. As investigators would look to examine whether criminal conduct occurred, they would likely inquire whether the prosecutor took steps to conceal or destroy relevant materials.³⁸⁷ Did the prosecutor dissuade an individual from testifying or from testifying truthfully? Did the prosecutor provide any incentive to an individual to testify or not to testify and neglect to disclose that incentive to all parties? These sorts of questions often animate investigations of obstruction against an individual.³⁸⁸ But the prosecution could potentially guide investigators to deeper analyses as well. By examining the prosecutor's *mens rea* or intent in engaging in the misconduct, investigators would have license to explore the complicity of supervisors or colleagues.³⁸⁹ It might also lead to an examination of the role of the office in encouraging such behavior.

The formality of—and stigma associated with—an obstruction of justice charge could provide a deterrent effect for those prosecutors contemplating engaging in this type of conduct.³⁹⁰ Right now, a prosecutor can choose to engage in misconduct without fear.³⁹¹ Quite often, neither internal nor external investigations into misconduct will lead to any real consequence or punishment.³⁹² With protections in

Commission on Prosecutorial Conduct, DAILY BEAST (Aug. 31, 2015, 1:00 AM) [hereinafter Gershman, *Bad Prosecutors*], <http://www.thedailybeast.com/articles/2015/08/31/how-to-hold-bad-prosecutors-accountable-the-case-for-a-commission-on-prosecutorial-conduct.html>.

386. *See id.*

387. *See* Quinn & Seoane, *supra* note 384, at 1339.

388. *See generally* Matthew Harrington et al., *Obstruction of Justice*, 52 AM. CRIM. L. REV. 1385 (2015); Quinn & Seoane, *supra* note 384, at 1339 (enumerating the elements that establish an obstruction of justice conviction under the most commonly utilized federal statutes).

389. *See* Corn & Gershowitz, *supra* note 105, at 405; Quinn & Seoane, *supra* note 384, at 1335; Weiss, *supra* note 175, at 220–21.

390. *See* Moore, *supra* note 17, at 827.

391. *Id.* at 816–21.

392. *See id.*

place, such as keeping an investigation confidential or maintaining the anonymity of any individual alleged to have engaged in misconduct, there is typically little likelihood that any individual involved will face censure or even exposure. But, at the very least, an obstruction charge would be public and the potential stigma or consequences might cause individuals who might otherwise consider engaging in misconduct to think twice before succumbing to the temptation.

Some scholars have called obstruction of justice statutes a powerful means of criminally punishing prosecutors who violate a defendant's constitutional rights.³⁹³ Certainly, federal³⁹⁴ and local statutes dealing with obstruction of justice could prove "an effective tool for curbing the behavior of prosecutors who intentionally subvert the rights of the accused."³⁹⁵ These statutes are "designed to prevent *anyone*, including prosecutors," from interfering with the due administration of justice.³⁹⁶ However, there have been no reported cases in which these statutes have been used to punish a prosecutor for violating a defendant's rights.³⁹⁷

This may be due to the fact that there are problems with existing obstruction of justice statutes. With a few notable exceptions,³⁹⁸ prosecutorial misconduct has not been treated as, or even labeled, obstruction of justice. For example, the U.S. Supreme Court has cited in dicta the availability of California laws to punish prosecutors criminally who have engaged in prosecutorial misconduct.³⁹⁹ However, California obstruction of justice laws are narrower than federal law.⁴⁰⁰ Specifically, California makes criminal only certain discrete acts such as

393. *Id.* at 826.

394. *E.g.*, 18 U.S.C. §§ 1501–21 (2012).

395. Moore, *supra* note 17, at 810.

396. *Id.* (emphasis added) (footnote omitted).

397. *Id.* at 834; *see also* Keenan et al., *supra* note 5, at 217–18 (citing the 1999 trial of police officers and prosecutors, the "DuPage Seven," for perjury and obstruction of justice as the first time in American history that a felony prosecution for prosecutorial misconduct reached the verdict stage, although the defendants were ultimately acquitted). *But see* Maurice Possley, *Willingham Prosecutor Accused of Misconduct*, MARSHALL PROJECT (Mar. 18, 2015, 2:20 PM), <https://www.themarshallproject.org/2015/03/18/willingham-prosecutor-accused-of-misconduct#.eGhV3WbEB> (reporting that the State Bar of Texas filed a disciplinary petition against a prosecutor for obstruction of justice in a noted death penalty case).

398. *See* Erika Bolstad, *Judge Orders Criminal Probe of Stevens Prosecutors*, MCCLATCHY DC (Apr. 7, 2009, 1:38 PM), <http://www.mcclatchydc.com/news/politics-government/article24532801.html> (citing the decision of U.S. District Judge Emmet Sullivan to order an investigation of five prosecutors in the Ted Stevens case for potential obstruction of justice violations).

399. *See* *Imbler v. Pachtman*, 424 U.S. 409, 429 n.29 (1976).

400. Mark Mermelstein & Charlotte Decker, *Walk the Line*, L.A. LAWYER, Dec. 2006, at 27, 30, <http://lacba.org/docs/default-source/lal-back-issues/2006-issues/december-2006.pdf>.

subornation of perjury,⁴⁰¹ solicitation of perjury,⁴⁰² and obstruction of a police officer during the performance of her official duties.⁴⁰³ This discrete set of categories of conduct limits the applicability of the California statute to the broad array of misconduct that could threaten justice.

Other states do not narrow the categories as much. For example, New York criminalizes the conduct of anyone who intentionally “obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function.”⁴⁰⁴ Related statutes criminalize tampering with a witness.⁴⁰⁵ The tampering charge seems to encompass any conduct contrary to law, such as “coercive conduct or bribes [used] to stop a witness from testifying.”⁴⁰⁶ Similarly, New York prohibits tampering with physical evidence; however, all of the cases cited in the official commentary under this statute have involved criminal defendants being accused of tampering with physical evidence.⁴⁰⁷ Finally, New York Penal Law section 195.00 criminalizes official misconduct, which is defined as a public servant committing “an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized,” or refraining “from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.”⁴⁰⁸ This could potentially apply to prosecutorial misconduct that involved *Brady* violations.

But perhaps Illinois offers the most promising version of obstruction. There, “[a] person obstructs justice when, with [the] intent to . . . obstruct the prosecution or defense of a[] person, . . . she . . . commits” various activities such as tampering with evidence, interfering with a witness, or leaving the state while possessing material knowledge.⁴⁰⁹ Bringing obstruction charges against *either* side in a criminal case better promotes transparency and fairness in the criminal process and telegraphs to both the public and to prosecutors

401. CAL. PENAL CODE § 127 (West 2016).

402. *Id.* § 653f(a).

403. *Id.* § 69.

404. N.Y. PENAL LAW § 195.05 (McKinney 2016).

405. *Id.* § 215.10.

406. *Id.* § 215.10 practice cmt.

407. *Id.* § 215.40 practice cmt.

408. *Id.* § 195.00.

409. 720 ILL. COMP. STAT. ANN. 5/31-4 (2013) (emphasis added).

themselves that this conduct will not be tolerated. Interestingly, the Illinois statute is one of very few obstruction statutes that has been applied to prosecutors. In 1999, three prosecutors faced trial for obstruction of justice and subornation of perjury.⁴¹⁰

Of course, the decision to treat misconduct as obstruction raises a question regarding who has authority to prosecute. If the misconduct encompasses not only individual prosecutors but extends to the leadership of the office, then expecting the district attorney's office to bring charges against itself seems misguided. In California, for example, prosecutors from the level of the State Attorney General's down through the county and local levels have been implicated in serious misconduct, and yet, what we have seen is the Attorney General continuing to defend her own.⁴¹¹ Even in the face of serious allegations involving false testimony by prosecutors in California, the Attorney General has not issued criminal charges for their misconduct.⁴¹² Instead, these prosecutors have maintained their employment without punishment.⁴¹³ California has recently passed a law that authorizes a judge to remove from a case any prosecutor who withholds evidence.⁴¹⁴ Further, "[t]he law requires the court to report violations to the [California S]tate [B]ar."⁴¹⁵ So, to prevent cases from falling between the cracks or from being tolerated by the prosecutor's office, the State Bar might need to make the initial finding of obstruction. And then that

410. Keenan et al., *supra* note 5, at 217–18; see also Possley & Armstrong, *Part 3*, *supra* note 189.

411. See Jason Kotowski, *Court Affirms Ruling in Falsified Transcript Case*, BAKERSFIELD.COM (Feb. 25, 2015), <http://www.bakersfield.com/news/2015/02/25/court-affirms-ruling-in-falsified-transcript-case.html> (citing the remarks of District Attorney Lisa Green, who was "disappointed" in the decision of the Fifth District Court of Appeal to affirm dismissal of the Velasco-Palacios charges); Sidney Powell, *California Prosecutor Falsifies Transcript of Confession*, OBSERVER (Mar. 4, 2015, 1:04 PM), <http://observer.com/2015/03/california-prosecutor-falsifies-transcript-of-confession/> (describing California Attorney General Kamala Harris's decision to appeal the decision dismissing charges against Efrain Velasco-Palacios when prosecutor Robert Murray fabricated an admission of guilt against him; Harris argued that only "abject physical brutality" could sustain a finding of prosecutorial misconduct and warrant dismissal).

412. See Powell, *supra* note 411 (discussing Attorney General Harris's defense of the prosecutor's false testimony as short of "abject physical brutality," the sole basis for a finding of prosecutorial misconduct in the Attorney General's eyes).

413. See Kotowski, *supra* note 411 (discussing how Robert Murray is still employed by the District Attorney's Office and works as a liaison attorney at the Kern Regional Crime Lab).

414. Matt Ferner, *New California Law Cracks down on Cheating Prosecutors*, HUFFINGTON POST (Oct. 7, 2015, 9:54 PM) http://www.huffingtonpost.com/entry/california-law-prosecutorial-misconduct_5615a45fe4b021e856d386a7 (referring to Assemb. B. 1328, 2015-16 Leg. Session (Cal. 2015)).

415. *Id.*

charge would trigger a referral for prosecution to an entity independent of the district attorney's office that gave rise to the finding.

Operationally, the primary responsibility for investigating prosecutorial misconduct should move from the office in which the prosecutor is employed to a different office in the state. While the originating office may initiate an investigation, history seems to suggest that depending on that office will not guarantee a full and impartial investigation.⁴¹⁶ Relationships, loyalties and local practices make this internal investigation difficult and may hinder the appearance or practice of impartiality. However, it is essential that the office involved be given the opportunity to initiate an investigation, in part, to isolate and identify any practices or individuals that should be changed to prevent future misconduct.⁴¹⁷

Where multiple allegations are sustained or where there are recurring instances of "clustering" the charging authority would shift to the next prosecutorial jurisdiction.⁴¹⁸ For example, if there are multiple sustained allegations of misconduct, such as we have seen in the Kings County (Brooklyn), New York, example cited earlier, that would trigger an investigation by the state Attorney General.⁴¹⁹ In an instance where state or federal prosecutors face accusations of misconduct, those offices would be required to maintain an independent entity outside of their daily operations tasked with investigating misconduct. Of course, some might argue that the weight of a criminal charge and the potential penalty might make reviewing bodies less inclined to investigate and unearth misconduct because of the stigma and consequence, which is true enough. But what would make that less likely is a scheme that coordinated responses to misconduct and expected that multiple sets of eyes would examine and seek to address any misconduct that occurred.

Still, efforts to amend obstruction of justice statutes to facilitate the prosecution of individuals who are alleged to have engaged in misconduct will likely meet vehement and vocal opposition, as state and

416. See Kotowski, *supra* note 411; Powell, *supra* note 411.

417. See, e.g., Ken Sturtz, *A First in Nation, DeFrancisco to Support New Commission on Prosecutorial Conduct*, SYRACUSE.COM (May 9, 2014, 7:27 PM), http://www.syracuse.com/news/index.ssf/2014/05/lawmakers_to_support_state_commission_on_prosecutorial_conduct.html (discussing the creation of a State Commission of Prosecutorial Conduct in New York).

418. See, e.g., Barkow, *supra* note 151, at 2093.

419. See *Probe Warranted*, *supra* note 102 (advocating for more substantial review of misconduct by Assistant District Attorney Michael Vecchione).

national associations of prosecutors tend to be quite vigilant in their efforts to protect their members.⁴²⁰ But legislators may find that the cost of permitting misconduct is too high. Once the extent of misconduct is understood, it becomes clear that the financial implications of wrongful prosecution and imprisonment are real costs for government.⁴²¹ More importantly, the costs in lives and futures for those who have been wrongfully convicted cannot be calculated, and the damage to the credibility and integrity of the government may also be significant.

B. Encouraging Federal Data-Collection and Oversight

Building on the foundation that such conduct disrupts and denies justice, we would then look to establish comprehensive mechanisms to track incidents of misconduct. Right now, there is nothing approaching uniformity in the way that states collect data or conduct investigations. As stated earlier, this type of conduct often happens in clusters in certain offices.⁴²² District attorneys themselves spend little or no time analyzing allegations of *Brady* violations and other such violations to determine the root cause.⁴²³ To develop some empirical data, it is important that the federal government begin to amass, retain, and study instances of misconduct. Congress should create and enforce a mandatory national reporting requirement for federal state and local prosecutors' offices where a finding of prosecutorial misconduct is made by any court or federal, state, or municipal agency. Data collection should happen any time that any tribunal sustains a finding of misconduct. Even if a reviewing court does not overturn a conviction, a finding of misconduct in the review should warrant inclusion into the national database. Nationally, offices would be required to self-report, and the Department of Justice would be responsible for maintaining the database and conducting periodic audits to ensure the accuracy of

420. See, e.g., Balko, *supra* note 2 (discussing how policies meant to prevent prosecutorial misconduct were vetoed after heavy lobbying by the California District Attorney's Association); Sapien et al., *supra* note 155 (discussing state and national bar associations' blind eye towards prosecutorial misconduct, citing examples in which the New York District Attorneys Association opposed misconduct reform, and the New York Bar Association passed a resolution disowning a member's criticisms of attorney misconduct).

421. See Stephanie Slifer, *How the Wrongfully Convicted are Compensated for Years Lost*, CBS NEWS (Mar. 27, 2014, 6:33 AM), <http://www.cbsnews.com/news/how-the-wrongfully-convicted-are-compensated/>.

422. See Barkow, *supra* note 151, at 2093.

423. See *id.* at 2095–96 (discussing reasons why both prosecutors and defense attorneys would not investigate or report potential *Brady* violations).

reporting. Access to the database would be open to the public. It is essential that responsibility for the database and accountability for its maintenance be clear, transparent and reviewed.

Lastly, better coordination between those organizations, agencies and individuals tasked with protecting the public from misconduct and corruption should be designed. Once an instance of prosecutorial misconduct is identified, investigative, data-gathering and oversight assets should be engaged.

C. Strengthening the Mandate of State Commissions: Taking Misconduct Seriously

The last external component of the coordinated scheme to address prosecutorial misconduct would be state-wide commissions focused on prosecutorial conduct. These statewide commissions should be non-partisan in nature but would be created by state legislatures. Statewide oversight, triggered whenever any tribunal made a finding of misconduct, would allow states to seriously investigate, review, and address issues of prosecutorial misconduct.

The State of New York has proposed the New York State Commission on Prosecutorial Conduct.⁴²⁴ This commission would serve as a model for other states and would be America's "first statewide commission on prosecutorial conduct to help prevent wrongful convictions or indictments, and to exonerate prosecutors from false accusations of misconduct."⁴²⁵ According to New York Senate Bill S24B, the purposes of the commission are

to serve as a disciplinary entity designated to review complaints of prosecutorial misconduct in New York State, to enforce the obligation of prosecutors to observe acceptable standards of conduct, and to establish reasonable accountability for the conduct of prosecutors during the performance of their functions, powers and duties as prosecutors.⁴²⁶

424. Sturtz, *supra* note 417.

425. *Id.*

426. S.B. S24B, 2015-2016 Leg. Sess. (N.Y. 2015). Eleven members would sit on the commission, two of whom are appointed by the governor, two by the president pro tempore (majority leader) of the State Senate, one by the Senate minority leader, two by

The commission is modeled after New York's commission on judicial conduct, which was created in 1975 and "has made a significant contribution to enforcing standards of judicial integrity."⁴²⁷ The bill to authorize the commission is currently in committee.⁴²⁸

The proposed commission would hold the power to receive and review complaints about prosecutors, decide whether or not to hold a hearing, and look at transcripts and evidence from cases in which misconduct allegedly occurred.⁴²⁹ Pending a final determination, the commission would have the authority to suspend a prosecutor from exercising the powers of her office.⁴³⁰ The commission would have a range of tools to respond to a finding of misconduct. It could choose to admonish or censure a prosecutor, or it could make the decision to remove the prosecutor from office for cause. The type of conduct that would give rise to removal would include "misconduct in office," "persistent failure to perform his or her duties, habitual intemperance and conduct, in and outside of his or her office, prejudicial to the administration of justice."⁴³¹

In May 2014, state lawmakers announced bipartisan support of this bill.⁴³² The legislation was initiated by Assemblyman Nick Perry, a Democrat from Brooklyn, and State Senator John DeFrancisco, a Republican from Syracuse.⁴³³ DeFrancisco said that "the push to create the commission [was not] prompted by any particular [instance] of [prosecutorial] misconduct."⁴³⁴ Instead, he said the legislation sought to respond to "issues throughout [New York] with prosecutorial misconduct and wrongful convictions" that have "been going on for

the speaker of the State Assembly, one by the Assembly Minority Leader, and three by the chief judge of the New York Court of Appeals. *See id.* § 499-C(1). The appointees of the governor and of the legislative leaders would be evenly split between public defenders and prosecutors. *Id.* Of the chief judge's appointees, one would be an appellate court judge, and the other two would be jurists from a lower court. *Id.*

427. Bennett Gershman, *How to Hold Bad Prosecutors Accountable: The Case for a Commission on Prosecutorial Conduct*, DAILY BEAST (Aug. 31, 2015, 1:00 AM), <http://www.thedailybeast.com/articles/2015/08/31/how-to-hold-bad-prosecutors-accountable-the-case-for-a-commission-on-prosecutorial-conduct.html>. Gershman notes that in the hundred years before the commission on judicial conduct was created, "only [twenty-three] judges in New York were disciplined." *Id.* Since the commission's creation, "826 judges have been disciplined, and 166 removed from office." *Id.*

428. S.B. S24B, 2015-2016 Leg. Sess. (N.Y. 2015).

429. *See id.* § 499-D(1), F(1).

430. *See id.* § 499-F(9).

431. *See id.* § 499-F(1)-(8).

432. Sturtz, *supra* note 417.

433. Will Bredderman, *Supporters Rally for State Commission on Prosecutorial Conduct Bill*, OBSERVER (June 5, 2015, 4:26 PM), <http://observer.com/2015/06/supporters-rally-for-state-commission-on-prosecutorial-conduct-bill/>.

434. Sturtz, *supra* note 417.

years and years.”⁴³⁵

Numerous organizations have come forward in support of the bill, including the Catholic Archdiocese, United Teachers Association, Legal Aid Society, the New York Association of Criminal Defense Lawyers, and others.⁴³⁶ The New York’s District Attorney’s Association continues to oppose establishing a commission on prosecutorial conduct, out of a concern that the commission could “expose prosecutors to harassment by defense lawyers and disgruntled convicts.”⁴³⁷ Past legislative efforts to establish a separate commission for managing prosecutorial misconduct have also faced opposition by the state’s district attorneys.⁴³⁸ But despite such opposition, the proposed commission could operate as a strong independent entity to unearth and address such allegations.

Legislatures nationwide can and should address misconduct by committing to take oversight seriously. For far too long, legislators have

435. *Id.* Assembly Bill A8634A and Senate Bill S6286A were introduced in the 2013-2014 Legislative Cycle. Assemb. B. A8634A, 2013-2014 Leg. Sess. (N.Y. 2013); S.B. S6286A, 2013-2014 Leg. Sess. (N.Y. 2013). The Assembly bill had nineteen co-sponsors. N.Y. Assemb. B. A8634A. The Senate bill had two co-sponsors. N.Y. S.B. S6286A. Committees in the Assembly and the Senate approved the bill during the legislative cycle, but the legislation did not reach the floor in time for a vote. *See* Charisma L. Miller, *Prosecutor Misconduct Commission Moves Forward in “Hynes” Legislature*, BROOK. DAILY EAGLE (June 11, 2014, 1:50 PM), <http://www.brooklyneagle.com/articles/2014/6/11/prosecutor-misconduct-commission-moves-forward-“hynes”-legislature>.

436. Gershman, *Bad Prosecutors*, *supra* note 385.

437. Bill Hammond, *Who Prosecutes the Prosecutors?*, N.Y. DAILY NEWS (Feb. 11, 2015, 4:08 AM), <http://www.nydailynews.com/opinion/bill-hammond-prosecutes-prosecutors-article-1.2110290>.

438. Terry Weaver, *DA Fitzpatrick: NY Legislature’s Prosecutor Conduct Proposal Retaliation for Moreland Commission*, SYRACUSE.COM (May 12, 2014, 2:11 PM), http://www.syracuse.com/news/index.ssf/2014/05/fitzpatrick_ny_legislatures_prosecutor_conduct_commission_retaliation_for_moreland.html. Legislation to establish a commission on prosecutorial conduct was reintroduced in the 2015-2016 Legislative Cycle as Assembly Bill A1131 and Senate Bill S24. Assemb. B. A1131B, 2015-2016 Leg. Sess. (N.Y. 2015); S.B. S24B, 2015-16 Leg. Sess. (N.Y. 2015). The Assembly bill has twenty-two co-sponsors, N.Y. Assemb. B. A1131B, while the Senate bill has seven co-sponsors, which is more than each bill had in the 2013-2014 legislative cycle, N.Y. S.B. S24B. The current status of the Senate bill is “In Committee” and the current status of the Assembly bill is “On Floor Calendar.” *Assembly Bill A1131B*, NY SENATE, <https://www.nysenate.gov/legislation/bills/2015/A1131#accordion-10-6207020> (last updated June 14, 2016); *Senate Bill S24B*, NY SENATE, <https://www.nysenate.gov/legislation/bills/2015/s24/amendment/b> (last updated June 17, 2016).

been unwilling to provide the necessary oversight of the prosecutorial function. Creation of statewide oversight would send a clear message to the public that this form of public misbehavior will not be tolerated. Most importantly, when prosecutorial misconduct is identified, better coordination between data gathering, investigation, prosecution, and oversight must take place. Currently there is little if any communication between agencies and organizations tasked with addressing misconduct. A coordinated, sustained effort is the only way to address this overall threat to the integrity of the criminal justice system.

V. CONCLUSION

We are well past the time to put real controls in place to stem the tide of misconduct. If we continue to view this narrowly, we will continue to see precisely what Judge Kozinski warns—a staggering number of acts of misconduct that will undermine the integrity of the criminal justice system and will negatively affect the lives of all seeking justice. The disconnected and isolated approaches to prosecutorial misconduct that have characterized our approach to date have proven inadequate to the task of deterring and curbing misconduct. In fact, lax controls and weak responses have encouraged those inclined to engage in misconduct to do so without fear of consequence. But knowing the gravity of the stakes hanging in the balance, we must change our approach by underscoring the severity of the conduct and then coordinating our responses to it. Our system of justice depends on it.