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The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices

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I. INTRODUCTION

My original intention was to focus on appellate cases in which prosecutors' offices sought to affirm convictions that involved unplanned prosecutorial misconduct during trials. The thesis is that any trial lawyer can go too far in the heat of a trial, but when prosecutors' offices seek to justify unethical and unconstitutional conduct on appeal, arguing that it constitutes acceptable trial tactics, they make the prosecutorial misconduct official policy and encourage more of it.

As I reread cases I was familiar with, and read many more, I realized that there are two related problems of unconstitutional and unethical conduct. One is the adoption by a chief prosecutor of policies and/or practices for the prosecutor's office that violate defendants' constitutional rights and prosecutors' ethical obligations. Another problem area is the so-called "rogue" prosecutor who purposefully adopts unethical and/or unconstitutional tactics, like concealing exculpatory material, as defined in *Brady v. Maryland*,[1] instead of turning it over to the defense as required by due process and ethical rules.[2]

There are two variations on the rogue prosecutor. One is the prosecutor who has, in fact, violated office policy, but the prosecutor's office nevertheless seeks to justify the unethical conduct on appeal, thereby making it office policy and encouraging more misconduct like it. The other variation is the prosecutor whose improper conduct is actually pursuant to covert office policy. In that case, the office adopts a dual response, disavowing the prosecutor's conduct, but, at the same time, arguing that the defendant is not entitled to redress as the victim of the misconduct.

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1. 373 U.S. 83 (1963).

2. *Id.* at 87; MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2012). In *Brady v. Maryland*, the U.S. Supreme Court held that prosecutors must disclose exculpatory material evidence to the defense upon request. 373 U.S. at 87. Model Rule 3.8(d) is broader than the due process requirement because it does not require that the exculpatory evidence be material. MODEL RULES OF PROF'L CONDUCT R. 3.8(d).

Another related issue will be illustrated as well. One of the two greatest scandals in lawyers' ethics is the general failure of disciplinary authorities and courts to take appropriate remedial action against prosecutors who violate both the constitutional rights of criminal defendants and the prosecutors' own ethical obligations.[3] For example, a computerized review has shown that there have been only 100 reported cases of professional discipline of federal and state prosecutors in the previous century—an average of only one disciplinary case per year.[4] Moreover, these cases are not limited to violations of the rights of criminal defendants but include cases of bribery, extortion, conversion, and embezzlement of government funds.[5] As one federal judge observed, "When faced with motions that allege governmental misconduct, most district judges are reluctant to find that the prosecutors' actions were flagrant, willful or in bad faith."[6] And Professor Bennett Gershman, the leading authority on prosecutorial misconduct, has concluded that discipline of prosecutors is "so rare as to make its use virtually a nullity."[7]

Despite the reluctance of courts to find that prosecutors have acted unethically and the failure of disciplinary authorities to sanction prosecutorial misconduct, a difficulty in writing this Article has been selecting illustrations from an extremely large number of cases that could have been used as examples of unethical and unconstitutional conduct by prosecutors' offices.[8] This Article, therefore, will provide illustrations of several kinds of prosecutorial misconduct (in no particular order, and sometimes overlapping). These case illustrations also demonstrate the general failure of courts and

3. The other major scandal is the failure to discipline criminal defense lawyers who fail to give indigent defendants effective assistance of counsel under the Sixth Amendment and competent representation under ethical rules. Indeed, a not uncommon practice is for judges to seek out and reappoint those lawyers to represent indigent defendants, which helps the judges to clear their calendars expeditiously. *See* FREEDMAN & SMITH, UNDERSTANDING LAWYERS' ETHICS § 4.13 (4th ed. 2010).

4. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 744–45 n.86 (2001); *see also* Monroe H. Freedman, *The Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 80 HOFSTRA L. REV. 121, 124 (2001). For a review of prosecutorial misconduct in California, see KATHLEEN M. RIDOLFI & MAURCIE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 (2010), *available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf. (updated reports for 2010 and 2011 available at http://www.veritasinitiative.org).

5. Freedman, *supra* note 4, at 124.

6. United States v. Aguilar, 831 F. Supp. 2d 1180 (C.D. Cal. 2011). The court in *United States v. Aguilar* illustrated its observation by quoting from *United States. v. Chapman*, 524 F.3d 1073, 1080, n.2 (9th Cir. 2008), where the conflicted district judge was quoted as saying that "the government did not act intentionally," but saying also that the government "did not . . . act[] . . . unintentionally." *Id.* at 1182 n.1 (internal quotations omitted). The appellate court in *Chapman* found this ruling to be "somewhat confusing." *Id.*

7. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 1.8(d), 13.6 (1998).

8. My intention is to focus on commonplace violations by prosecutors. I am therefore omitting two of the most egregious cases of prosecutorial misconduct in our history. One relates to the Japanese exclusion cases. *See, e.g.*, PETER IRONS, JUSTICE AT WAR (1983). The other is the litigation relating to the imprisonment and torture of prisoners at Guantanamo and litigation relating to those people sent by the United States to be tortured in other countries. *See* JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006); CLIVE STAFFORD SMITH, EIGHT O'CLOCK FERRY ON THE WINDWARD SIDE (2007).

disciplinary authorities to take remedial action to punish and discourage prosecutorial misconduct.

II. UNITED STATES V. AGUILAR

The decision in *United States v. Aguilar*[9] illustrates both the reluctance of judges to find that prosecutors have deliberately acted improperly and the failure of judges to name prosecutors even when finding that particular prosecutors have committed serious violations of their ethical and constitutional obligations.

After the jury found the defendants guilty of violating the Foreign Corrupt Practices Act, Federal District Judge A. Howard Matz, wrote a long, scathing opinion regarding the misconduct of a local assistant United States attorney and two prosecutors from the main office of the Department of Justice.[10] In addition, Judge Matz candidly acknowledged his own failure to timely recognize the prosecutors' multiple violations of their ethical and constitutional obligations.[11] He said, "[T]he Court denied several previous motions to dismiss and permitted the prosecution to proceed over the heated objections of defense counsel because it was willing to accept the prosecutors' assurances that their conduct was inadvertent and would not be repeated. The Court even said that it was 'not anxious to attribute a deliberate, intentional, and devious motive' to the Government."[12]

In characterizing the Government's conduct, Judge Matz found that "at best . . . the Government was reckless in disregarding and failing to comply with its duties."[13] Under the heading "MISCONDUCT FINDINGS" Judge Matz then discussed in detail the conclusions stated below.[14]

After a five-week trial and a jury verdict of guilty, however, Judge Matz said that it was "with deep regret that this Court is compelled to find" that the Government lawyers had

> [1] allowed a key FBI agent to testify untruthfully before the grand jury,
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> [2] inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants,
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> [3] improperly reviewed e-mail communications between one Defendant and her lawyer,
>
> [4] recklessly failed to comply with its discovery obligations,

9. 831 F. Supp. 2d 1180 (C.D. Cal. 2011).

10. *See Aguilar*, 831 F. Supp. 2d 1180. In addition to three experienced prosecutors, the government's trial team included some paralegals and a large number of FBI agents. *Id.* at 1184.

11. *See id.* at 1182.

12. *Id.*

13. *Id.* at 1209.

14. *Id.* at 1187–1200.

[5] posed questions to certain witnesses in violation of the Court's rulings,

[6] engaged in questionable behavior during closing argument, and

[7] even made misrepresentations to the Court.[15]

With regard to the Government's failure to produce discovery materials, Judge Matz said, "the Court ordered that all the transcripts of [grand jury testimony] be produced to the Defendants in their entirety .... Opening statements began on April 5, 2011. The transcripts were produced, finally, on April 15, 2011, more than ten days after the openings. Or so the Court and Defendants believed, based on the Government's representations. Not so, as it turned out."[16]

On April 7, 2011, two days after the opening statements, the prosecution assured the court that it had conducted a "top-to-bottom review of discovery" and that it had not only met its "obligation but exceed[ed] it."[17] In fact, critical grand jury testimony, which would have been extremely useful to the defense in its opening statement and closing argument to the jury, was not produced until seven weeks after the jury's verdict.[18]

Judge Matz added, "The belated and incomplete disclosure of the ... grand jury testimony was prejudicial for an entirely different reason ... it prevented the ... Defendants from presenting important evidence of potential grand jury bias to the Court that might have warranted dismissal even before trial began, thereby sparing Defendants the costs, travail and attendant burdens of a more than five week ordeal."[19] The judge further explained, "The financial costs of the investigation and trial were immense, but the emotional drubbing these individuals absorbed undoubtedly was even worse."[20]

Accordingly, Judge Matz dismissed the indictment with prejudice, "not only as a deterrent but to release [the defendant] from further anguish and uncertainty."[21] He added that, in view of the prosecutors' "many wrongful acts," they should not be permitted to retry the defendants, and he expressed the hope that "this ruling will have a valuable prophylactic effect."[22]

Despite his desire to achieve a "deterrent" to prosecutorial abuse and his hope that his ruling would have a "valuable prophylactic effect," Judge Matz did not name the prosecutors who had disregarded the court's orders, acted

15. *Id.* at 1182.
16. *Id.* at 1192.
17. *Id.* at 1193 (internal quotations omitted).
18. *See id.* at 1192.
19. *Id.* at 1205.
20. *Id.* at 1209. "Expressing the idea that the government seeks justice ... it is said that the government wins its point even when a not-guilty verdict is returned. That is also true in a less idealistic, more cynical, sense: the prosecution wins even when the defendant is found innocent because, typically, the defendant will carry for life the severe wounds of his encounter with justice." FREEDMAN & SMITH, *supra* note 3, § 10.04.
21. *Aguilar*, 831 F. Supp. 2d at 1210 (citation and internal quotations omitted).
22. *Id.*

unethically, and violated the defendants's constitutional rights.[23] Instead, he referred throughout his opinion to "the Government" or "a prosecutor."[24] In addition, Judge Matz did not hold the prosecutors in contempt for repeatedly violating his orders nor refer their conduct to an appropriate disciplinary authority.[25]

Judge Matz's hopes of a deterrent and prophylactic effect were promptly dashed by Charles Duross, the chief prosecutor of Foreign Corrupt Practices in the U.S. Department of Justice. Duross assured the public that the integrity of the prosecutors in the *Aguilar* case was "above reproach."[26]

In defending the unethical conduct of members of his office, Duross has not only encouraged future ethical violations, but has violated his own ethical obligations. Model Rule of Professional Conduct 5.1(a) requires a supervisory lawyer to make reasonable efforts to ensure that all lawyers in the office conform to their ethical obligations.[27] Furthermore, Model Rule 5.1(c)(1) makes a lawyer responsible for another's ethical violations if the lawyer ratifies the other's ethical misconduct.[28]

III. UNITED STATES V. LOPEZ-AVILA

The decision in *United States v. Lopez-Avila*[29] illustrates deliberate unethical conduct by a prosecutor and the extremely unusual action of a court to identify the prosecutor by name. In addition, the U.S. Court of Appeals for the Ninth Circuit took steps to refer the matter to the appropriate authorities for professional discipline. However, the prosecutor's office made its own efforts to protect its prosecutor from embarrassment for his unethical conduct and his violation of a defendant's right to due process.

Defendant Lopez-Avila originally pleaded guilty to smuggling drugs.[30] In entering a guilty plea, a defendant is typically required to state on the record (1) that she is pleading guilty because she is guilty and (2) that she has not been coerced or threatened by the prosecution to enter the plea.[31]

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23. *Id.*
24. *Id.* at 1208.
25. *See Aguilar*, 831 F. Supp. 2d 1180.
26. Jon Pacenti, *Federal Prosecutors Not Backing Off on Policing Foreign Bribes*, DAILY BUSINESS REVIEW.COM (March 5, 2010), www.dailybusinessreview.com.
27. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2012).
28. *Id.* R. 5.1(c)(1).
29. 678 F.3d 955 (9th Cir. 2012).
30. *Id.* at 958.
31. Everyone in the courtroom, including the judge, knows that these responses are perjury. *See generally* Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911 (2005). A guilty plea is coerced by a threat of an extremely long sentence if the defendant goes to trial and is convicted, and it is also induced by the prosecutor's promise to recommend a shorter sentence in return for the guilty plea and by the understanding that the judge will accede to the prosecutor's sentencing recommendation. The colloquy between the judge and the defendant, in which the defendant states that she has not been induced to plead by any threats or promises, is designed to prevent the defendant from later trying to maintain that the plea was not voluntary.

However, Lopez-Avila was later allowed to withdraw her guilty plea and go to trial on the drug-smuggling charge.[32] The reason for allowing her to withdraw the plea was that Lopez-Avila had pleaded guilty without having been aware that she had a defense of duress to the charge because she had been threatened with serious harm if she did not smuggle the drugs, something her lawyer learned after the plea agreement.[33]

In cross-examining Defendant Lopez-Avila at the trial, AUSA Jerry R. Albert, of the U.S. Attorney's Office for the District of Arizona, sought to show that Lopez-Avila had admitted to a federal magistrate at an earlier hearing that she had not been coerced to smuggle the drugs.[34] But what AUSA Albert represented as being the colloquy between the magistrate judge and Lopez-Avila was actually a half-truth that confused the defendant and misled the court and defense counsel.

AUSA Albert gave the court and defense counsel an altered copy of the question and answer at the hearing before the magistrate judge, and then, based on that altered version, AUSA Albert conducted the cross-examination of Lopez-Avila as follows:

> "Q: Do you recall testifying under oath on February 24th, 2010, and being asked *this question* by the . . . Magistrate Judge:
>
> Ms. Lopez, has anyone threatened you?
>
> And . . . did you give the following answer: No.
>
> Did you tell that under oath to Magistrate Judge Guerin?
>
> DEFENDANT: Yes.
>
> Q: Was that a lie?
>
> DEFENDANT: How is that? I don't understand.
>
> Q: Well . . . you've now admitted that you in fact told the [magistrate] judge that *you were not threatened in this case.* And I'm asking you was your testimony on February 24th, 2010, while you were under oath, was that a lie? Did you lie to the judge about not being threatened?
>
> DEFENDANT: Yes."[35]

However, the colloquy between Lopez-Avila and the magistrate had in fact taken place during Lopez-Avila's submission of her guilty plea, and the full question by the magistrate was, "Ms. Lopez, has anyone threatened you *or forced you to plead guilty?*"[36] AUSA Albert omitted the italicized clause.[37] The effect was to conceal the fact that Lopez-Avila was saying that she had not been coerced to submit the guilty plea and to make it appear that she was saying that she had not been forced to smuggle the drugs.

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32. *Lopez-Avila*, 678 F.3d at 959.
33. *Id.*
34. *Id.* at 959–60.
35. *Id.* at 960.
36. *Id.*
37. *Id.*

When the trial judge realized what the prosecution had done, he declared a mistrial but declined to do so with prejudice.[38] The defense then appealed to the Ninth Circuit claiming double jeopardy, but the appeal was denied.[39] In its opinion, however, the Ninth Circuit took the unusual step of referring to the prosecutor by name and suggesting that, on remand, the district court might want to discipline Albert directly.[40]

The action by the Ninth Circuit in naming the unethical prosecutor in its opinion was so unusual that the U.S. Attorney for the District of Arizona filed a motion requesting the that the court delete Albert's name from its final published opinion.[41] The court rejected the U.S. Attorney's argument that naming Albert would be inappropriate because no disciplinary proceedings had been concluded on the matter of Albert's alleged misconduct.[42]

The Ninth Circuit responded that it did "not need a record greater or different than [it had in the trial transcript] to determine that Albert should not have misrepresented the transcript's question."[43] The court further observed, "The mistake in judgment does not lie with [AUSA] Albert alone. We are also troubled by the government's continuing failure to acknowledge and take responsibility for Albert's error. The Department of Justice has an obligation to its lawyers and to the public to prevent prosecutorial misconduct. Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers; they must serve truth and justice first . . . . That did not happen here . . . . When a prosecutor steps over the boundaries of proper conduct and into unethical territory, the government has a duty to own up to it and to give assurances that it will not happen again. Yet, we cannot find a single hint of appreciation of the seriousness of the misconduct within the pages of the government's brief on appeal."[44]

The Ninth Circuit concluded that "the U.S. Attorney's Office in Arizona regularly makes public the names of prosecutors who do good work and win important victories . . . . If federal prosecutors receive public credit for their good works—as they should—they should not be able to hide behind the shield of anonymity when they make serious mistakes."[45]

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38. *Id.* at 960–61.
39. *Id.* at 958.
40. *Id.* at 965–66.
41. *Id.* at 965.
42. *Id.*
43. *Id.*
44. *Id.* at 964–65 (citation omitted).
45. *Id.* at 965 (citing e.g., Press Release, U.S. Attorney's Office for the District of Arizona, Northern Arizona Man Sentenced to Federal Prison for Arson, (January 31, 2012) (The prosecution was handled by Christina J. Reid-Moore, Assistant U.S. Attorney, District of Arizona, Phoenix)) (internal quotations omitted).

IV. UNITED STATES V. WALLACH

United States v. Wallach[46] further illustrates the Government's efforts to justify a failure to take appropriate action on *Brady* material even when, as the Second Circuit found, it either knew or should have known of its existence.[47] The opinion in *Wallach* focused on a government witness, Anthony Guariglia, whose testimony was "the centerpiece of the government's case" and essential to the case against the defendant.[48]

Guariglia testified that, during a crucial period, he had not been gambling.[49] The Government had information, however, that during the relevant time, Guariglia—who had a history of compulsive gambling—had bought $65,000 worth of chips in an Atlantic City gambling parlor.[50] Without conducting an adequate investigation, the Government accepted Guariglia's explanation that he had cashed $15,000 of the chips and that he had bought the remainder for a friend, but that he had not gambled himself.[51] Not surprisingly, a later investigation by the defense produced ample evidence that the witness had in fact gambled with the chips.[52]

In addition, the defense proffered testimony and casino records at the trial to establish that Guariglia had placed bets during the relevant period.[53] The Government objected that the proffer was extrinsic evidence that was being offered only to impeach Guariglia's credibility and that it was therefore subject to exclusion; the trial court sustained the objection.[54] The prosecution nevertheless sought to rehabilitate Guariglia on redirect, permitting him to testify that he had bought the chips but had not gambled with them.[55]

On appeal to the Second Circuit, the Government urged the court to uphold the conviction, in part on the ground that Guariglia's perjury was merely cumulative impeaching material.[56] Rejecting this argument and ordering a new trial, the Second Circuit held that "[t]he taint of [the] false testimony is not erased because his untruthfulness affects only his credibility as a witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence."[57]

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46. 935 F.2d 445 (2d Cir. 1991).

47. *Id.* at 457. The lawyers supporting Wallach in his appeal were unusual colleagues. They included Robert Bork (retained) and Michael Tigar and Ellen Yaroshefsky (amici). *Id.* at 449.

48. *Id.* at 457–58. The court explained that Guariglia and one other witness "offered the only testimony that directly linked the defendants with the admittedly illegal conduct of Wedtech. Indeed, their testimony was, to say the least, critical to the government." *Id.* at 455. The court also explained that the other witness was an admitted perjurer and the jury was warned of this, which necessarily placed greater importance on Guariglia's testimony. *Id.* at 455, 457.

49. *Id.* at 455–56.

50. *Id.*

51. *Id.* at 456.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 457.

56. *Id.* at 458.

57. *Id.* (internal quotations omitted).

Also, with regard to the Government's contention that it had not known that the witness's testimony was false, the Second Circuit said that it was "convinced that the government should have known that Guariglia was committing perjury."[58] The court feared that "given the importance of Guariglia's testimony to the case, the prosecutors may have consciously avoided recognizing the obvious—that is, that Guariglia was not telling the truth."[59]

Moreover, the Government acknowledged that it had received additional information concerning the falsity of the Guariglia's testimony.[60] However, the Government pointed out that this information had come to it months after the conclusion of the trial and contended that it was therefore too late to order a new trial.[61] The court also rejected this argument, holding that "[t]his additional information in itself provides a sufficient basis for granting the defendant[] a new trial."[62]

In effect, the Second Circuit recognized that the prosecutors had failed to act in accord with their ethical obligations under the Model Rules of Professional Conduct, which state that "[a prosecutor] has the responsibility of a minister of justice and not simply that of an advocate."[63] Moreover, the official comment to Model Rule 3.8 continues by insisting that a prosecutor's duty, far from attempting to preserve a miscarriage of justice, is "to rectify the conviction of innocent persons."[64] Nor is it enough that the prosecutor insists that he or she is satisfied that the defendant is not factually innocent, because a prosecutor's responsibility also carries with it the obligation to see that "the defendant is accorded procedural justice."[65] This was not the case in *Wallach.*

Despite its strong criticism of the prosecutors in its *Wallach* opinion, the court took pains not to name any particular prosecutor. Instead, the court referred throughout its opinion to "the government" and, in a particular instance, to "[o]ne of the prosecutors."[66] Nor did the court refer the trial prosecutors to a disciplinary committee for possible sanctions.[67]

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58. *Id.* at 457.
59. *Id.*
60. *Id.* at 458.
61. *Id.* at 456.
62. *Id.* at 458.
63. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2012); *accord id.* R. 3.3 (using false testimony before a tribunal); *id.* R. 3.4 (using and preserving false evidence); and *id.* R. 8.4 (conduct involving dishonesty and conduct prejudicial to the administration of justice).
64. *Id.* 3.8 cmt. 1.
65. *Id.*
66. *Wallach*, 935 F.2d at 459.
67. Because it had been implicated in Guariglia's perjury, the government sought to distance itself from Guariglia by taking the unusual step of prosecuting him for perjury. *See id.* at 455 n.2. The fact that prosecution of a government witness for perjury is rare is explained in Monroe H. Freedman, *The Cooperating Witness Who Lies—A Challenge to Defense Lawyers, Prosecutors, and Judges*, 7 OHIO ST. J. CRIM. L. 739, 745 (2010).

V. TEXAS V. MORTON

Texas v. Morton[68] involved a defendant who spent twenty-five years in prison for a murder he did not commit.[69] The prosecution alleged that Michael Morton had bludgeoned his wife Christine to death in their bed and then went to work at 5:30 a.m., leaving their three-and-half year-old son in the house alone with the body.[70] Morton argued—truthfully as it turned out—that, after he had left, an intruder must have entered the house and killed Christine.[71]

A new district attorney, John Bradley, successfully fought Morton's access to DNA evidence for five years.[72] When Morton finally obtained the DNA, it proved that Morton was innocent and implicated another man, a felon with a long criminal record who lived twelve miles from the Mortons' house.[73] The prosecutors had strong evidence against that man at the time of Morton's trial, but it was not revealed to Morton's defense lawyers.[74]

Upon his release from prison, Morton pressed for an investigation of the prosecutors responsible for his false conviction.[75] His persistent efforts resulted in an unprecedented judicial inquiry into whether the prosecutors suppressed evidence of Morton's innocence. In addition, the state bar has taken the unusual step of opening an investigation into the prosecutors' conduct.[76]

Discussing Morton's case, the *Wall Street Journal* reported, "exonerations have rarely led to scrutiny of prosecutors, who enjoy broad immunity from civil suits and a measure of professional courtesy that discourages defense lawyers and judges from filing complaints that could lead to state bar investigations."[77] One reason defense lawyers are reluctant to file charges against prosecutors is the concern that the prosecutors' offices will retaliate against the lawyers' clients in future cases.[78] And judges,

68. Plea to Jurisdiction, Motion to Quash and for Protective Order, No. 86-452-K26 (26th Jud. Dist. Williamson Cnty., Tex. (2011)) [hereinafter Plea to Jurisdiction].

69. *Id.* at 1. The facts recited below are from a 143-page Report to Court, prepared by Morton's lawyers and based upon depositions, statements, and other materials that were developed as a result of an investigation authorized by the Texas Court of Criminal Appeals.

70. *Id.*

71. *Id.* at 12.

72. *Id.* at 13.

73. *Id.*

74. *Id.* at 2.

75. *Id.* at 135–36.

76. Nathan Koppel, *Freed Convict Pushes Rare Probe of Prosecutors*, WALL ST. J., Oct. 29, 2011, at A2.

77. *Id.* (relying upon interviews with lawyers, the Executive Director of the National District Attorneys Association, and a specialist on lawyers' ethics).

78. Also, judges say that they assume that disciplinary offices will take appropriate action, and disciplinary authorities say that they rely on the prosecutors' offices to impose sanctions for prosecutorial misconduct, which rarely, if ever, happens.

particularly those who are subject to re-election, do not want to appear to be anti-prosecutor.[79]

At the time of Morton's trial in 1987, DNA testing was not available to either party.[80] In 2005, Morton filed a motion to test a bandana that Christine's brother had found the day after the murder at a construction site next to a wooded area directly behind the Mortons' home.[81] The DNA proved that some of the blood on the bandana was Christine's and that the rest belonged to Mark Alan Norwood.[82] Norwood had previously been charged with burglary and assault with intent to murder.[83] Norwood has since been charged with the murder of Christine Morton.[84] In addition, Norwood has been charged with the murder of another woman, a wife and mother in her early thirties, who was bludgeoned to death in her bed in the same neighborhood a year after Christine's death.[85]

The chief prosecutor in Morton's case was Ken Anderson, who is now a Texas state court judge sitting on criminal trials. Anderson argued to the jury that Morton had murdered his wife in a rage after she declined to have sexual intercourse with him.[86] Anderson did not provide the following documents to Morton's trial counsel as required by due process of law and by Anderson's ethical obligations:

> (1) The transcript of a taped interview by Anderson's chief investigator in which Christine's mother said that the Morton's little boy, Eric, said that he had seen a man ("the monster") who had "a big mustache," and who was not his "Daddy," beat his mother to death at a time when his "Daddy" was not there.[87] Eric's description of the intruder is consistent with Norwood's appearance then and now, and Eric's account included a number of details that are consistent with the crime, the crime scene, and the murder weapon.[88]
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> (2) A memo by the chief investigator to Anderson summarizing the interview with Christine's mother.[89]
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> (3) A telephone message to the chief investigator two days after the murder from the police in San Antonio.[90] The message said that Christine's missing credit card had been recovered at a jewelry store in San Antonio and that a police officer in that city would be able to

79. *See* FREEDMAN & SMITH, *supra* note 3, § 8.10.
80. Plea to Jurisdiction, *supra* note 68, at 12.
81. *Id.*
82. *Id.* at 13.
83. *Id.* at 14.
84. Brandi Grissom & John Schwartz, *Exonerated of Murder, Texan Seeks Inquiry on Prosecutor*, TEX. TRIB., Dec. 19, 2011, http://www.texastribune.org/2011/12/19/exonerated-murder-morton-seeks-prosecutor-inquiry/.
85. Brandi Grissom, *Mark Norwood Indicted in Second Austin Murder*, TEX. TRIB., Nov. 9, 2012, http://www.texastribune.org/2012/11/09/mark-norwood-faces-grand-jury-second-austin-murder/.
86. Plea to Jurisdiction, *supra* note 68, at 12.
87. *Id.* at 17, 58 (internal quotations omitted).
88. *Id.* at 83.
89. *Id.* at 17.
90. *Id.*

identify the woman who had attempted to use the card.[91] The identified woman was a prior offender with "$1000 in fraud on her."[92] There is no indication that the prosecution followed up on this message.[93]

(4) A police report that a neighbor of the Mortons had on several occasions observed a man park a green van on the street behind the Mortons' home and walk into the wooded area.[94] The report also said that another neighbor might know where the man lives.[95]

In addition, a former Assistant District Attorney, now in private practice, has given Morton's lawyers an affidavit saying that she was present when Anderson and another prosecutor discussed how they could neutralize Eric's testimony if the defense should learn what Eric had said and use him as a witness. The defense lawyers did not offer Eric as a witness because the prosecution successfully concealed the interview with Christine's mother.[96]

Nevertheless, Anderson repeatedly and emphatically assured the trial judge in prosecuting Morton that he was well aware of his *Brady* obligations and that he had complied with them fully.[97] John Bradley, the District Attorney who succeeded Anderson, has since said that he opposed Morton's access to the DNA material for so long and so strenuously because Anderson, a friend of his, had urged him to do so.[98] Bradley now regrets having delayed Morton's access to the DNA, which resulted in keeping Morton in prison for five additional years.[99] At the time of this writing, there has not been a decision regarding Anderson's culpability.[100]

VI. THE SUPREME COURT'S FAILURE REGARDING PROSECUTORIAL MISCONDUCT

A. Connick v. Thompson

In *Connick v. Thompson*,[101] the U.S. Supreme Court considered the case of John Thompson, who, having been convicted of murder, spent eighteen years in prison, fourteen of them isolated on death row.[102] In his trial for

91. *Id.*
92. *Id.* (internal quotations omitted).
93. *Id.*
94. *Id.* at 17–18.
95. *Id.* at 18.
96. *See id.* at 38.
97. *Id.* at 34.
98. *See id.* at 7.
99. *See id.* at 4.
100. *See* Brandi Grissom, *Ken Anderson Responds to State Bar's Ethics Filing*, TEX. TRIB., Nov. 5, 2012, http://www.texastribune.org/2012/11/05/ken-anderson-responds-ethics-lawsuit/ (Disciplinary charges filed against Anderson by State Bar of Texas remain unresolved.); Brandi Grissom, *Norwood Trial in Morton Murder Set for March*, TEX. TRIB., Dec. 12, 2012, http://www.texastribune.org/2012/12/12/court-inquiry-michael-morton-case-delayed/ (delaying court of inquiry, which will determine whether Ken Anderson faces criminal charges, until Feb. 4, 2013).
101. 131 S. Ct. 1350 (2011).
102. *Id.* at 1355.

murder, Thompson did not testify because he had previously been convicted of an unrelated crime, attempted armed robbery.[103] If a defendant testifies in his defense, the prosecution can introduce evidence of prior convictions, which would otherwise be inadmissible. As commonly happens, Thompson gave up his constitutional right to testify in order to avoid prejudicing the jury in the murder case with the knowledge of his armed robbery conviction.[104] However, when a defendant does not take the stand, his chances of being convicted increase substantially.[105]

Both the armed robbery trial and the murder trial were prosecuted by Assistant District Attorney James Williams of the Orleans Parish District Attorney's Office.[106] He was assisted by three other prosecutors in both cases, including Eric Dubelier, the third-in-command of the office.[107] The head of the office was District Attorney Harry Connick.[108]

One month before Thompson's scheduled execution, his investigator discovered *Brady* material from his armed robbery trial that showed Thompson's innocence—evidence that the prosecutors withheld from the defense.[109] As a result, both of Thompson's convictions were vacated; the murder conviction was vacated on the ground that he had been deprived of the constitutional right to testify in his own defense because of his wrongful conviction in the armed robbery case.[110]

The District Attorney's office then retried Thompson on the murder charge.[111] This time, Thompson had the benefit of compelling exculpatory material that had not been revealed to his lawyers in the first murder trial.[112] After deliberating only thirty-five minutes, the jury found him not guilty.[113]

Thompson subsequently sued the District Attorney's office on the ground that the conduct by its members of withholding *Brady* evidence had violated his constitutional rights by causing him to be wrongfully convicted, imprisoned for eighteen years, and nearly executed.[114] Specifically, he alleged that the violation was caused by Connick's failure to train prosecutors

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103. *Id.*
104. *Id.*
105. *See* Edward Bennett Williams, *The Trial of a Criminal Case*, 29 N.Y. ST. B. BULL. 36, 42 (1957) ("The fact . . . is that a defendant who does not take the stand does not in reality enjoy any longer the presumption of innocence."); *see also*, Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237, 261–68 (2006) (finding that jurors in Florida held the defendant's choice not to testify against him).
106. *Connick*, 131 S. Ct. at 1356, 1372 (Ginsburg, J., dissenting).
107. *Id.* at 1372 (Ginsburg, J., dissenting).
108. *See id.*
109. *Id.* at 1355 (majority opinion).
110. *Id.* at 1355–57.
111. *Id.* at 1357.
112. *Id.* at 1376 (Ginsburg, J., dissenting).
113. *Id.*
114. *Id.* at 1357 (majority opinion).

in his office regarding their constitutional obligations.[115] The jury found the office liable on this ground and awarded Thompson $14 million dollars in damages.[116]

The jury's award was ultimately appealed to the U.S. Supreme Court, with Justice Clarence Thomas writing the opinion for a majority of five justices reversing the jury's award.[117] Justice Thomas asserted that the *Brady* violation in Thompson's case was a single incident and did not represent a pattern or policy.[118]

Justice Ruth Bader Ginsburg wrote the dissent on behalf of herself and Justices Breyer, Sotomayor, and Kagan.[119] The evidence showed, she wrote, that "[w]hat happened here . . . was no momentary oversight, no single incident of a lone officer's misconduct[,]" but that *Brady* violations were "pervasive in Orleans Parish."[120]

In their testimony, Connick and other prosecutors in the office revealed their misunderstanding of *Brady* obligations. As Connick explained, he had "stopped reading law books . . . and looking at opinions when he was first elected District Attorney" thirty years earlier.[121] He also admitted that he had himself withheld a crime lab report in violation of *Brady* and had been indicted by the U.S. Attorney for having done so.[122] In addition, Connick admitted that he had terminated a grand jury investigation of prosecutorial misconduct because it would "make his job more difficult."[123]

Ginsburg's assessment of Connick's policy, based on the record in the case, has since been confirmed by former members of his office, who have said that the office under Connick maintained a "win-at-all-cost approach and a restrictive attitude towards its obligations to hand [over] evidence."[124] In an affidavit in another *Brady*-related wrongful conviction case, a former prosecutor in Connick's office said, "[t]he policy was '[w]hen in doubt, don't give it up.' "[125]

115. *Id.* at 1376 (Ginsburg, J., dissenting).
116. *Id.* at 1357 (majority opinion).
117. *Id.* at 1355.
118. *Id.* at 1361–62.
119. *Id.* at 1370 (Ginsburg, J., dissenting).
120. *Id.*
121. *Id.* at 1380.
122. *Id.* at 1378.
123. *Id.* at 1375.
124. Campbell Robertson & Adam Liptak, *Louisiana Prosecutors' Methods Raise Scrutiny Again*, N.Y. TIMES, Nov. 3, 2011, at A19.
125. *Id.* In another case, in 2009, after the defendant had been convicted and sentenced to death, it was revealed that the prosecutors had not turned over a videotaped interview with a key witness in which she had contradicted her trial testimony in several significant respects, nor had they revealed the nature of a deal with a jailhouse informer who testified for the prosecution. *Id.* Prosecutors' questionable use of jailhouse informers, or snitches, is discussed *infra* Part VII.A.

B. Smith v. Cain

Imposing sanctions, including civil liability, against prosecutors who engage in misconduct, does "make [the prosecutor's] job more difficult[,]" but condoning that misconduct encourages more of it.[126] This has been shown dramatically in *Smith v. Cain*,[127] a case that came out of the same New Orleans parish as *Connick v. Thompson*.

Juan Smith was convicted of participating in a mass murder when a group of men burst into a house in search of drugs and killed five people.[128] His conviction was based solely on the eyewitness testimony of a survivor, Larry Boatner. Boatner told the jury that "he had [n]o doubt that Smith was the gunman."[129] That unequivocal testimony was contradicted, however, by files from the police investigation of the case.[130] The lead investigator's "notes from the night of the murder state that Boatner 'could not . . . supply a description of the perpetrators other [than] they were black males.' "[131] Also, Boatner told the investigator five days later that he "could not ID anyone because [he] couldn't see faces and would not know them if [he] saw them."[132] The prosecutors unlawfully and unethically withheld these files from the defense, but they were discovered and used in Smith's habeas corpus attack on his conviction.

The brief for the District Attorney's Office did not dispute that Boatner's statements had been withheld from the defense.[133] Nevertheless, the prosecution justified its misconduct on appeal by contending that the failure to turn over the exculpatory material had been harmless because the jury would have ignored it.[134]

In oral argument of the case before the U.S. Supreme Court, even members of the *Connick v. Thompson* majority were incredulous. Chief Justice Roberts said that any defense lawyer would want to have an eyewitness's statement that said "I couldn't identify them."[135] And Justice Scalia said, "Of course it should have been turned over."[136]

Chief Justice Roberts wrote the opinion for the Court vacating Smith's conviction; only Justice Thomas dissented. However, Roberts's opinion indicated that the Court has not learned that it has been encouraging prosecutors to violate *Brady* and then justify the violations as harmless error. In its opinion, the Court emphasized that Boatner's testimony was material

126. *Connick*, 131 S. Ct. at 1375.
127. 132 S. Ct. 627 (2012).
128. *Id.* at 629.
129. *Id.* (internal quotations omitted).
130. *Id.* at 629–30.
131. *Id.* at 629.
132. *Id.* at 629–30 (internal quotations omitted).
133. Robertson & Liptak, *supra* note 124.
134. *Id.*
135. Adam Liptak, *Justices Rebuke a New Orleans Prosecutor*, N.Y. TIMES, Nov. 9, 2011, at A18.
136. *Id.*

because it was the principal evidence against Smith and observed that "evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict."[137] This means, of course, that the Court is still willing to allow prosecutors to get away with serious *Brady* violations by arguing that the violation is not material.

A final irony in *Smith v. Cain* is that the lead prosecutor in the case, Roger W. Jordan, Jr., had previously been found guilty of *Brady* violations.[138] Accordingly, the Louisiana Supreme Court suspended him from practicing law for three months.[139] Then, noting that it had never disciplined a prosecutor for violating a *Brady* obligation, the court suspended Jordan's three-month suspension.[140]

VII. SOME CATEGORIES OF PROSECUTORIAL MISCONDUCT

A. Prosecutors' Use of "Cooperating Witnesses" or Snitches

According to the U.S. Department of Justice, many cooperating witnesses are "outright conscienceless sociopaths" who will do anything to benefit themselves, including "lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double crossing anyone with whom they come into contact."[141] One career informant explained his "code": "I don't set up people I know. I only set up nobodies."[142] Nevertheless, prosecutors commonly encourage and use cooperating witnesses and, not surprisingly, this practice has resulted in a significant number of wrongful convictions.[143]

Another, Leslie White, admitted that, in more than a dozen cases in which he had been imprisoned for crimes, including robbery and kidnaping, he had earned his release by falsely testifying that someone else had confessed a crime to him.[144] "Every time I come in here," White boasted, "I inform and get back out."[145] Yet, prosecutors repeatedly used him as a witness, and the California Attorney General's Office refused to re-open the

137. *Cain*, 132 S. Ct. at 630 (citing United States v. Agurs, 427 U.S. 97, 112–13, & n.21 (1976)).

138. Robertson & Liptak, *supra* note 124.

139. *Id.*

140. *Id.*

141. FREEDMAN & SMITH, *supra* note 3, § 1013 (quoting STEPHEN S. TROTT, U.S. DEP'T OF JUSTICE, PROSECUTION OF PUBLIC CORRUPTION CASES, 117–18 (1988)). The author was Stephen S. Trott, then an Associate Attorney General, now a judge on the U.S. Court of Appeals for the Ninth Circuit. *Id.*

142. Ted Conover, *A Snitch's Dilemma*, N.Y. TIMES, June 29, 2012, http://www.nytimes.com/2012/07/01/magazine/alex-white-professional-snitch.html?pagewanted=all&_r=0 (internal quotations omitted).

143. *See Informants*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Dec. 30, 2012) (reporting that such testimony was a key factor in more than fifteen percent of wrongful convictions uncovered by DNA evidence).

144. *A Snitch's Story in L.A: An Informer Blows the Whistle on Himself*, TIME, Dec. 12, 1988, at 32.

145. *Id.*

cases in which White had testified.[146] Furthermore, the Los Angeles County District Attorney's Office rejected their own prosecutors' recommendations that it establish a central record index of jail-house informants.[147]

Two reasons for the decision not to keep a central record index of jail-house informants were revealed in a memo marked "Confidential" from a chief deputy to the Director of Bureau, Branch and Area Operations.[148] The first reason is that a central record would help defense lawyers attack the credibility of repeat snitches, like Leslie White.[149] The second is that such a record could lead to charges that the Sheriff's Department "intentionally put jailhouse informants in jail cells with defendants from whom law enforcement could use a confession"—a practice that the U.S. Supreme Court has held to be a violation of the Sixth Amendment right to counsel when an accused has a lawyer.[150]

B. The Prosecution's Condonation of Perjury for the Prosecution

"The dirty little secret in this country, and it's not such a secret, is that if you perjure yourself for the prosecution, no one's going to prosecute you."[151] However, if the cooperating witness turns on the prosecution by recanting the incriminating testimony, a perjury prosecution of the cooperating witness follows.[152]

An example of a prosecution witness who committed perjury for the prosecution with impunity is Mario Montuoro, who was a repeat cooperating witness for the DOJ.[153] His criminal record included four arrests, one of them for possession of heroin and one for possession of a gun.[154]

On one occasion Montuoro told the Federal Organized Crime Strike Force in Brooklyn that Ronald Schiavone and Raymond Donovan, officers of Schiavone Construction Company, were guilty of making an illegal cash payment to a union official.[155] Montuoro testified before a federal grand jury

146. *See* Ted Rohrlich, *Informant Told Tester of Lying Back in 1987*, L.A. TIMES (DEC. 2, 1988), *available at* http://articles.latimes.com/1988-12-02/local/me-1115_1_jailhouse-informant.

147. Martin Berg, *D.A. Memo Airs Private Suspicions of Snitch Misuse*, L.A. DAILY J., Aug. 17, 1989, at 1.

148. *Id.*

149. *Id.*

150. *See* Massiah v. United States, 377 U.S. 201, 204 (1964).

151. Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999, at 66, 77 (quoting Walter F. Rowe, professor of forensic science at George Washington University).

152. Examples of cases in which a cooperating witness was prosecuted for multiple counts of perjury after turning on the prosecution by recanting include *Dunn v. United States*, 442 U.S. 100, 103–04 (1978) and *United States v. Tibbs*, 600 F.2d 19, 20–21 (6th Cir. 1979).

153. *In re* Application for Appointment of Indep. Counsel, 596 F. Supp. 1465, 1466 (E.D.N.Y. 1984).

154. *Id.*

155. *Id.* Schiavone and Donovan were prominent citizens. Donovan was Secretary of Labor in President Reagan's Cabinet from 1981–1985. Schiavone held two degrees from Dartmouth College and was a member of the Dartmouth Board of Overseers and an officer of national and state professional organizations.

that the payment had been made during a luncheon at Prudenti's Restaurant in May or June of 1977.[156]

The grand jury declined to indict Schiavone and Donovan and, thereafter, a federal court appointed Leon Silverman, a prominent lawyer, to be Special Prosecutor to investigate Montuoro's testimony about the luncheon at Prudenti's.[157] With the help of three Assistant Special Prosecutors and the FBI,[158] the Special Prosecutor conducted an exhaustive investigation and concluded that "no credible evidence exist[ed] that a luncheon as alleged by Montuoro ever occurred."[159]

Perjury, of course, was one of the several serious federal crimes that Montuoro had committed as a cooperating witness.[160] Nevertheless, the DOJ refused requests by Schiavone that Montuoro be prosecuted.[161]

C. Turning on the Victim to Maintain a Conviction

Some prosecutors like to claim that they have a duty to victims of crimes to prosecute zealously.[162] But they are not above trashing the victim if it serves to support a bad conviction. For example, in *Illinois v. Juan Rivera*,[163] the defendant was convicted in part on snitch testimony and in part on a coerced confession. The victim was Holly Staker, an eleven-year-old girl who was raped and brutally murdered.[164] When DNA showed that the sperm in Holly's vagina was not Rivera's, the prosecutor made the absurd and repulsive argument that the child had been "sexually active" and, therefore, the fact that the sperm was not Rivera's did not exculpate him.[165]

Similarly, in a case in Nassau County, New York, when DNA showed that the sperm in a sixteen-year-old victim was not that of the man convicted of the crime, the prosecution argued that it "must have come from a

156. *Id.*

157. *Id.*

158. United States Court of Appeals for the District of Columbia Circuit, No. 81-2, Sept. Term 1981, Report of the Special Prosecutor, vol. I, p. 3 (June 25, 1982).

159. *In re Application for Appointment of Indep. Counsel*, 596 F. Supp. at 1466. Among other serious discrepancies in his story, Montuoro said that Schiavone was walking normally at the time of the luncheon. In fact, during the time in question, Schiavone was on crutches and wearing a cast up to his thigh because of a skiing accident.

160. *Id.*

161. *Id.*

162. *See, e.g.*, Erica Goode, *When DNA Evidence Suggests "Innocent," Some Prosecutors Cling to "Maybe,"* N.Y. TIMES, Nov. 15, 2011, http://www.nytimes.com/2011/11/16/us/dna-evidence-of-innocence-rejected-by-some-prosecutors.html?pagewanted=all.

163. 777 N.E.2d 360 (Ill. App. Ct. 2002).

164. *Id.* at 360. Rivera was exonerated but was retried in 2009. Andrew Martin, *Court Reverses Conviction of Man Jailed for 19 Years in Rape and Murder*, N.Y. TIMES, Dec. 10, 2011, http://www.nytimes.com/2011/12/11/us/illinois-court-reverses-conviction-of-man-jailed-in-rape-murder.html [hereinafter Martin, *Court Reverses*]. He was finally freed in 2012, after nineteen years in prison. Mitch Dudek, *After 19 Years in Prison for Girl's Murder, Juan Rivera Goes Free*, CHICAGO SUN-TIMES, Jan. 6, 2012, http://www.suntimes.com/news/metro/9851013-418/man-jailed-19-years-in-11-year-olds-stabbing-death-to-go-free.html.

165. Andrew Martin, *The Prosecution's Case Against DNA*, N.Y. TIMES, Nov. 25, 2011, http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html?pagewanted=all.

consensual lover, even though [the girl's] mother and best friend insisted that she was a virgin."[166] The unnamed lover theory has been used by prosecutors so often that defense lawyers have a name for it. Varying the term unindicted co-conspirator, defense lawyers refer to it as the "unindicted co-ejaculator."[167]

D. Prejudicial Pretrial Publicity by Prosecutors

The First Amendment right to freedom of speech is never more important to an individual than when he or she is the accused in a criminal prosecution.[168] In contrast to the defense lawyer, the prosecutor is not the spokesperson for a private citizen. Rather, the prosecutor acts under color of law as an agent of the Government. In that official capacity, the prosecutor is privileged to publish to the world—including the defendant's family, friends, neighbors, and business associates—the most heinous and defamatory charges in an indictment.

Despite this devastating impact on the reputation of the accused, it is essential that indictments are open to public scrutiny; secret indictments are familiar weapons of tyrannous governments. In addition, in a particular case, a prosecutor may find a compelling law enforcement purpose justifying a public announcement, such as to notify the public that the accused is at large and dangerous. Also, the prosecutor should be permitted to respond publicly if the defense accuses the prosecutor of unlawful or unethical conduct in the case.

Beyond those limited situations, however, there is no legitimate reason for a prosecutor, as an agent of the government, to engage in pretrial publicity, including press conferences and leaks of information that heighten the public condemnation of the accused.[169] Accordingly, ethical rules now forbid prosecutors to make "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused" and also require them to "exercise reasonable care to prevent . . . law enforcement personnel . . . or other persons . . . associated with the prosecutor" from prejudicing the accused extra-judicially.[170] Nevertheless, prosecutors have commonly engaged in prejudicial pretrial publicity and persist in doing so.

Illustrative is the following statement that was made by a U.S. Attorney at a press conference that was called to announce an indictment:

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166. Martin, *Court Reverses*, *supra* note 164.

167. *Id.*

168. FREEDMAN & SMITH, *supra* note 3; MONROE H. FREEDMAN & JANET STARWOOD, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys*: Ratio Decidendi v. Obiter Dictum, 29 STAN. L. REV. 607, 613 (1977).

169. As a practical matter, the defendant can also be deprived of a fair trial. Unfortunately, however, courts virtually never reverse a conviction when a prosecutor deprives a defendant of a fair trial through pretrial publicity. *See* FREEDMAN & SMITH, *supra* note 3, § 4.09.

170. MODEL RULES OF PROF'L CONDUCT R 3.8(f) (2012).

> Ladies and Gentlemen, I am very happy to be here and to be . . . part of something which I perceive to be probably the largest corruption, criminal investigation, probably in the history of the nation. It crosses city lines, it crosses state lines, it crosses federal lines. Also it has its tentacles in Puerto Rico and probably in Hawaii . . . . I suspect that the bottom line is that corruption or greed has no bias.[171]

Thus, the clear thrust of the prosecutor's statement was that the defendants—who were identified by name—were guilty of the largest crime of corruption and greed in the history of the nation.[172]

At the time of the prosecutor's statement in that case, a formal ethical rule had not yet been adopted, but the U.S. Constitution has always forbidden punishment without due process of law, and the United States District Court for the Southern District of New York subsequently found the prosecutor's statement to have been "egregious."[173] Nevertheless, the prosecutor was successful. Despite his egregious statement, along with other "massive publicity" adverse to the defendants, and "shameful abuse" of grand jury secrecy by the prosecutor, the court did not overturn the convictions in the case.[174]

Thus, prosecutors systematically and freely inflict severe punishment on defendants—the modern equivalent of the pillory—before the defendants have even had their day in court and regardless of innocence-in-fact. For example, after he was acquitted of criminal charges involving dishonesty, but after years of lengthy adverse publicity, former U.S. Secretary of Labor Ray Donovan bitterly commented, "[w]hich office do I go to to get my reputation back?"[175]

A variation on this kind of punishment without due process is the "perp walk." A recent example occurred in April 2012 in New York City.[176] Despite ample documentary evidence that he could not have been the man who had molested four women, Karle Vanderwoud, a young man who works in private finance, was arrested for the crime.[177]

While Vanderwoud was in his holding cell, the police taunted him by commenting on how many photographers, whom they had alerted, were waiting outside to take his picture on his way to court.[178] After a large number had gathered, the police led him in handcuffs through the

171. United States v. Simon, 664 F. Supp. 780, 794 n.17 (S.D.N.Y.1987).

172. The case was not Teapot Dome, Watergate, or Enron, but Wedtech—a name that is not likely to make the list of historic scandals.

173. *Simon*, 664 F. Supp. at 794 n.17.

174. *Id.* at 792.

175. Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES (May 26, 1987), *available at* http://www.nytimes.com/1987/05/26/nyregion/donovan-cleared-of-fraud-charges-by-jury-in-bronx.html?pagewanted=all&src=pm.

176. Jim Dwyer, *Cleared, but Will the Next Person Be So Lucky?*, N.Y. TIMES, May 11, 2012, at A25, *available at* http://www.nytimes.com/2012/05/11/nyregion/karl-vanderwoude-wrongly-accused-and-cleared-by-the-nypd.html.

177. *Id.*

178. *Id.*

photographers, who took hundreds of photographs of him.[179] Inevitably, pictures of Vanderwoud's perp walk were widely published, along with headlines calling him the "Grope Sicko" and the "dapper fiend."[180]

Although perp walks are carried out by the police, they are ordinarily coordinated with prosecutors to coincide with the accused's arraignment. Also, there is no indication that prosecutors exercise reasonable care to prevent the orchestrated perp walk.[181]

VIII. CONCLUSION

Despite the reluctance of courts to find that prosecutors have acted unethically, a difficulty in writing this Article has been selecting illustrations from an extremely large number of cases that could have been used as examples of unethical and unconstitutional conduct by prosecutors' offices. Part of the problem is the failure of judges to recognize even flagrant, willful, or bad faith misconduct by prosecutors. Another is the failure of courts and disciplinary committees to hold prosecutors accountable even when serious misconduct is uncovered.

As a number of authorities have concluded, the failure to hold prosecutors accountable has contributed to a culture in too many prosecutors' offices in which prosecutors act as if they are above constitutional and ethical restraints. According to Professors Abbe Smith and Paul Butler, the role of prosecutor is inherently corrupting.[182] As Smith has said, the "current culture of prosecution fosters rigidity, cynicism, and a tendency to engage in willful or careless abuse of official power."[183] Certainly, the cases recounted here and numerous others tend to confirm that view.

Nevertheless, I advise students who are interested in public interest careers to consider joining a prosecutor's office. I do that because I know that one can do more good as an honest and conscientious prosecutor than as a zealous criminal defense lawyer. A defense lawyer may be able to expose unlawful law enforcement and prosecutorial misconduct, but a prosecutor of "honor, temperament, and professionalism" can prevent those abuses from ever happening.[184] I therefore maintain the hope that an increasing number of conscientious prosecutors will help to protect society from antisocial people without helping to create an antisocial state.

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179. *Id.*
180. *Id.*
181. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3(c)(1) cmt. 1; 8.4(a); 8.4(d) (2012).
182. PAUL BUTLER, LET'S GET FREE (2009); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).
183. FREEDMAN & SMITH, *supra* note 3, § 10.18.
184. Irving Younger, *Memoir of a Prosecutor*, 62 COMMENT., Oct. 1976, at 70.