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**KEYNOTE ADDRESS:
ENHANCING THE JUSTICE MISSION IN THE EXERCISE
OF PROSECUTORIAL DISCRETION**

by ELLEN YAROSHEFSKY*

It is an interesting time to reflect upon the exercise of prosecutorial discretion. In the past decade, changes in the legal landscape have slowly, but significantly, affected the prosecution function. These shifts, in conjunction with public attention to the prosecutor's role, will continue to impact how prosecutors exercise discretion and suggest the need for ongoing modifications. Notably, wrongful conviction cases provide a critical lens through which to view necessary reforms.

I. THE CURRENT STATE OF THE CRIMINAL JUSTICE SYSTEM

This focus on the exercise of prosecutorial discretion comes at time when the criminal justice system in the United States is often referred to as "in crisis." There are over 2.4 million people in prison in the United States.¹ We have five percent of the world's population² and twenty-five percent of its prisoners.³ In the United States, sixty percent more people serve sentences in prison than serve our country in the military.⁴ The state of California imprisons more people than France, Great Britain, Germany, Japan, Singapore and the Netherlands combined.⁵ New prisons

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1. William J. Sabol, Heather C. West & Matthew Cooper, *Bureau of Justice Statistics Bulletin: Prisoners in 2008*, 8, Table 9 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf> (documenting statistics for total United States incarcerated population at the end of December 2008). Table 9 includes all inmates in United States federal and state prisons, local jails, United States territories, military facilities, U.S. Immigration and Customs Enforcement owned and contracted facilities, jails in Indian countries, and juvenile facilities. *Id.*

2. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1, available at <http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=1&r=1>.

3. *Id.*

4. Compare Sabol, *supra* note 1 (totaling the United States incarcerated population at the end of December 2008 as 2,424,279), with DEPARTMENT OF DEFENSE ACTIVE DUTY MILITARY PERSONNEL BY RANK/GRADE (2009), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0902.pdf> (totaling the number of persons serving in the U.S. military as 1,411,932 by February 2009).

5. Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC MONTHLY, Dec. 1998, at 1, available at <http://theatlantic.com/past/issues/98dec/prisons.htm>.

and jails continue to open, and at this time, it is one of the few growing industries in the United States.⁶

This recognized crisis in our criminal justice system results, in significant measure, from the “war on drugs.”⁷ During the middle of the 20th century, crime, notably drug use, escalated.⁸ The legislative response was to allocate monies to the war on drugs and to building more prisons.⁹ Legislators also enacted three-strikes laws and mandatory prison sentences.¹⁰ Parole was virtually eliminated in a number of jurisdictions.¹¹ During the 1980s and 1990s, the United States quadrupled the number of people imprisoned. Simultaneously, the crime rate steadily dropped.¹²

II. RECONSIDERING THE CRIMINAL JUSTICE SYSTEM

Increasingly, prosecutors at the state and federal levels are examining the operation of our criminal justice systems. Attorney General Eric Holder, reflecting on the current state of criminal justice, reinforced the importance of alternatives to incarceration and reentry programs.¹³ He focused upon the need to develop the

6. PAUL BUTLER, LET’S GET FREE HIP HOP THEORY OF JUSTICE 27 (2009).

7. The term “war on drugs” was popularized by President Nixon between 1971 and 1973 when he declared that drug use was “America’s Public Enemy No. 1.” *The Nation: The New Public Enemy No. 1*, TIME, June 28, 1971, available at <http://www.time.com/time/magazine/article/0,9171,905238-1,00.html>; TIMELINE: AMERICA’S WAR ON DRUGS (2007), <http://www.npr.org/templates/story/story.php?storyId=9252490>.

8. See Steven D. Levitt, *Understanding Why Crime Fell in the 1990’s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 165-66 (2004), available at <http://pubs.aea.org/doi/pdfplus/10.1257/089533004773563485> (discussing the increase of crime in the United States from the 1950s to the 1990s and its relationship with drugs).

9. See Robert H. Stroup, *The Political, Legal, and Social Context of the McCleskey Habeas Litigation*, 39 COLUM. HUM. RTS. L. REV. 74, 86 (2007) (stating that President Reagan signed the Anti-Drug Abuse Act of 1986 which allocated \$97 million to building new prisons as a “part of a massive prison-building program across the United States that saw a 70% increase in the number of state prison facilities beginning in the mid-1970s through 2000”).

10. See Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 103 (1988) (“Many states and the federal government have enacted ‘Three Strikes’ laws that mandate extremely long prison terms for offenders who have been convicted of three serious or violent felonies.”); see also, e.g., CONN. GEN. STAT. § 53a-40, *invalidated by* State v. Bell, 931 A.2d 198, 201 (Conn. 2007), *amended by* 2008 Conn. Legis. Serv. 08-51 (2008) (penalizing second and subsequent offenses by “upgrading” sentencing for lesser offenses by higher grades); LA. REV. STAT. § 15:529.1 (2001) (describing the sentences imposed for second and subsequent offenses in the state of Louisiana); MONT. CODE § 46-18-502 (1999) (imposing sentences for “persistent felony offenders”); 42 PA. CONS. STAT. § 9714 (a)(2) (2001) (providing for a mandatory twenty-five year sentence for third offenses of a serious nature for the state of Pennsylvania).

11. See, e.g., LA. REV. STAT. § 15:529.1 (A)(1)(b)(ii) (eliminating parole for third offenses involving controlled substances); MONT. CODE § 46-18-502 (increasing the maximum sentence to 100 years for persistent felons); 42 PA. CONS. STAT. § 9714 (a)(2) (providing that the third strike offense warrants a mandatory twenty-five year sentence without parole).

12. Butler, *supra* note 6, at 31.

13. See Eric Holder, Attorney Gen., Attorney General Eric Holder at the Fatherhood Town Hall (Dec. 15, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-091215.html> (discussing the Second Chance Act for reentry programs and the importance of these programs for the success of returning prisoners).

government's ability to enhance public safety before the crime is committed and after the former offender returns to society.¹⁴

Attorney General Holder's comments reflect state initiatives in the past ten years on such alternatives to incarceration. In some jurisdictions, there are drug treatment courts,¹⁵ problem-solving courts, and domestic violence courts.¹⁶ In limited cases, mediation has become an option, even for some felony charges.¹⁷ Significantly, the juvenile justice system has been the focus of reform, with the goal of providing assistance to juveniles at the first contact with the criminal justice system to keep them out of the criminal justice system in their adult lives.¹⁸ Some prosecutors specifically focus on a reentry program, a non-collateral consequence. One of them is Charles Hynes, the District Attorney from Brooklyn and the new head of the ABA's Criminal Justice Section.¹⁹

On the defense side, there are limited but important programs that employ "holistic lawyering."²⁰ For instance in the Bronx, New York, a very creative defender's association provides services beyond representation in criminal cases.²¹ These services range from assistance in civil cases to child care, a drop-in center, assistance in schooling and social services.²²

14. Eric Holder, Attorney Gen., Attorney General Eric Holder at the 2009 ABA Convention (Aug. 3, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html>.

15. See *id.* (discussing the positive effects of drug treatment courts).

16. Kathryn C. Sammon, Note, *Therapeutic Jurisprudence: An Examination of Problem Solving Justice in New York*, 23 ST. JOHN'S J. LEGAL COMMENT. 923, 928 (2009). See generally Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003) (discussing the history and current form of problem-solving courts).

17. Jean Whyte, *How Do You Mediate a Criminal Case?*, CRIMINAL JUSTICE SECTION NEWSLETTER VOL. 15, NO. 1 (2006), available at <http://www.abanet.org/crimjust/practicetips/whytetips.pdf>, reprinted in LAW TRENDS & NEWS PRACTICE AREA NEWSLETTER VOL. 6, NO. 1 (2009) available at http://www.abanet.org/genpractice/newsletter/lawtrends/09_fall/lit-feat4.html (discussing mediation as an option in some criminal cases).

18. See Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1470-1505 (2009) (analyzing juveniles in the criminal justice system). See generally Judith S. Kaye, Address, *A New Beginning for Adolescents in Our Criminal Justice System*, 36 FORDHAM URB. L.J. 839 (2009) (suggesting alternative procedures for the juvenile justice system).

19. Charles J. Hynes, *After Release: The Challenge of Successful Reentry*, 24-WTR CRIM. JUST. 1, 1, 44 (2010). See Melissa Morris & Lance Ogiste, *ComALERT*, ABA Criminal Justice Section, Re-Entry and Collateral Consequences Committee E-News (2009), <http://www.abanet.org/crimjust/committees/reentry/reentrynewsjuly08.htm> (scroll to "Articles"; find "ComALERT"; then follow "here" hyperlink) (describing the ComALERT initiative); see also Editorial, *The Right Way to Handle Former Inmates*, N.Y. TIMES, Nov. 29, 2007, available at http://www.nytimes.com/2007/11/29/opinion/29thu3.html?_r=3&scp=1&sq=Comalert&st=cse&oref=slogin (describing the initiative as a promising method to reduce recidivism).

20. See Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1067-70 (2004) (discussing the aspects and popularity of holistic lawyering for defense representation).

21. The Bronx Defenders, <http://www.bronxdefenders.org/our-practice/holistic-advocacy> (last visited May 11, 2010) (describing the interdisciplinary practice of the Bronx Defenders).

22. The Bronx Defenders, <http://www.bronxdefenders.org/our-practice/we-fight-keep-families-together> (last visited May 11, 2010) (describing specifically the interdisciplinary approach to family defense).

At the same time that alternative models are adopted in jurisdictions around the country, resources are limited, not only for new programs, but for existing ones.²³ Legislatures hardly clamor to allocate additional monies to drug treatment or other diversion programs. Nor do they clamor to provide needed funds for adequate defense services, judicial salaries or alternative courts. For example, judges in New York have not received a raise in more than ten years.²⁴

State prison systems have been stretched beyond the breaking point. Conditions in the California prison system were declared unconstitutional,²⁵ and California has to determine how to reduce its jail and prison population.²⁶ This will necessarily have an impact upon how California prosecutors exercise their discretion.

III. RE-EXAMINING THE PROSECUTORIAL FUNCTION

A. *The Vera Institute of Justice (Vera Institute)*

In recent years, a number of policy and criminal justice organizations are taking a hard look at critical issues in the functioning of the prosecutors' offices. The Vera Institute in New York examined the impact of race in the criminal justice system in the district attorney's offices of Milwaukee, Charlotte, North Carolina and San Diego.²⁷ The Vera Institute's main goal for the project was to study the intersection of race and poverty in the criminal justice system and to determine how prosecutors can change their offices so that there is less disparity in terms of charging by race.²⁸ These prosecutors opened their offices for examination and evaluation.

The Vera Institute studied screening and case evaluation methods in the early stages of prosecution. It looked at racial disparities in misdemeanor and felony drug cases. It found that some disparities resulted from charging decisions for drug paraphernalia in crack cases that were different from charging decisions for drug paraphernalia in other drug cases.²⁹ This study highlighted previously unexamined biases and led to systemic changes.³⁰

23. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

24. William Glaberson, *Judge is Censured for His Efforts to Secure a Pay Raise*, N.Y. TIMES, Dec. 29, 2009, at A22.

25. Solomon Moore, *Court Panel Orders California to Reduce Prison Population by 55,000 in 3 Years*, N.Y. TIMES, Feb. 10, 2009, at A12 (describing the tentative ruling in *Coleman v. Schwarzenegger*, which found that the source of petitioning prisoners' constitutional violations was the overcrowded conditions of the prisons. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 330960, at *1 (E.D. Cal. Feb. 9, 2009)).

26. *Id.*; Solomon Moore, *California Prison Must Cut Inmate Population*, N.Y. TIMES, Aug. 5, 2009, at A10.

27. Vera Institute of Justice, *Prosecution and Racial Justice*, <http://www.vera.org/centers/prosecution-and-racial-justice> (last visited May 11, 2010).

28. *Id.*

29. *Id.*

30. *Id.*

B. The Effect of Scientific Development

Beyond these changes to the legal landscape, scientific developments have and should continue to impact our thinking about the exercise of prosecutorial discretion. There have been advances toward an increased knowledge of the brain function as it affects behavior. Systematically, we are beginning to apply that knowledge about diagnosable disorders to those who commit crimes.³¹ Knowledge gained from medicine, psychology and social work is beginning to have a greater impact on the view of the proper function of our criminal justice systems.³²

C. Increased Public Attention

In the past few years, there has also been increased public attention to the prosecutor's exercise of discretion. Prosecutorial failures and misdeeds have been increasingly the subject of judicial opinions and press accounts as highly publicized cases have been dismissed because of the prosecutor's failure to disclose exculpatory evidence. The "Duke lacrosse case" resulting in the disbarment of prosecutor Michael Nifong was a highly charged and seemingly aberrant instance of intentional prosecutorial misconduct.³³ Several years later there has been increased attention to prosecutorial failures to disclose evidence. The dismissal of the conviction of Alaska Senator Ted Stevens' was a low point of the Department of Justice,³⁴ only to be followed by a series of similar dismissals by judges around the country.³⁵

31. See Amanda C. Pustilnik, *Violence on the Brain: A Critique of Neuroscience in Criminal Law*, 44 WAKE FOREST L. REV. 183, 205-14 (2009) (detailing scientific psychological discoveries as they relate to the criminal justice system).

32. See generally Atul Gawande, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009) (describing how advances in professional fields have overburdened practitioners while at the same time aided in developing advanced solutions); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (discussing support found in cognitive and behavioral research for the effect of decision-making biases on prosecutorial decisions); Kerry Murphy Healey, *Case Management in the Criminal Justice System*, NATIONAL INSTITUTE OF JUSTICE (Feb. 1999), available at <http://www.ncjrs.gov/pdffiles1/173409.pdf> (positing that case management systems which include psychology and social work are more successful in providing criminal justice than those that do not).

33. David Barstow, *Prosecutor in Duke Sexual Assault Case Faces Ethics Complaint From State Bar*, N.Y. TIMES, Dec. 29, 2006, at A22, available at <http://www.nytimes.com/2006/12/29/us/29nifong.html#>. See also Transcript of Comments of F. Lane Williamson, chairman of the disciplinary panel that voted unanimously to disbar Michael Nifong, as recorded by the New York Times, N.Y. TIMES, June 17, 2007, available at http://www.nytimes.com/2007/06/17/us/17duketext.html?_r=1&pagewanted=1.

34. Nedra Pickler, *Judge Overturns Stevens Conviction Ex-Alaska Senator Triumphs; Prosecutors Could Be Charged*, SAN JOSE MERCURY NEWS, Apr. 8, 2009, at 6A.

35. See, e.g., *U.S. v. Farinella*, 558 F.3d 695, 701-02 (7th Cir. 2009) (granting an acquittal because of the grave misconduct by the prosecutor and the government's failure to present sufficient evidence for a conviction); *U.S. v. Shaygan*, 661 F. Supp. 2d 1289, 1324-25 (S.D. Fla. 2009) (issuing a public reprimand and sanctions against the prosecutor and office for its severe misconduct and lack of oversight); *U.S. v. Jones*, 620 F. Supp. 2d 163, 185 (D. Mass. 2009) (requiring an education discovery program and delaying its ruling on sanctions on the prosecutor who failed to disclose material exculpatory evidence).

D. Wrongful Convictions: The Innocence Project and A Hidden Problem

Examination of wrongful convictions is yet another critical shift in the legal landscape that has and will continue to affect the exercise of prosecutorial discretion. The Innocence Project, which began in 1982, uses DNA to exonerate the wrongfully convicted.³⁶ It has grown into the “Innocence Movement” with projects around the country that have resulted in more than 249 exonerations.³⁷ Many of those wrongful convictions were the result of false confessions, eyewitness misidentification, faulty laboratories and “junk” science.³⁸ Significant reforms have been and continue to be undertaken to remedy the causes of error in eyewitness identification,³⁹ false confessions⁴⁰ and laboratories.⁴¹

A relatively unexamined area as a cause of wrongful convictions is the lawyer’s role, both prosecution and defense. While there is little “hard” data, the Innocence Project reports that a review of the first sixty-two exonerations in the United States reveals that prosecutorial misconduct was a factor in about forty-two percent of those cases.⁴² Most of the prosecutorial misconduct occurred in cases where the prosecutor failed to disclose evidence.⁴³ Some of the conduct is intentional, but it is likely that the prosecutorial errors that lead to findings of prosecutorial misconduct are the result of negligence and systemic challenges within prosecutor’s offices.⁴⁴ One of the interesting aspects of examining wrongful conviction cases is that prosecutorial misconduct arises in cases where, typically, there is ineffective defense counsel, that is, the defense lawyer did not zealously attempt to obtain the critical evidence that the prosecution failed to disclose.⁴⁵

36. The Innocence Project, About the Organization—About the Innocence Project, <http://www.innocenceproject.org/about/> (last visited May 11, 2010).

37. The Innocence Project, About the Organization—Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited May 11, 2010).

38. The Innocence Project, Understand the Causes—The Causes of Wrongful Conviction, <http://www.innocenceproject.org/understand> (last visited May 11, 2010).

39. The Innocence Project, Fix the System—Priority Issues: Eyewitness Identifications, <http://www.innocenceproject.org/fix/Eyewitness-Identification.php> (last visited May 11, 2010).

40. The Innocence Project, Understand the Causes—False Confessions, <http://www.innocenceproject.org/fix/False-Confessions.php> (last visited May 11, 2010).

41. The Innocence Project, Forensic Oversight, <http://www.innocenceproject.org/fix/Crime-Lab-Oversight.php> (last visited May 11, 2010).

42. BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000).

43. See Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM U. INT’L L. REV. 1241, 1254 (2002) (discussing that the failure of prosecutors to divulge evidence to the defense is a “dominant and recurring factor in wrongful conviction cases”).

44. See The Innocence Project, Understand the Causes—Government Misconduct, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited May 11, 2010) (“Most law enforcement officers and prosecutors are honest and trustworthy . . . [but e]ven if one officer of every thousand is dishonest, wrongful convictions will continue to occur.”).

45. See Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 199-200 (2008) (discussing the failure of “ordinary defense counsel to . . . to investigate adequately”).

These wrongful conviction cases are an important lens through which to view the need for improvements in the exercise of prosecutorial discretion. If failure to disclose exculpatory or favorable evidence exists in the cases that went to trial and where there exists DNA to exonerate an innocent person, what about the ninety-five percent of cases where the case ended in a guilty plea and no disclosure of exculpatory evidence was required prior to the plea?⁴⁶ Many of these cases are unlikely to have DNA to exonerate an individual.⁴⁷ In other words, the failure to disclose exculpatory evidence is likely a hidden problem within our criminal justice systems. The DNA exoneration cases starkly suggest the need for review of systems of prosecutorial case evaluation and processing.

IV. CORRECTING PROSECUTORIAL DISCRETION ISSUES

In the future, we are likely to confront an increasing number of claims of innocence in non-DNA cases. These cases will be more troublesome for prosecutors because of the lack of scientific proof of innocence. What steps should be taken to ensure that discretion is exercised in a manner that provides the greatest likelihood of avoiding wrongful convictions? What should prosecutors' offices do in cases where a person claims innocence and there is no DNA and five eyewitnesses?

A. The Guilty Plea System

We should acknowledge shortcomings in our criminal justice model.⁴⁸ We assume that jurisdictions in the United States have effective adversary systems where facts are tested through the "engine of cross examination."⁴⁹ This assumption does not reflect state or federal practice. Facts are rarely tested in an adversarial forum. First, more than ninety-five percent of cases result in guilty pleas⁵⁰—thus facts are presented to a trier of fact in a marginal number of cases. Second, in that ninety-five percent of cases resolved by guilty pleas, the defense rarely obtains the

46. See Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (2006) (observing that more than ninety-five percent of cases result in plea bargains).

47. Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 77-78 (2008).

48. See Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 430 (2007) ("It has also been argued that the criminal justice system as a whole has been inadequate in its treatment of crime victims, its ability to reduce crime and its capability to fulfill public expectations of fairness and justice."); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 299 (2006) (noting that sometimes in the course of plea-bargaining, prosecutors take the role of adjudicator, thereby transforming "many of the familiar features of U.S. criminal procedure"); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 787 (2006) (discussing the justice system's reliance on cross examination as a primary truth finding tool as too heavily relied upon because cross examination is difficult for even well-prepared counsel to perform effectively); *id.* at 790-91 (discussing the myth that jury instructions cure trial error).

49. Marc Chase McAllister, *Two-way Video Trial Testimony and the Confrontation Clause: Fashioning a Better Craig Test in Light of Crawford*, 34 FLA. ST. U. L. REV. 835, 873 (2007).

50. Ross, *supra* note 46, at 717.

underlying information that a prosecutor obtains and should disclose if a case went to trial.⁵¹ In most jurisdictions there is little discovery provided to the defense attorney prior to or until trial.⁵²

In other words, our criminal justice system hardly exhibits the hallmarks of an adversarial system. Rather, we have a “guilty plea system,” referred to as the Guilty Plea State.⁵³ It is a system where, in most places, the power is with the prosecutor who decides what to charge, when to charge, whether to turn over certain discovery or information, and what plea to offer.⁵⁴ Our system is akin to an administrative law model where the prosecutor acts in an investigative and ultimately quasi-judicial capacity because the prosecutor makes the decisions as to charging, plea bargaining and therefore ultimate disposition.⁵⁵ We need to consider the ramifications of this administrative system of criminal justice and adopt transparency and accountability mechanisms to ensure fair processes.

B. Administrative Law and Open-File Discovery Models

We should draw a lesson from the administrative law model that information should be disclosed to the defense early in the process because it is the sole effective method to properly evaluate the potential evidence.⁵⁶ In other words, discovery policies and practices are in need of significant revision. Continuing to draw from the administrative model, there has also been advanced the suggestion that we should separate the prosecutor who investigates the case from the person who ultimately evaluates and offers the plea.⁵⁷ While such a model may cause obvious resource problems especially in misdemeanor cases, it should become a template in felony cases.⁵⁸

An expanded scope of discovery needs to be accompanied by clear written guidelines. Currently, there is little clarity or uniformity as to required disclosure.⁵⁹ Statutes, criminal procedure rules, court rules and ethics rules establish varying obligations. There are differences in state and federal laws, differences among and

51. See *id.* at 719-20 (“Though the Constitution requires that defendants’ waiver of trial rights be knowing, intelligent, and made with ‘sufficient awareness of the relevant circumstances and [likely] consequences,’ guilty pleas still count as voluntary [without exculpatory evidence]” (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002))).

52. See Ellen Yaroshefsky, *Ethics and Plea Bargaining, What’s Discovery Got to do With It?*, 23 CRIMINAL JUSTICE MAGAZINE 28, 31 (2008), available at <http://www.abanet.org/crimjust/cjmag/23-3/yaroshefsky.pdf> (discussing the *Ruiz* decision in 2002 where the Supreme Court held that a defendant’s right to pretrial disclosure of exculpatory evidence did not apply to guilty pleas).

53. Andrew E. Taslitz, *The Guilty Plea State*, 23 CRIMINAL JUSTICE MAGAZINE 6, 6 (2008), available at <http://www.abanet.org/crimjust/cjmag/23-3/taslitz.pdf>.

54. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).

55. *Id.* at 871; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2149 (1998).

56. Barkow, *supra* note 54, at 905 n.187.

57. *Id.* at 873.

58. See Lynch, *supra* note 55, at 2146 (discussing the volume of misdemeanor cases that involve a short disposition process, whereas the stakes in felony cases are high to warrant such an “appeals process to regulate prosecutorial decisions”).

59. Yaroshefsky, *supra* note 52, at 31.

between states and localities and even differences within individual offices.⁶⁰ Few offices have written policies.⁶¹ Individual prosecutors are often confused as to what they are required to disclose and what constitutes exculpatory evidence. Additionally, the appellate standard for disclosure differs from the standard used at trial.⁶²

Increasingly, prosecutors have moved to versions of “open-file discovery.” While definitions vary, the most expansive view is that open-file discovery requires the prosecutor to undertake the obligation to secure all the necessary information from the police and then, forthwith, provide copies of the file to the defense with a continuing duty to do so as the case progresses.⁶³ Work product and information for witness protection are excluded from disclosure.⁶⁴ An open-file system of discovery might obviate the need for the increased attention to defining and refining legal and ethical standards for the disclosure obligation. Even with open-file systems, there is a need for written protocols and practices to define this aspect of the exercise of prosecutorial discretion.

A number of jurisdictions around the country have implemented open-file policies, including Brooklyn, New York;⁶⁵ Portland, Oregon;⁶⁶ and Milwaukee, Wisconsin.⁶⁷ As those prosecutors report, there is typically initial resistance to such open-file policies.⁶⁸ Opponents argue that defense lawyers will improperly use the information and that prosecutors will lose cases which they should win. However, as prosecutors report, the results are the opposite. Cases are resolved more quickly

60. See, e.g., Martha Rayner, *Conference Report: New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1062 (2004) (surveying a working group of New York County prosecutor's offices revealed that some provided early discovery, others did not, and “[t]he group did not reach any consensus on this controversial topic”).

61. NEW YORK COUNTY LAWYERS' ASSOCIATION, CRIMINAL COURTS TASK FORCE, DISCOVERY IN NEW YORK CRIMINAL COURTS: SURVEY REPORT & RECOMMENDATIONS 8 (2006), http://www.thejusticeproject.org/wp-content/uploads/nycla_discovery_in_new_york1.pdf (“Of the five who found the question [in a New York County Lawyers' Association survey] about whether the ‘official’ policy was written anywhere applicable, one indicated the belief that it was a written policy and four learned essentially through practice.”).

62. On appeal, the standard of review for a District Attorney's violation of an open-file discovery policy is whether the failure to disclose resulted was harmless error. Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 517-18 (2009); Christopher Deal, Note, *Brady Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1783-84 (2007).

63. LAURAL HOOPER AND SHELIA THORPE, *BRADY V. MARYLAND MATERIAL IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS, AND POLICIES*, REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, at 8 (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/\\$file/bradyma2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/$file/bradyma2.pdf); see Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 277 (2008) (citing a North Carolina statute compelling that the prosecution disclose law enforcement records to the defense).

64. FED. R. CRIM. P. 16(a)(2).

65. N.Y. CODE CRIM. P. § 240.20 (McKinney 2002); Yaroshefsky, *supra* note 52, at 33.

66. OR. REV. STAT. § 135.815 (2010).

67. WIS. STAT. § 971.23 (2010).

68. Interview with John Chisholm, Milwaukee County District Attorney, in Milwaukee, Wis. (Oct. 7, 2008).

and favorable guilty pleas are obtained.⁶⁹

Milwaukee, Wisconsin District Attorney John Chisholm reports that his office's open-file discovery system has also engendered enhanced trust between prosecutors and defense lawyers.⁷⁰ Moreover, it has helped the relationship between defense lawyers and their clients because the lawyer is armed with much more information than in the past, thereby engaging in better client counseling.⁷¹ The result is more informed—and often quicker—guilty pleas.⁷²

C. Increased Social Science Reliance

Exoneration cases teach that we need to continue to incorporate lessons from the social sciences in training, supervision and all aspects of case processing.⁷³ An understanding of our cognitive biases—confirmation⁷⁴ and hindsight bias⁷⁵—is essential. Often termed “tunnel vision,” confirmation bias refers to the human tendency to focus upon facts that confirm our theory and to discount or ignore the facts that do not.⁷⁶ Often prosecutors tend to view a weakness in the case not as indicative that a person might be innocent, but rather as a failure of proof. What can be done to insure that the evidence is viewed critically? Prosecutor's offices must train and supervise to create a skeptical mindset for case evaluation. It is an obvious difficulty when the prosecutor, who must maintain that skeptical mindset, is the person working with the police officer who brought him the case. The police tell the prosecutor that they arrested the “right guy,” that he confessed and that there are four eyewitnesses. The officer, with whom the prosecutor has a good relationship, catalogues the evidence in the case. The impetus and instinct is to agree with the police, particularly when the prosecutor is overworked. Nevertheless, the prosecutor must critically check each and every fact brought by the police and then conduct an independent evaluation.⁷⁷

69. *Id.*

70. *Id.*; John Chisholm, Remarks at the Conference, New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works? (Nov. 16, 2009).

71. Interview with John Chisholm, Milwaukee County District Attorney, in Milwaukee, Wis. (Oct. 7, 2008).

72. See Andrew P. O'Brien, *Reconcilable Differences: The Supreme Court Should Allow the Marriage of Brady and Plea Bargaining*, 78 IND. L.J. 899, 911-17 (2003) (arguing that open-file discovery results in better-informed guilty pleas, with less likelihood of being appealed). As we move forward in our exploration of open file discovery we need to recognize necessary qualifications to protect witnesses and for other good cause. In these cases, withholding certain information or protective orders by courts maybe be the appropriate course of action.

73. Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 522-23 (2007).

74. Keith Findlay & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 309-16 (2006).

75. *Id.* at 317-22.

76. See *id.* at 292-93 (discussing the effects of “tunnel vision” in the criminal justice system and is defined as “that ‘compendium of common heuristics and logical fallacies,’ to which we are all susceptible, that lead actors in the criminal justice system to ‘focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt”).

77. Bias exists throughout the system. Defense lawyers exhibit their own cognitive biases. In our

Cognitive bias is of particular concern where prosecutors deal with cooperating witnesses—that is, a witness who obtains a benefit by working with the prosecution.⁷⁸ As a result of the “war on drugs,” our criminal justice systems rely upon cooperators to a greater extent than in the past. Cases that once were made by intensive police investigative work are now being made primarily through the use of “Johnny on the street,” who becomes a cooperative witness.⁷⁹ This creates a major problem for prosecutors. The cooperator is intent on pleasing the prosecutor in order to obtain the sought benefit. How does a prosecutor overcome the confirmation bias to know whether the cooperator is telling the truth?⁸⁰ Prosecutors often acknowledge the need for corroboration when using cooperating witnesses, but they do not necessarily require it. Instead, they place unwarranted trust in cooperators often leading to a lack of proper investigation.

Understanding hindsight bias is essential to adequately ensure critical evaluation of claims of innocence.⁸¹ Hindsight bias arises where a prosecutor reviews a claim of innocence for a person who was convicted.⁸² The guilty verdict serves to confirm the prosecutor’s initial bias; “I indicted the right person, and the jury agrees with me. Since the jury agrees with me, my goal here is to protect the conviction rather than investigate what I believe to be an unwarranted claim of post-conviction innocence.”⁸³ Units that review wrongful conviction claims within or independent of prosecutor’s offices need to establish systems to counteract the hindsight bias tendency. Independent evaluators—and typically not the prosecutor who tried the case—should review evidence of innocence.⁸⁴

D. Evaluation of the Review Procedures for Wrongful Conviction Claims

Each jurisdiction should evaluate its systems for examining claims of wrongful

inadequate defense system, most lawyers represent clients whom they know have done something wrong. The defense lawyer believes that the person is probably guilty. Claims of innocence often fall on the deaf ears of defense lawyers who fail to review the facts with a critical eye. *See id.* at 293 (claiming that even defense counsel is susceptible to the cyclical “feedback loop” that reinforces the defendant’s guilt at trial).

78. *Id.*

79. *See generally* ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 3* (New York University Press 2009) (stating that snitching, “like the criminal system itself, is rapidly expanding”).

80. I have previously explored prosecutors’ misplaced reliance upon cooperators in *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917 (1999) (concluding that “prosecutors’ reliance on inaccurate cooperator testimony is a problem within the criminal justice system that warrants further study and reform”). *See also generally* NATAPOFF, *supra* note 79 (criticizing the use of cooperative witnesses for its negative effects on the integrity of the criminal justice system).

81. *See* Findley & Scott, *supra* note 74, at 317-22 (discussing hindsight and outcome bias).

82. *See id.* at 318-19 (discussing the ways in which hindsight bias might “reinforce premature or unwarranted” focus on an innocent suspect).

83. *See* Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 *HOW. L.J.* 475, 491 (2006) (“It is difficult to admit mistakes, and certainly difficult for a prosecutor to accept that her actions have led to the conviction of an innocent person.”).

84. Bruce A. Green & Ellen Yaroshesky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 *OHIO ST. J. CRIM. L.* 467, 517 (2009).

conviction. Some prosecutors' offices have adopted important reforms. The office in Dallas, Texas, previously one of the jurisdictions with the highest number of exonerations,⁸⁵ created a Conviction Integrity Unit (Unit) upon the election of Craig Watkins as District Attorney.⁸⁶ The Unit reviewed more than 400 cases in which convicted defendants had requested DNA tests.⁸⁷ In most of those cases, courts denied DNA tests. The Unit reinvestigated those cases, resulting in a number of exonerations.⁸⁸

The Dallas Conviction Integrity Unit consists of newly hired lawyers who did not have a personal interest in protecting particular convictions.⁸⁹ These lawyers approach cases with a "critical eye" as to the underlying conviction.⁹⁰ Their attitude going forward was not that they had to protect a conviction, but rather that they had to get it right.⁹¹ This is relatively easier where DNA evidence exists, but it is more difficult to devise a standard of evaluation where there is no DNA evidence.

Where there is no DNA evidence but other evidence of innocence is presented, the Unit's standard for investigation is that there must be a reasonable possibility that the person is innocent.⁹² On the question of reasonableness, the benefit is given to the defendant. The standard to overturn the conviction is very high: clear and convincing evidence that the person is probably innocent.⁹³

All prosecutors' offices should develop obligations and systems to review claims of wrongful conviction. Last year, the ABA passed a new Rule, 3.8 (g) and (h), that imposes a post-conviction duty upon prosecutors when presented with evidence of innocence.⁹⁴ That Rule requires a prosecutor to investigate where that prosecutor "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense."⁹⁵ The evidence must be turned over to the defense and turned over to the court under certain

85. *Id.* at 494 (citing Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas*, WASH. POST, Mar. 5, 2007, at A4).

86. *Id.* (referring to the Dallas County District Attorney's Office, Conviction Integrity Unit, <http://www.dallasda.com/conviction-integrity.html> (last visited May 11, 2010)).

87. *Id.*

88. See Jennifer S. Forsythe & Leslie Eaton, *The Exonerator: The Dallas D.A. is Reviewing Old Cases, Freeing Prisoners—and Riling His Peers*, WALL ST. J., Nov. 15, 2008, at A1, available at <http://online.wsj.com/article/SB122669736692929339.html> (discussing District Attorney Watkins' request that the Innocence Project of Texas review all DNA requests, previously rejected or not).

89. See Green & Yaroshefsky, *supra* note 84, at 494-95 (stating that the staff members of the Unit were not employed by the DA's office at the time of the convictions).

90. *Id.* at 495 (citing Telephone Interview with Michael Ware, Director of the Conviction Integrity Unit (July 14, 2008) [hereinafter Ware Interview]).

91. See *id.* at n.174 ("We are not trying to prove things one way or the other. We have no axe to grind. We are searching for the 'factual historical truth.'" (quoting Ware Interview, *supra* note 90)).

92. *Id.* at 495.

93. See *id.* (citing *Ex parte* Thompson, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005) ("Under Texas law, the defendant must establish that, had the results of the investigation been available at the time of the trial or guilty plea, it would "unquestionably" establish his or her innocence.")).

94. See MODEL RULES OF PROF'L CONDUCT R. 3.8(g), (h) (2009), available at http://www.abanet.org/cpr/mrpc/rule_3_8.html (requiring prosecutors to disclose exculpatory evidence prior to or after conviction).

95. *Id.* at R. 3.8(g).

circumstances.⁹⁶ If, after the investigation, the prosecutor knows of clear and convincing evidence that the person did not commit the offense, then the prosecutor has a duty to seek to remedy the conviction.⁹⁷

The ABA's new Rule is an important step forward and is under consideration in a number of jurisdictions. Wisconsin has led the way. There, the District Attorneys spearheaded the adoption of 3.8 (g) and (h). Delaware, Tennessee, Connecticut, California and Louisiana are considering a version of the Rule. State bar associations should encourage promulgation of Rule 3.8 (g) and (h).⁹⁸

Several conferences in recent months, in addition to this program, have focused on the proper exercise of prosecutorial discretion. Hofstra and Cardozo Law Schools hosted multi-day conferences that focused upon the exercise of prosecutorial discretion.⁹⁹ Those conferences reviewed aspects of current systems of prosecution and made suggestions for systemic changes in training, supervision and management.¹⁰⁰

The Cardozo conference, drawing upon lessons from wrongful conviction cases, explored how to best encourage compliance with disclosure obligations.¹⁰¹ It examined lessons from medical and corporate systems to determine what the legal system could glean from such models.¹⁰² It explored approaches to improved systems for information management, training, oversight and systems of accountability.¹⁰³ Participants discussed best practices and how to encourage a

96. *See id.* at R. 3.8(g)(2) (requiring disclosure "if the conviction was obtained in the [discovering] prosecutor's jurisdiction").

97. *Id.* at R. 3.8(h).

98. *See, e.g., In re Petition for the Adoption of Amended Tennessee Rules of Professional Conduct at 11*, available at http://www.tba.org/ethics/amends_051309/2009_rules_petition.pdf (including, among its proposed amendments to the Tennessee rules, "new provisions . . . patterned upon ABA model language. (Rule 3.8(f), (g) and (h))"); STATE BAR OF CALIFORNIA, COMM'N FOR REVISION OF THE RULES OF PROF'L CONDUCT, Meeting Summary—Open Session at 7-8 (Feb. 29-30, 2008), available at http://www.calbar.ca.gov/calbar/pdfs/ethics/CRRPC/RRC_2008_2-29&3-1-08_FINAL_Open_Session_Summary.pdf (considering whether to add paragraphs (g) and (h)); *Comments Sought on New ABA Model Rules 3.8(g) and (h)*, LOUISIANA STATE BAR ASS'N, Mar. 11, 2009, available at <http://www.lsba.org/2007NewsResources/newsresources.asp?NewsID=347> (stating that "[t]he [LSBA Rules of Professional Conduct Committee] will be reviewing these new rules at its upcoming meetings").

99. Cardozo Law Review Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?* (Nov. 15-16, 2009), http://www.cardozolawreview.com/content/Nov_2009_Symposium.pdf [hereinafter Cardozo Symp.] (last visited May 11, 2010); Hofstra Legal Ethics Conference, *Power, Politics, and Public Service: The Legal Ethics of Lawyers in Government* (Oct. 18-20, 2009), http://law.hofstra.edu/pdf/NewsAndEvents/Conferences/EthicsConference/ethics_brochure.pdf [hereinafter Hofstra Conf.] (last visited May 11, 2010).

100. *See* Cardozo Symp., *supra* note 99, at 1 (describing the conference's purpose as an "in-depth examination of systemic causes and remedies"); Hofstra Conf., *supra* note 99, at 2 (quoting Professor Monroe H. Freedman as saying that the conference is "intended to produce real changes and solutions").

101. *See* Cardozo Symp., *supra* note 99, at 5 (describing a special discussion group devoted to "examin[ing] the differing disclosure obligations and practices in state and federal prosecutor's offices throughout the country").

102. *Id.* at 1.

103. Presentations given included "Information Management and Control in Policing;" "Lessons from Risk Management in Law Firms and Corporations;" and "Post Conviction Issues and Management Systems." *Id.* at 2-3.

commitment to those practices.

The medical system has useful lessons for prosecutors' offices. Faced with the need to minimize diagnostic errors, hospital risk-management systems shifted from a presumption of individual blame for errors toward the presumption that such errors were systemic problems.¹⁰⁴ Whenever there was a questionable death, the medical system created morbidity and mortality panels to forthrightly examine system failures that led to an avoidable death. As medical personnel came to understand that the goal was systemic improvement and not individual blame, they were encouraged to examine their errors and make suggestions for improvement. Such lessons can be incorporated into the criminal justice system.

V. A CALL TO ACTION

Our criminal justice system needs to learn from its mistakes. Peter Neufeld and Barry Scheck, co-founders of the Innocence Project, remark that after a plane crash, the airline industry establishes panels to determine the causes of such a crash and to suggest changes, but that when a person has spent significant time in prison or on death row and is subsequently exonerated, there is rarely a commission to examine causes of errors and to make suggestions for change.¹⁰⁵ It is time to implement systems to undertake such inquiry, and in so doing, move from individual blame to an understanding of systemic causes and remedies.

Prosecutors' offices need to rethink hiring and training models. Leadership is key to insuring that prosecutors comply with their duties, notably the duty of disclosure. But beyond leadership, prosecutors need initial and ongoing training and supervision to insure that they understand and comply with their legal and ethical duties. The Conviction Integrity Unit in Dallas, Texas learned that in many of the exonerations, the prosecution had failed to disclose exculpatory evidence.¹⁰⁶ That office enacted hiring policies to effect disclosure practices. It sends copies of *Brady v. Maryland*¹⁰⁷ and Texas cases that define the disclosure obligation to every prospective candidate. During the interview process, the cases and the candidate's approach to disclosure are explored. The Dallas prosecutor's office wants to ensure that it hires prosecutors that will perform their duties with integrity and adherence to the fair administration of law.

104. See Michelle M. Mello & David M. Studdert, *Deconstructing Negligence: The Role of Individual and System Factors in Causing Medical Injuries*, 96 GEO. L.J. 599, 600 (2008) (noting the shift from holding individuals liable for medical injuries to "emphasiz[ing] the role of 'system failures' in causing injuries").

105. Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 98 (2002). North Carolina established the first such Commission in the U.S. See The North Carolina Innocence Inquiry Commission (NCIIC), <http://www.innocencecommission-nc.gov/ABOUTUS.htm> (last visited Feb. 12, 2010); Green & Yaroshefsky, *supra* note 84, at 492-93 (describing the operation and process of NCIIC).

106. See Dennis A. Rendleman, *Two Faces of Criminal Prosecution: Harvey Dent, Mike Nifong, Craig Watkins*, 9 J. INST. JUSTICE & INT'L STUDIES 171, 174-75 (2009) (noting the old mentality in Dallas County of "conviction at any cost" and the failure of police and prosecutors to use reliable evidence that would lead to exoneration).

107. 373 U.S. 83 (1963).

Prosecutorial training needs to include lessons from social science. Cognitive bias training is essential and needs to be developed creatively, perhaps in simulations, so that lawyers can experience the effect of their own cognitive biases. Moreover, training should focus upon skills beyond the rational decision making process that is the staple of legal education. For years, clinical educators at law schools have highlighted the need to train lawyers in the “10 fundamental lawyering skills,” of which legal analysis and reasoning is only one.¹⁰⁸ Within these necessary skill sets, it is important to focus upon relational aspects and the emotional factors that drive decision making. In other words, a significant body of work demonstrates that decision making is based only in part upon rationality.¹⁰⁹ We need to understand the role of other factors that affect our perceptions, choices, and decisions. Alternative dispute resolution trainings undertake this mission. It would be useful to incorporate these trainings and introduce concepts such as training for “emotional intelligence” in all law schools and lawyers’ offices.¹¹⁰

We might also begin exploring a credentialing system for prosecutors. Lawyers would be second-seated at each stage of a case and certified that they are prepared to handle that stage before moving onto the next phase. In the area of supervision, random auditing procedures could be implemented. Lawyers could be required to maintain checklists in a file for each required task and procedure in a case. Random audits may be a particularly useful tool to insure compliance with disclosure obligations.

We need to begin looking at the culture in our systems. What is being rewarded? Do we only reward the prosecutors who obtain the most convictions? If our systems are equally concerned with avoiding wrongful convictions, we should also reward the prosecutors who carefully look at a case and decline to prosecute. Other aspects of the existence and promotion of institutional culture are worthy of examination.¹¹¹

108. These lawyering skills are derived from task force recommendations known as the MacCrata Report. These skills are: problem solving; legal analysis and reasoning; legal research; factual investigation; oral and written communication; counseling; negotiation; litigation and alternative dispute resolution procedures; organization and management of legal work; recognizing and resolving ethical dilemmas. A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, (1992), excerpts available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

109. See generally Paul Brest & Linda Hamilton Krieger, *The Phyllis W. Beck Chair in Law Symposium: New Roles, No Rules? Redefining Lawyers’ Work Article—New Roles: Problem Solving*, 72 TEMP. L. REV. 811 (1999) (analyzing two different decision making models—one rationally based on steps and the other an intuitive reaction—and concluding that real-world decision making includes both models); HOWARD GARDNER, SEVEN INTELLIGENCES 3-11 (Basic Books 1993) (1983) (stating that multiple intelligences exist, and identifying seven of them).

110. See GARDNER, *supra* note 109, at 331-66 (analyzing the education of intelligences); DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 381-85 (Bantam Books 2005) (1995) (noting the importance of emotional literacy); Leonard Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1, 1-66 (2002) (analyzing mindful mediation and its application and instruction in law schools and law offices).

111. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960-64, 1016 (2009) (outlining all aspects of the institutional culture that affect conviction statistics and concluding that institutional design of prosecutor offices deserves more focus).

There are a range of thoughtful suggestions for improved procedures and accountability in prosecutors' offices including those for external and internal regulation.¹¹² These include an emphasis on consequences for intentional violations of ethical and legal obligations. The New York State Bar Association's Task Force on Wrongful Convictions, a group of esteemed jurists, prosecutors, and defense lawyers, recommended that there should be a presumption that a prosecutor will be fired if he is found to have intentionally violated his disclosure obligation.¹¹³ This is far from the norm. Internal regulation is perhaps the key component to avoid wrongful convictions. Other professions and institutions face some form of civil liability, a factor which often causes systemic changes.¹¹⁴ Prosecutors do not face the threat of civil liability except in limited and rare circumstances. As such they have a need for even greater internal regulation.

External regulation by judges and disciplinary committees merits serious consideration. In most jurisdictions, judges must report lawyers who have engaged in misconduct to disciplinary committees.¹¹⁵ The California Commission of the Fair Administration of Justice conducted a study of wrongful convictions and found that judges, although required to do so, do not report misconduct.¹¹⁶ This appears to be true in many jurisdictions and warrants attention. Additionally, judges can impose sanctions or otherwise admonish prosecutors whose conduct violates ethical and legal standards.¹¹⁷ Prosecutors who engage in intentional violations that distort and unfairly take advantage of their discretion need to face more serious consequences. Judges can and should impose consequences.

With increased and significant attention focused on the exercise of discretion, prosecutors often feel under attack. Most prosecutors are ethical, honorable public servants. They do not engage in misconduct. Nor do they feel powerful. While acknowledging that systemically, the prosecutor is the most powerful person in the system, individual prosecutors do not feel all that powerful. They are overworked with ever-burgeoning caseloads.¹¹⁸ Individual prosecutors do not have the power or

112. See Cardozo Symp., *supra* note 99 (giving an overview of the symposium presentations on external and internal regulations used to improve procedures and accountability in prosecutor offices).

113. FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS (2009), available at <http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/FinalWrongfulConvictionsReport.pdf>.

114. See, e.g., Mello & Studdert, *supra* note 104 (noting some of the consequences of medical malpractice and negligence).

115. See, e.g., CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE: FINAL REPORT 70-71 (Gerald Uelman & Chris Boscia eds., 2008), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> (noting California's reporting requirement).

116. *Id.* at 70-71, 73.

117. See, e.g., *U.S. v. Jones*, 620 F. Supp. 2d 163, 165-66 (D. Mass. 2009) (discussing the history of persistent problems in the government's compliance with discovery obligations and ordering the government to show why sanctions should not be imposed for their "egregious failure . . . to disclose plainly material exculpatory evidence . . ." and further stating that "the court does intend to institute criminal contempt proceedings in future cases if there is good reason to be concerned that discovery orders have been intentionally violated").

118. See Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1524 (2009) (noting that prosecutors are overworked, which might cause judges to be sympathetic).

the resources to accomplish their desires or goals in individual cases. They are underpaid compared to their colleagues in the private sector.¹¹⁹ This disjunction between the systemic power of the prosecution and the individual perception needs to be acknowledged as suggestions are offered to enhance a justice mission for prosecutors in the exercise of their discretion. That said, prosecutors must lead the way and proactively implement changes in our case processing systems so that our systems reach a small measure of their potential and promise. If we examine causes for our previous mistakes and learn from other disciplines, we can begin to implement the changes necessary to ensure that justice is a meaningful term.

119. See Major Maritza S. Ryan, *The Betrayed Profession: Lawyering at the End of the Twentieth Century*, 145 *MIL. L. REV.* 179, 181 (1994) (noting that prosecutors are underpaid while private defense attorneys earn many times more than the judges they argue before).

