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WRONGFUL CONVICTIONS: IT IS TIME TO TAKE PROSECUTION DISCIPLINE SERIOUSLY

Ellen Yaroshefsky*

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

1908 Canons of Ethics**

INTRODUCTION

Ron Williamson, who came within five days of execution, and Dennis Fritz, who served twelve years of a life sentence, were released from prison in 1999. They were innocent men, wrongfully convicted of the rape and murder of Debra Carter. Arrested five years after her murder and tried separately, the cases against them rested on testimony of a jailhouse informant, a jail trainee, and unreliable hair evidence. Fortunately, there was DNA evidence in the case, and scientific testing exonerated Fritz and Williamson. The evidence instead implicated Glen Gore, the person who should have been the prime suspect. Many of these facts came to light only when Fritz and Williamson filed a civil rights action after Williamson's conviction for murder was overturned (primarily on grounds of ineffective assistance of counsel).2

During the course of discovery, the scope of police and prosecutorial misconduct was exposed. In addition to egregious use of fabricated testimony from the informants, the case was permeated with police and prosecutorial suppression of exculpatory evidence. The prosecutor failed to disclose to the defense a two-hour videotaped statement in which Williamson denied the murder and never wa-

* Clinical Professor of Law and Director of the Jacob Burns Ethics Center, Benjamin N. Cardozo School of Law. The author appreciates the contributions of the Hon. Joel Blumenfeld, Hon. James G. Carr, Peter Neufeld, Barry Scheck, Abbe Smith, and Larry Vogelman, and the research assistance of Sarah Tofte of the Innocence Project, and Andrew Anissi, a student at Cardozo Law School. It is a privilege to participate in a colloquium honoring Monroe Freedman and Abbe Smith for their significant book Understanding Lawyers' Ethics. Thanks to the Dean of the University of the District of Columbia David A. Clarke School of Law, Katherine S. “Shelley” Broderick, for organizing the colloquium and encouraging this contribution as part of that program.

** Canon 5, “The Defense or Prosecution of Those Accused of Crime.”


The confession of Glen Gore, the murderer, was never disclosed. Gore’s false statement the day after the homicide was suppressed and “redone.” Statements from the victim’s friend implicating Gore were suppressed, as were other plainly material and exculpatory statements from more than twenty other witnesses. Ultimately the civil case settled.3

Neither the exoneration nor the civil settlement resulted in scrutiny of the prosecutor’s behavior. No disciplinary action was taken against him. No court sanctioned the misconduct or referred him to a disciplinary committee. No internal investigation was undertaken by the prosecutor’s office.

While the misconduct in the Fritz and Williamson cases is particularly egregious, and involves both the police and the prosecutor, the lack of accountability for such misconduct is typical and cannot be blamed upon a lack of enforceable standards governing the behavior of prosecutors.4 Beginning in 1969, all states adopted rules of conduct for lawyers and a lawyer who violates them is subject to sanctions before the disciplinary committee within her jurisdiction.5 The vast majority of the reported decisions of lawyer discipline are, however, cases involving solo practitioners or those in small firms.6 Few public prosecutors are brought before disciplinary committees. The reason for this is not the paucity of ethical lapses that should subject prosecutors to sanctions. Bennett Gershman, in his comprehensive treatise, Prosecutorial Misconduct, documents hundreds of reported cases in which the misconduct of prosecutors could and should have subjected the offending lawyer to discipline. With few exceptions, it does not happen. Even in the handful of cases where prosecutors are disciplined, the “imposition of a ‘slap on the wrist’ even for egregious misconduct demonstrates a disciplinary double standard.”7 Scholars and other commentators agree that dis-

3 Fritz Civ. No. 00-194, see supra note 1.
4 The decision in Banks v. Dretke, 540 U.S. 668 (2004) reversing a death sentence because the Texas prosecutor concealed significant exculpatory and impeaching evidence is a recent instance of violation of prosecutorial ethical standards. See also Jeffrey Tooner, Killer Instincts, NEW YORKER, Jan. 17, 2005, at 54.
5 All states have versions of the Model Code of Professional Responsibility, the Model Rules of Professional Conduct or similar provisions. Throughout this essay, I refer to the provisions governing the conduct of lawyers as “rules.”
6 Most of these disciplinary cases were sanctions for misuse of client funds and neglect of cases. See, e.g., ABA Special Commission on Evaluation of Disciplinary Enforcement Problems and Recommendations in Disciplinary Enforcement 41 (Prelim. Draft, Jan. 15, 1970); Fred C. Zacharias, The Future Structure and Regulation of Law Practice, 44 ARIZ. L. REV. 829, 872 (2002) (conclusions on regulation of lawyers) [hereinafter Zacharias, Future Structure].
7 BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT, § 14.1, n.5 (2d ed. 2001) (hundreds of cases of flagrant misconduct, none of which resulted in punishment) [hereinafter GERSHMAN, PROSECUTORIAL MISCONDUCT]. The Center for Public Integrity, an organization of investigative journalists, found that, since 1970, prosecutorial misconduct was a factor in 2,012 cases, causing courts to dismiss charges at trial, reverse convictions or reduce sentences. In 513 additional cases, appellate courts found prosecutorial misconduct sufficiently serious to merit reversal or, at least, additional discussion. In thousands of other cases, the appellate courts found the prosecutor’s actions to be
cipline for prosecutors is rare and that there are few, if any, consequences for prosecutorial misconduct. In contrast to discipline for private lawyers, we have hardly moved beyond the 1908 aspirational standard to a regulatory disciplinary model for the errant prosecutor.

Despite some minimal attention to ethics provisions for prosecutors, few bar associations engage in serious discussion of changes to ethics rules governing the behavior of prosecutors. While all courts, prosecutors, and defenders would certainly agree that it is “highly reprehensible” to suppress facts or secrete evidence “capable of establishing the innocence of the accused,” when that happens, the disciplinary consequence is often nil. Aside from increasingly louder complaints from the defense bar, there appears to be an implicit agreement that, absent rare circumstances, offending prosecutors should not be subject to sanctions before disciplinary committees. The work of scholars who have studied the issue and offered useful ideas has been met with little response.


9 The profession’s “longstanding failure to address problems in the disciplinary process” is not confined to sanctioning prosecutors, but is problematic for the conduct of all lawyers. See Deborah Rhode, In the Interests of Justice, 160-61 (2000) [hereinafter Rhode, Justice].

10 For that matter, the bar associations do not engage in the discussion of discipline for defense lawyers whose version of zealous advocacy is a “walking violation of the 6th Amendment.” Vanessa Merton, What Do You Do When You Meet a “Walking Violation of the Sixth Amendment” if You’re Trying to Put That Lawyer’s Client in Jail, 69 Fordham L. Rev. 997 (2000). The pervasive issue of lack of accountability for ineffective assistance of counsel is beyond the scope of this essay and merits significant attention.

11 Green, Policing, supra note 8; Lyn M. Morton, Seeking the Elusive Remedy for Prosecutorial Misconduct, Suppression, Dismissal, or Discipline?, 7 Geo. J. Legal Ethics 1083, 1086 (1994) [hereinafter Morton, Seeking]; Rosen, supra note 8; Walter W. Steele Jr., Unethical Prosecutors and Inadequate Discipline, 38 S.W. L.J. 965, 966-67 (1984); Zacharias, Professional Discipline, supra note 8. See Justice, supra note 9 (arguing for reforms of disciplinary systems to regulate the behavior of all lawyers).
In this essay I will argue that wrongful conviction cases demonstrate a serious need to reconsider disciplinary systems as a measure of prosecutorial accountability. I examine the current system of prosecutorial regulation and its rationale. I conclude that it is necessary to establish an independent commission to examine wrongful cases, and to promulgate, implement and enforce disciplinary rules for prosecutors.

I. Wrongful Convictions

In the past twelve years, groundbreaking work in the use of post-conviction DNA testing to exonerate the wrongfully convicted has challenged the belief that our criminal justice system functions effectively. These miscarriages of justice—often involving defendants convicted of capital offenses—have compelled an examination of the causes of the conviction of innocent people. All too often prosecutorial misconduct is one of primary reasons for these breakdowns in the adversary system.

The Innocence Project\textsuperscript{12} reports that of the first seventy-four exonerations, prosecutorial misconduct was a “factor” in forty-five percent of those cases. The vast majority of those instances were cases of destruction or suppression of exculpatory evidence. In some of those cases, prosecutors concluded that the evidence was just not important; in others, and more egregiously, “a team of police and prosecutors were so convinced of their righteousness that they were willing to do anything to get their man.”\textsuperscript{13}

The prosecutorial misconduct in those cases cannot be readily excused as mistakes or errors of judgment. In the vast majority of cases, the misconduct was deemed to be grossly negligent or intentional.\textsuperscript{14} Few of those prosecutors were disciplined, either internally or through the state disciplinary system. And, while there has yet to be a systematic analysis of the now 140 exonerations by category and severity of error, the existent analyses confirm that prosecutors have rarely been held accountable for their behavior.\textsuperscript{15} With rare exception, there has been

\textsuperscript{12} The Innocence Project of the Benjamin N. Cardozo School of Law was begun by Barry C. Scheck and Peter Neufeld in 1992. It has now expanded into a national innocence network. See www.innocenceproject.org.

\textsuperscript{13} BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE 226-27 (2001) (discussing the notorious Chicago Rolando Cruz wrongful conviction) [hereinafter ACTUAL INNOCENCE].

\textsuperscript{14} Id. at 222. ACTUAL INNOCENCE details cases where courts, despite misconduct, upheld the convictions of people later proved to be innocent because of the harmless error doctrine. The hurdle of “harmless error” is the myth that the “criminal justice system tells itself” in order to “absolve police officers and prosecutors of misconduct.” Scheck and Neufeld examined the case files of each of the exonerations and concluded that suppression of exculpatory evidence was the primary factor that led to the conviction in a “not insubstantial” number of cases. Conversation with Barry Scheck, Innocence Project co-director, in N.Y., N.Y. (Dec. 29, 2003) [hereinafter Scheck Conversation].

\textsuperscript{15} ACTUAL INNOCENCE, supra note 13. One exception is the prosecutor in the Chicago Rolando Cruz case where three prosecutors and four sheriff's office investigators were indicted for perjury and
no discipline for egregious instances of misconduct that led to these convictions. The recent exoneration of Darryl Hunt in North Carolina is yet another case of a wrongful conviction based upon "use of unreliable witnesses, the illegal withholding of exculpatory material . . . and the refusal to acknowledge clear evidence of innocence." Those prosecutors have yet to make a motion to vacate his murder conviction or take responsibility for official misconduct.

Nor are prosecutors held accountable in death penalty cases where the defendant is either found to be innocent or otherwise wrongfully convicted. A groundbreaking national study of death penalty verdicts concluded that "serious reversible error . . . permeates America's death penalty system. Sixty-eight percent of all death verdicts imposed and fully reviewed during the 1973-1995 study period were reversed by courts due to serious error." In that study, prosecutorial misconduct, primarily the suppression of evidence, accounted for the second highest incidence of serious error. The evidence suppressed in those cases established either the innocence of the defendant or the fact that he did "not deserve the death penalty." There is little data on the discipline of any of those prosecutors.

A glaring example of the hands-off approach to prosecutorial misconduct is the wrongful rape and murder conviction of Alfred Brian Mitchell wherein crucial notes from the Federal Bureau of Investigation (FBI) laboratory's DNA unit for testing were suppressed at trial. These notes suggested that the FBI's tests cleared Mitchell of committing rape, either before or after murdering the victim.

obstruction of justice. The case against two of the prosecutors was dismissed at the end of the state's case. The other prosecutor was acquitted. There is no record of discipline of those prosecutors. Id. at 232.


18 "Serious error" is error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial. The most common errors are (1) egregiously incompetent defense lawyering (accounting for 37% of the state post-conviction reversals) and (2) prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty (accounting for another 16%-19%, when all forms of law enforcement misconduct are considered). See ACTUAL INNOCENCE, supra note 13. "As is true of other violations, these two count as 'serious' and warrant reversal only when there is a reasonable probability that, but for the responsible actor's miscues, the outcome of the trial would have been different." James S. Liebman & Jeffrey Fagan, A Broken System: Error Rates in Capital Cases, 1973-1995, available at http://www2.law.columbia.edu/instructional/services/liebman/.

19 This study confirms the data from the 1987 study by Professors Bedau and Radelet that identified 350 cases in which defendants were wrongfully convicted of capital or potentially capital crimes. In fifty of those cases, the cause for the erroneous conviction was "prosecution error." In thirty-five of those cases exculpatory evidence had been suppressed. In the remaining fifteen cases the cause was "other overzealous prosecution." Hugo Adam Bedeau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L. REV. 21, 57 (Table 6) (1987).
Moreover, FBI Special Agent Gilchrist presented false testimony at the trial. In reversing the death penalty, the Tenth Circuit commented not only on Agent Gilchrist, but also on the trial prosecutor:

Gilchrist . . . provided the jury with evidence implicating Mr. Mitchell in the sexual assault of the victim which she knew was rendered false . . . by evidence withheld from the defense. Compounding this improper conduct was that of the prosecutor, whom the [federal] district court found had “labored extensively at trial to obscure the true DNA test results and to highlight Gilchrist’s test results,” and whose characterization of the FBI report in his closing argument was “entirely unsupported by evidence and . . . misleading.”

In addition to the exoneration cases, other studies confirm the longstanding phenomenon of lack of any consequences for prosecutors who engage in misconduct. The Center for Public Integrity, in an analysis of prosecutorial misconduct, studied post-1970 appellate decisions in each state. Its New York study revealed 1,283 state cases in which defendants alleged prosecutorial error or misconduct. In 277 cases, judges ruled that a prosecutor’s conduct prejudiced the defendant and reversed or remanded the conviction or dismissed the indictment. In forty-four other cases, a dissenting judge or judges thought the prosecutor’s conduct prejudiced the defendant. Out of all the defendants who alleged misconduct, ten later proved their innocence. There is no indication that any prosecutor in those cases was subject to discipline.

The recent civil rights lawsuit stemming from Alberto Ramos’ wrongful conviction is perhaps the most revealing instance of flaws in the system of prosecutorial accountability. In 1985, Ramos, a college student working as a teachers’ aide at a Bronx day care center, was convicted of the rape of a five-year-old girl. He served seven years in prison, suffering physical, sexual and psy-

20 Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001); ACTUAL INNOCENCE, supra note 13, at 226. The legal affairs writer for the Chicago Tribune, Ken Armstrong, studied 381 murder convictions that were reversed because of police or prosecutorial misconduct since 1963 and found that “not one of the prosecutors who broke the law in these most serious charges was ever convicted or disbarred. Most of the time they were not even disciplined.” Id.

21 Steve Weinberg, Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct, at www.publicintegrity.org. The study does not state whether any of the prosecutors were referred to disciplinary committees. There is no record of such action.

Of the cases in which judges ruled that a prosecutor’s conduct prejudiced the defendant, 196 involved courtroom behavior such as improper arguments and examination, thirty-nine involved the prosecution’s withholding evidence from the defense, twenty-three involved misconduct in grand jury proceedings, six involved harassment of the defendant, three involved the use of perjured testimony, four involved discrimination in jury selection, and two involved vindictive prosecution. The Center for Public Integrity also studied forty-four reported attorney disciplinary cases in various states in which prosecutors appeared before disciplinary committees. In the handful of cases where prosecutors were disciplined for suppressing exculpatory evidence, the discipline was only a public censure.
chological abuse. Through his diligence and that of his counsel, the conviction was set aside because critical exculpatory information was never provided to the defense. This evidence included day care center and Human Resources Administration records (1) documenting the child's sexually provocative behavior which fully explained the behavioral and medical evidence relied upon by the prosecution's expert in concluding that there was abuse, (2) containing the child's statements exonerating Ramos or inconsistent with his guilt, and (3) showing that a key prosecution witness, contrary to her testimony, was not even present to have observed the child's emotional state after the alleged incident.22

In the subsequent civil rights case, the court, acknowledging that prosecutors must be insulated against discipline for "good faith, if mistaken, prosecution," concluded that "diligence [had] gone ... far astray ... in the present case."23 The court named the prosecutor,24 and excoriated her for failure to provide exculpatory statements to the defense25 and for arguing false information to the jury.26 There is no record of any discipline within the District Attorney's office. The disciplinary committee closed an investigation after interviewing the prosecutor under oath in a secret proceeding.27 During the course of discovery, the city produced the most detailed information to date regarding failure to discipline prosecutors for misconduct. Ramos' attorney obtained information about each of the seventy-two reported cases from 1975-1996 (spanning the tenure of two District Attorneys) where Bronx courts had cited prosecutors for several categories of misconduct: withholding of exculpatory evidence (eighteen cases resulting in set aside or overturning of convictions), or presenting false or misleading evidence or argument to the court (fifty-four cases combined). The records, including the personnel records, demonstrated that only one prosecutor was disciplined.

23 Id.
24 This is unusual. See GERSHMAN, PROSECUTORIAL MISCONDUCT, supra note 7.
25 In Brady v. Maryland, 373 U.S. 83, 87 (1963) the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." The opinion in Ramos 2001 highlights a problem common to Brady violations: the prosecutorial determination of what items are "exculpatory." District Attorney Diana Farrell concluded that information that the child was actually sexually knowledgeable prior to the alleged molestation would not exonerate the suspect and hence was not Brady material. Ramos 2001, supra note 22, at 684.
26 Justice Collins, who set aside the conviction, did not "suggest that the District Attorney deliberately and consciously withheld documents but that ... the handling of the matter was cavalier and haphazard." Such allegations would subject a private lawyer to disciplinary sanctions. The People of the State of New York v. Alberto Ramos, No. 3280/84, slip op. at 8 (N.Y. Sup. Ct., June 1, 1992), aff'd, 201 A.D.2d 78 (N.Y.1994), 614 N.Y.S.2d 977 (1994).
27 The Disciplinary Committee contacted the Bronx District Attorney's Office about initiating proceedings against Farrell. Staff counsel for the disciplinary committee interviewed Farrell under oath in a secret proceeding and closed the investigation without affording Ramos or his counsel any notice or opportunity to be heard. Interview with Joel Rudin, plaintiff's counsel, in N.Y., N.Y. (Dec. 22, 2003).
In 1978, that prosecutor, who had been named by courts in four cases for misconduct, was suspended for four weeks and lost two weeks’ pay. Immediately after he returned to the office, he was granted a bonus, followed by a series of merit increases during the pendency of his case before the disciplinary committee. Moreover, the District Attorney sent a letter to the disciplinary committee requesting that he not be disciplined. Ultimately, there was no record of discipline and no other action appears to have been taken against him. Another prosecutor cited for misconduct by the Bronx courts also received merit and other bonuses after a number of appellate courts criticized his behavior and mentioned him by name. There is no record that he was ever disciplined. When this information was reported in the press, “officials in the Bronx district attorney’s office said that the citings were not conclusive evidence that the misconduct occurred willfully, or that a pattern existed, given the high volume of felony cases tried in the 21 year period . . . .” This comment reflects a failure of the district attorney’s office to take responsibility for prosecutorial practices that lead to wrongful convictions. The Ramos case is a glaring example that internal controls to which disciplinary committees defer are ineffective. The instances of prosecutorial misconduct in these cases cannot be dismissed as simple mistakes or errors of judgment. Instead, the cases reflect the gross negligence or intentional acts of prosecutors, motivated apparently by a mistaken view of pursuing justice, which lead to conviction of men they believe to be guilty. Such cases require an examination of previous tolerance of “overzealous advocacy.” After all, some people presumed innocent actually are innocent and, but for egregious systemic errors, would not be prosecuted, or would be found not guilty. If disciplinary authorities severely punish lawyers who steal money from clients, it behooves our justice system to at least consider discipline of lawyers

29 Interview, Joel Rudin, supra note 27.
30 Id.
32 Milton Lantigua is yet another person wrongfully convicted in the Bronx, New York. The state appeals court reversed the conviction because the prosecutor failed to correct perjured testimony of its chief witness and failed to disclose the existence of a potential second witness favorable to the defense, an action the court found to be “especially egregious.” People v. Lantigua, 228 A.D.2d 213, 221, 643 N.Y.S. 2d 963 (1996). Once again, there has been little prosecutorial accountability. Andrea Elliott & Benjamin Weiser, When Prosecutors Err, Others Pay the Price, NY TIMES, Mar. 21, 2004, at 25.
33 It also suggests that the standards for which prosecutors are subject to discipline need review. Gross negligence subjects private lawyers to discipline. Particularly where it has been demonstrated that such gross negligence has resulted in wrongful convictions, individual prosecutors and their offices should be subject to sanctions for actions that might not be intentional, but are nevertheless a serious breach of responsibility.
who, intentionally or through gross negligence, steal years of a person’s life and distort our justice system.\footnote{Wrongful conviction cases raise significant questions about the need to revise the disciplinary standards for prosecutors. Prominent among these questions is whether to hold prosecutors accountable if they should have known about the police misconduct, the behavior of perjured witnesses, false scientific evidence, or exculpatory evidence. The 1996 Department of Justice study \textit{Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial} 15 (1996) reported government malfeasance or misconduct in eight of the then twenty-eight exonerations. While that study did not make a finding that there was prosecutorial misconduct in those cases, the allegations of perjured testimony, withholding of exculpatory evidence, and submission of intentionally erroneous laboratory reports ought to be sufficient to at least question the role of the prosecutor in the case.}

\textit{Ramos} raises other questions, including (1) what is the ethical duty of a prosecutor who comes to believe that an innocent person is in prison but strict \textit{habeas corpus} law prevents review of the case; (2) whether it is ethical for a prosecutor to contest a defendant’s attempt to secure DNA testing when there is an allegation of innocence; and (3) whether it is ethical to appeal a conviction when the prosecution has reliable evidence of innocence.\footnote{\textit{Ramos} 2001, \textit{supra} note 22.} The failure of internal discipline for prosecutorial misconduct raises the issue of finding alternative means of deterrence and discipline.

\section*{II. Achieving Accountability for Prosecutorial Misconduct}

How can we achieve some measure of accountability for such misconduct and deter similar behavior in the future?

First, of course, is to recognize that action must be taken. Until exonerations became widely known throughout the popular media, few prosecutors, police agencies, courts or legislatures were willing to examine the causes of wrongful convictions. Now, these cases have transformed the debate about reforms in the criminal justice system. They have led to reexamination of the frequency and cause of mistaken eyewitness identification—the single most common cause of conviction of the innocent.\footnote{Mistaken eyewitness identification was a factor in eighty-one percent of wrongful conviction cases. \textit{Actual Innocence}, \textit{supra} note 13, at 361.} As a result of two decades of comprehensive social science research, certain systemic reforms in the conduct of identification procedures are being accepted by courts and law enforcement authorities.\footnote{\textit{National Institute of Justice, Eyewitness Evidence: A Guide for Law Enforcement} (1999); see also \textit{National Institute of Justice, Eyewitness Evidence: A Trainer's Manual for Law Enforcement} (2003).} Moreover, a method of conducting photographic arrays and lineups known as “sequential presentation with blinded examiners” is being implemented by the state of New Jersey and a number of cities. This method was recently recommended by an
innocence commission in North Carolina chaired by the Chief Justice of the North Carolina Supreme Court.\(^3\)

Second, is to address the problem of false confessions, a factor in twenty-two percent of post-conviction DNA exonerations, by measures such as videotaping of precinct interrogations.\(^3\)\(^9\) Recently Illinois adopted this reform in response to its crisis of wrongful convictions.\(^4\) That crisis caused Governor Ryan to declare a moratorium on capital punishment and to issue clemency to 169 people on death row.\(^4\) In Florida, the Sheriff’s Office of Broward County has also begun using cameras in interrogation rooms.\(^4\)\(^2\)

Third, post conviction DNA exonerations have generated an epidemic of scandals involving fraud and junk forensic science. Efforts to remedy this problem have produced a series of audits and investigations.\(^4\)\(^3\)

Fourth, suggested reforms for problems of false testimony by jailhouse informants and other cooperating witnesses were the subject of a symposium, and are under discussion.\(^4\)\(^4\) These include detailed recommendations from the Canadian Morin Commission, a thorough wrongful conviction inquiry, which examined the problems with the use of jailhouse informants in criminal cases.\(^4\)\(^5\)

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\(^1\) Criminal Justice Reform Act, Ill. SB 15 (2003).

\(^2\) Maurice Possley & Steve Smith, Clemency for All, CHICAGO TRIBUNE, Jan. 12, 2003, at 1.

\(^3\) Paula McMahon, Hidden Cameras Earn Rave Reviews in Interrogations, South Florida SUN-SENTINEL, Dec. 7, 2003, at 1B.


\(^5\) Steven Skurka, Canada: A Canadian Perspective on the Role of Cooperators and Informants, Symposium, supra note 44, at 759; see Hon. Fred Kaufman, The Commission on Proceedings
Finally, following the public inquiry model in Canada and the criminal case review commission in England, states have begun to create "innocence commissions" specifically designed to determine what factors led to guilty verdicts in the wrongful conviction cases and to implement reforms based on those lessons.

All of these reforms and proposals, even if fully implemented (and funded where necessary) still would not remedy prosecutorial misconduct. While the focus of this essay is on prosecutorial misconduct, it must be pointed out that "bad lawyering" was a factor in 32% of wrongful conviction cases. Another reason for wrongful conviction is police misconduct (a factor in 50% of cases). Any commission established to examine prosecutorial misconduct should necessarily examine the oversight of police agencies by prosecutors' offices.

No institution or entity has yet established a system to examine the large percentage of wrongful convictions due to prosecutorial misconduct and to attempt to make recommendations to deter such misconduct. These wrongful convictions have placed the spotlight on the need for a frank, public assessment of accountability systems for prosecutors, including the role of the state disciplinary systems. In such discussion, it should be apparent that the 140 exonerations studied by the Innocence Project are merely the tip of the iceberg. These cases are ones where DNA existed and was preserved, and where there were lawyers who undertook litigation on behalf of that prisoner. The Innocence Project reports that more than half of the cases they accepted had to be closed because evidence had been lost or destroyed. Moreover, these data suggest that there are thousands of cases of wrongfully convicted people who cannot prove their innocence because their cases did not involve DNA.

At the very least, there should be an investigation of each instance of documented misconduct. In other institutions where a serious instance of misconduct


46 Barry Scheck & Peter Neufeld, Toward the Formation of 'Innocence Commissions' in America, 86 Judicature 98 (2002) [hereinafter Innocence Commissions].


48 North Carolina, supra note 38. Among the reasons for intractability of a remedy for such misconduct is that courts are unlikely to change the law that insulates prosecutorial misconduct from accountability: immunity doctrines and harmless error analysis. Gershman, Prosecutorial Misconduct, supra note 7.

49 Scheck Conversation, supra note 14.

50 See Actual Innocence, supra note 13, at 361; Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Col. L. Rev. 749 (2003) (exploring dynamics between prosecutors and agents).

51 Scheck Conversation, supra note 14.

is discovered that threatens life, health, or public welfare, an audit is conducted to
determine whether that person engaged in similar misconduct in other cases. The
audit includes examination of the supervisors, trainers and protocols. This is
done to discover the weaknesses in the system and to take remedial action.\(^5\)

Neither courts, prosecutors’ offices, nor any government agency has under-
taken such an investigation in wrongful conviction cases based upon prosecutorial
error or misconduct. As for the organized bar’s regulation of prosecutors, “effect-
disciplinary action is an illusion.”\(^5\)

**III. Ethics Rules Governing Prosecutors**

It is not that the ethics rules are bereft of disciplinary standards for prosecu-
tors. While recognizing the unique role and responsibilities of prosecutors, the
ethics rules of all jurisdictions claim the authority to regulate their
behavior.\(^5\) Most jurisdictions have adopted a version of Model Rule 3.8 titled “Special Re-
sponsibilities of a Prosecutor.”\(^5\) First adopted in 1983, this rule primarily re-

\(^5\) Carlisle, Comment: the FAA v. the NTSB: Now that Congress Has Addressed the Federal
Aviation Administration’s “Dual Mandate,” Has the FAA Begun Living Up to Its Amended Purpose
of Making Air Travel Safe, or Is the National Transportation Safety Board Still Doing Its Job Alone, 66
AIR L. & COM. 741, 757 (2001); see Innocence Commissions, supra note 46, at 98, 102-103.

\(^5\) GERSHMAN, PROSECUTORIAL MISCONDUCT, supra note 7, at § 1.8(d); but see Green, Polic-
ing, supra note 8 (arguing that criticisms of failure to discipline prosecutors overlook the importance
of informal judicial and professional regulatory controls).

\(^5\) Most ethics rules do not apply to prosecutors (e.g., advertising, fees, solicitation). Rules that
apply uniquely to prosecutors hold them to a higher standard than private lawyers. See Green &
Zacharias, supra note 8.


\(^5\) See Bruce A. Green, Symposium: Ethics 2000 and Beyond: Reform or Professional Responsi-
bility As Usual?: Prosecutorial Ethics as Usual, 2003 U. ILL. L. REV. 1573, 1584 n.54 (Nov. 21, 2003)
[hereinafter Green, Prosecutorial Ethics]. Ethics rules of individual states include additional provi-
sions, but none have comprehensive provisions.

\(^5\) Some of these obligations include “a duty: (1) to disclose to the tribunal material facts neces-
sary to correct the court’s apparent or possible misunderstanding of the facts bearing on the court’s
decision; (2) to refrain in closing argument from drawing inferences from circumstantial evidence
that are contradicted by extra-record evidence which the prosecutor knows to be accurate, (3) to refrain
from seeking a legal ruling that the prosecutor knows to be contrary to law; (4) to call the court’s
attention to legal or procedural errors; and (5) to correct testimony of a prosecution witness, including
testimony elicited by defense counsel on cross-examination, if the prosecutor knows or reasonably
should know it is false.” Id. at 1593.
These omissions are only partially ameliorated by other rules applicable to all lawyers. Rules prohibiting making false statements or offering false evidence, obstructing access to or unlawfully concealing evidence, making non-meritorious claims, and engaging in other conduct involving dishonesty, fraud, deceit or misrepresentation apply universally, and subject prosecutors, as well as other lawyers, to discipline.

Despite these provisions, there is widespread agreement that the ethics rules do not cover the "full range of troubling prosecutorial conduct" and that they are a "woefully incomplete list of obligations that courts would recognize" as binding prosecutors.

Some rules actually misrepresent the prosecutorial role. For example, Model Rule 3.3, barring false statements, does not distinguish between prosecutors and defense counsel. Such distinction does, however, exist. Thus, a prosecutor cannot cross-examine a witness to make that witness appear to be untruthful if she "knows" the witness is, in fact, truthful. A defense lawyer, in contrast, must test the accuracy, reliability and credibility of all witnesses and their testimony.

Other distinctions between the ethical obligations of prosecution and defense counsel flow from the difference in role that is not reflected in the rules. Unlike the criminal defense lawyer, who may press every advantage within the bounds of the law, the prosecutor's ethical obligation is famously stated in Berger v. United States:

[H]e may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The American Bar Association (ABA) and various state courts and disciplinary committees are fully aware of the criticisms of the current rules for prosecu-

59 See generally Model Rules 3.1, 3.3, 3.4, 4.3, 4.4, 8.4; see Zacharias, Professional Discipline, supra note 8, at 722 (studying applicability of specific ethics rules for prosecutors).

60 Green, Prosecutorial Ethics, supra note 57, at 1597.


62 For example, prosecutors, unlike private lawyers, are required to "prevent or correct judicial or other procedural errors." They have a duty not to mislead, cannot make statements contrary to what they know to be true and cannot introduce testimony they suspect to be false. Green & Zacharias, supra note 8, at 228.

tors. Nonetheless, after a thorough review of the Rules of Professional Conduct, the ABA's "Ethics 2000 Commission" declined to revise the ethics rules for prosecutors.\(^6\) Despite the fact that the ABA's Criminal Justice Section completed an extensive analysis of the deficiencies in disciplinary provisions for prosecutors (the Kuckes Commission Report),\(^6\) the Ethics 2000 Commission apparently concluded that the subject of the need for enhanced disciplinary standards and procedures for prosecutors was so politically controversial that its proposals would encounter not only heated debate but also unyielding opposition.\(^6\) If so, it is unfortunate, as the Commission was certainly well aware of thoughtful suggestions to amend disciplinary rules to codify and enforce the ethical obligations of prosecutors.\(^6\)

Nonetheless, and even in the continuing absence of rules and regulations responding to the realities of the prosecution function and potential misconduct, the governing disciplinary structure offers sufficient standards and mechanisms to prohibit and sanction prosecutors for conduct that, if left unregulated, threatens the integrity of the criminal justice system.

The most common, and in any event, the most dangerous misconduct is the intentional suppression of exculpatory evidence. Despite this well documented and all too recurrent violation of professional responsibility, prosecutors who engage in such tactics are rarely, if ever, disciplined.\(^6\) The same holds true for other categories of sanctionable conduct.\(^6\)

\(^6\) Ethics 2000 is the American Bar Association's Commission that evaluated the Rules of Professional Conduct. Its work began in 1997 and its wide-ranging recommendations were adopted nearly in their entirety at the February 2002 meeting of the ABA House of Delegates. Ethics 2000 recommended only minor changes to exempt prosecutors from some disciplinary obligations under the Model Rules. Green, Prosecutorial Ethics, supra note 57, at 1581-87.

\(^6\) Id. (discussing Kuckes Report and Commission's decision not to amend R 3.8).

\(^6\) Id.


\(^6\) Bennett L. Gershman, Brady v. Maryland, a 40th Anniversary Checkup, in NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MID-HUDSON TRAINER MATERIALS, (forthcoming) (on file with author) [hereinafter Gershman, Brady]; Rosen, supra note 8.

\(^6\) A prosecutor's view of the "Top Ten disciplinary rule situations" is:
1. Suppression of exculpatory (and mitigating) evidence;
2. Improper statement to the press;
3. Ex parte communications with the trial court;
4. The threatening of prosecutions not supported by probable cause;
5. Knowing use of false evidence;
6. "No contact rule" violations;
7. False statements of material fact;
8. Threats of criminal prosecution or discipline;
9. Comments to harass or embarrass or influence jurors; and
10. "Being so eager to win, or so angry that you allow your judgment to fail and lose sight of 'seeing that justice is done.'"
IV. LACK OF ACCOUNTABILITY

Why have the organized bar and disciplinary committees tolerated this disconnect between the stated ethical duty of prosecutors and the accountability for those whose behavior falls far short of the mark? There are at least six reasons why there is an unwillingness to do little but tinker with exercising disciplinary authority over prosecutors.

The primary reason for the “hands off” approach is the belief that internal controls and judicial oversight effectively and adequately regulate prosecutorial misconduct. Courts, disciplinary committees and the organized bar accede to prosecutors’ claims that layers of supervision within their offices, training systems, internal investigations, and performance evaluations are sufficient to en-gender and regulate ethical behavior. According to this view, governance via Model Rule 3.8 or some variant thereof, or by means of a specially devised set of standards and rules is not necessary, given such sources of guidance and instruction as the Department of Justice manual and similar state manuals. These publications, with the compilations of constitutional norms, statutory regulations, rules of procedure, and advisory texts containing case law, have been the guideposts for prosecutors. The ABA Standards for Criminal Justice, the Prosecution Function, has also been viewed as setting forth important guidelines that are in- fluential and often cited by courts.

The wrongful conviction cases call into question whether it is now plausible, if it ever was, to rely upon internal controls as the means to deter and sanction prosecutorial misconduct. While federal prosecutors argue that their internal Office of Professional Responsibility (OPR) provides sufficient controls, few observers of that system have confidence that it serves as an adequate mechanism for ensuring prosecutorial accountability. Judges have expressed frustration with the lack of internal discipline for reported misconduct. OPR has been accused of “controlling spin, not a prosecutor’s conduct.” Its conduct, in widely known

Kris Moore, Ethics from a Prosecutor’s Point of View, 16TH ANNUAL JUVENILE LAW CONFERENCE (Feb. 2003), available at www.juvenilaw.org/Articles/2003/ProsecutorEthics.pdf; see also sources supra note 8.

70 See Zacharias, Professional Discipline, supra note 8, at 762-63.
71 Zacharias, Future Structure, supra note 6, at 863.
74 See Morton, Seeking, supra note 11, at 1109; Leslie E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3474-76 (1999) [hereinafter Williams, Civil Regulation]; Green, Policing, supra note 8.
investigations such as *United States v. Isgro*, causes it to maintain a reputation for lacking neutrality and judgment and being "unduly protective." 

The recent reversal of the conviction of Central Intelligence Agency officer Edwin P. Wilson is illustrative. Federal Judge Lynn N. Hughes, in the reversal of that conviction, excoriated twenty-four government lawyers who deliberately deceived the court by introducing false affidavits, failing to disclose crucial evidence, putting on false rebuttal testimony and refusing to correct it. The court's opinion prompted the Justice Department to begin an ethics investigation. Given the publicity, it is possible that the internal investigation by OPR will lead to internal discipline for some of the lawyers. Skepticism abounds.

The relevant differences between state and federal systems of internal review do not translate into different degrees of cynicism about the effectiveness of prosecutorial self-policing. The *Ramos* civil rights case, demonstrating lack of effective internal controls, is confined to one borough in New York City, but there is no reason to suggest that other jurisdictions differ significantly.

Prosecutors' manuals can provide useful instruction, and vigilant internal enforcement can influence the conduct of subordinates—especially those committed to a career in the particular department or office. But not all offices have manuals, and not all manuals are read or followed. And, if not more importantly, political and other pressures may induce the leadership itself to disregard, or at least discount, the importance of supervision that insures ethical conduct. Unquestionably, a system dependent on internally developed standards, implemented and enforced internally, embodies all the dangers of sole and self-regulation.

Moreover, the internal control mechanisms, largely shielded from public scrutiny, make it difficult to obtain data about the instances of misconduct and whether prosecutors are subject to internal discipline or referred for disciplinary action. This lack of transparency only serves to increase cynicism about the process and disparages the majority of prosecutors who serve the public with the

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75 Green, *Policing*, supra note 8, at 86 (discussing the investigation of prosecutors in *United States v. Isgro* and the public perception of OPR).

76 Eric Lichtblau, *Justice Officials Face Inquiry over Testimony in Arms Case*, NY TIMES, Dec. 23, 2003, at A18. In a highly publicized case that shocked intelligence agencies, Edwin P. Wilson was convicted of selling tons of explosives to Libya. Wilson's defense, that he acted with the support of the CIA, was contradicted by the false CIA affidavit denying that it had asked him to perform any services "directly or indirectly." *Id.*

77 Gershman, *Prosecutorial Misconduct*, supra note 7, at § 14.1 n.2 (criticizing inadequate discipline in all jurisdictions).

78 San Diego County is among the state prosecutor's offices that have introduced innovations, including a comprehensive manual, in their training program. See Weinberg, *Breaking the Rules*, supra note 7; Steve Weinberg, *Changing an Office's Culture* (Dec. 30, 2003), available at http://www.publicintegrity.org/pm/default.aspx?sid=sidebarsa&aid=27.
highest degree of ethical judgment. While those systems might be effective in
given circumstances, the perception is that they are not.\footnote{79}

A second reason for deferral of action by disciplinary committees is the exist-
ence of, or at least belief in the existence of, judicial oversight of prosecutorial
misconduct. This includes reversals of convictions, contempt citations, or other
sanctions such as imposition of fines and costs, and criticism in appellate opin-
ions. Such potential sanctions, however, are an insufficient check on
prosecutorial overzealous behavior. In a system in which well over ninety per
cent of the indictments result in guilty pleas, judges are hardly exposed to
prosecutorial misconduct. Moreover, judicial oversight is unlikely to provide a
remedy in most cases, because the court's supervisory powers to remedy miscon-
duct have been curtailed by the Supreme Court.\footnote{80} Appellate reversal, to the ex-
tent it provides a remedy for misconduct, is rare.\footnote{81} Except for the very limited
cases such as knowing use of false testimony,\footnote{82} prosecutors know that there is
little, if any, remedy for misconduct because the appellate standard of review is
harmless error. Their behavior is judged by the "no harm, no foul" principle.\footnote{83}

The harmless error rule, "originally developed as an appellate mechanism to
prevent 'the mere etiquette of trials' or the 'minutiae of procedure' from upset-
ting a verdict . . . has evolved into the most powerful judicial weapon to preserve
convictions. . . . [C]ourts . . . have invoked harmless error to preserve convictions
despite serious constitutional, evidentiary and procedural violations."\footnote{84} While habeas corpus historically has been used to protect fundamental constitutional
rights, this writ has been substantially weakened by recent court decisions that
raise procedural obstacles to the bringing of claims and give increased deference
to state court determinations as to whether violations constitute harmless error.\footnote{85}

\footnote{79} Whatever the reality of instances of misconduct, the fact is that there is little transparency in
the prosecution function except for some information about the rare cases that are the subject of
media attention. Thus, it is not possible to undertake an independent analysis, so critical to public
confidence.

\footnote{80} Rory K. Little, Who Should Regulate the Ethics of Federal Prosecutors, 65 FORDHAM L. REV.
355, 360 (1996) (concluding that even if a court were inclined to consider judicial sanctions, the court's
supervisory powers to remedy misconduct have been curtailed by a series of Supreme Court cases)
[hereinafter Little, Who Should Regulate].

\footnote{81} GERSHMAN, PROSECUTORIAL MISCONDUCT, supra note 7, at ¶14.3.

\footnote{82} United States v. Gale, 314 F.3d 1, 4 (D.C. Cir. 2003) (knowing use of false testimony entails a
veritable hair trigger for setting aside the verdict).

\footnote{83} Charles S. Chapel, The Irony of Harmless Error, 51 OKLA. L. REV. 501, 504 n.26 (citing

\footnote{84} Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. REV. 393, 425-26 (1992); Bennett

\footnote{85} See generally Bennett L. Gershman, The Gate Is Open but the Door Is Locked, 51 WASH. &
As the due process revolution has been forced into retreat, so has the willingness to respond to prosecutorial misconduct. Sanctions are rarely imposed.\(^6\)

At the very least, the problem is that the judiciary does not have a consistent approach to reviewing prosecutorial actions.\(^8\) On a practical level, many state judges, concerned about career advancement, are loathe to sanction or report lawyers to disciplinary committees because the judge does not want to alienate the powerful prosecutor's office.\(^8\) The belief in judicial oversight, like the faith in the efficacy of internal controls,\(^8\) results in a lack of accountability because disciplinary committees defer to courts and prosecutors' systems of regulation. Even where some impulse or impetus exists for prosecutors to be regulated by their offices, courts or disciplinary committees, the lack of coordination between these institutions diminishes their responsiveness in taking necessary action. This is especially true where the courts and disciplinary agencies are not informed about internal disciplinary investigations, proceedings or sanctions.

Third, and perhaps the most significant reason for the hands off approach to discipline of prosecutors, is their political power and deference to the executive branch. Prosecutors believe that the problem of prosecutorial misconduct is overstated. The President of the National Association of Assistant United States Attorneys testified that federal prosecutors are subject to “continual and pervasive scrutiny” far beyond that of other lawyers, including being subject to internal discipline within their office for minor infractions, examination by OPR (Office of Professional Responsibility) for more serious infractions, judicial sanctions, reprimand, fines, and prohibition from practice, and that they are themselves subject to prosecution.\(^9\) While this view is not readily accepted outside prosecutors' offices, it appears to be sufficiently influential to discourage state disciplinary bodies from asserting their authority.\(^9\)

Moreover, prosecutors believe that (1) meritless claims of prosecutorial misconduct have become a standard defense tactic;\(^2\) (2) they face misperceptions...
and negative images of their activities in the media, such as charges that "prosecutors feel that [they] are above the law";\textsuperscript{93} and (3) it is incorrect to assume that they are not subject to professional discipline.\textsuperscript{94} The fact that these views are disputed by defense lawyers and scholars only serves to discourage the organized bar from examining its potentially controversial role. Additionally, deference to the executive branch may reflect the view that the separation of powers doctrine limits the authority of state disciplinary committees, which, as arms of the judiciary, cannot control executive branch decision-making. This issue remains untested in most jurisdictions.\textsuperscript{95} Moreover, discipline of federal prosecutors by state authorities may raise supremacy clause issues that those authorities choose to avoid.\textsuperscript{96} This further diminishes the likelihood that the bar will develop and impose ethical norms on prosecutors.

The wrongful conviction cases demonstrate that the political power of prosecutors can no longer serve as a reason to maintain the status quo of lack of accountability. The need to challenge the lack of accountability is compounded in this era of expanded prosecutorial power. The federal sentencing guidelines caused a sea change by vesting power in the prosecutor that once resided in the judiciary.\textsuperscript{97} Prosecutors, particularly on the federal level, control investigations and effectively wield the ultimate sentencing authority because charging decisions determine the range of the ultimate sentence. Under this system, upwards of ninety-five percent of defendants plead guilty, thus permitting many prosecutorial actions to remain unchecked. Moreover, these changes occurred in an environment of mandatory minimum sentences, skewing the balance of power between courts and prosecutors, and one in which case law significantly decreased the ability of defense lawyers to advocate zealously for clients.\textsuperscript{98}

The recent Feeney Amendment (PROTECT Act)\textsuperscript{99} vests further power in the executive branch of government, and deprives judges of their traditional role. In
the climate created by the Patriot Act, where there are increased prosecutorial tools of unfettered authority, an overly zealous prosecutor is less likely to have his behavior subject to judicial review. As judicial influence and control have waned, so has the opportunity for meaningful judicial oversight over and control of prosecutorial conduct.

Recognizing the human tendency to push margins when there are no sufficiently demanding external controls, it is apparent that this increase in prosecutorial power affords greater opportunity for prosecutors to stretch ethical boundaries. While most prosecutors are honorable, there are individual prosecutors who will take advantage of any system. The current system offers more incentive and opportunity for the errant prosecutor.

Sometimes called the "true believers," these prosecutors, found in offices throughout the United States, believe that "the ends justify the means." Such prosecutors tend to (1) rely on police without question; (2) be insufficiently skeptical about cooperating witnesses and tolerate some degree of prevarication or falsity by those witnesses; and (3) in general, be unwilling to investigate or examine evidence that does not fit within the "winning theory" of the case. These prosecutors are in contrast to the vast majority of open-minded ones who perform their often difficult tasks with a questioning eye and an ability to tolerate discrepancies in testimony of witnesses.

Even where prosecutors are required to disclose evidence, the true believers may engage in a skewed analysis of the facts and risk assessment. Such prosecutors know that the likelihood of reversal is minimal, and that the likelihood of sanctions or any discipline is insignificant. Civil liability often is precluded because of the problems of proof and the expansive scope of immunity. Not infrequently, evidence deemed exculpatory by defense lawyers is not disclosed because prosecutors decide which evidence is "material" based upon their view of what would assist the defense in preparing and presenting its case. Typically,

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101 See Rachel V. Stevens, Center for National Security Studies v. United States Department of Justice: Keeping the USA Patriot Act in Check One Material Witness at a Time, 81 N.C. L. Rev. 2157 (2003); see Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003) (ruling that, absent Congressional authorization, the President does not have authority to detain as an enemy combatant an American citizen seized on American soil). While the Supreme Court reversed, 124 S. Ct. 2711 (2004), its decision was based on a finding that the Southern District of N.Y. lacked jurisdiction, and did not reach the issue of presidential authority.

102 Nels C. Moss Jr., a St. Louis prosecutor for thirty-three years, known as a "recidivist breaker of the rules by which prosecutors are supposed to operate," characterizes himself as a "hard hitting but honest prosecutor." His record includes seven reversals due to misconduct and seventeen findings that he committed prosecutorial error. Weinberg, Breaking, supra note 7.

courts uphold this exercise of discretion. \(^{104}\) Changes in discovery obligations from less of a "cat and mouse game" to relatively open discovery would afford the true believer less opportunity to stretch ethical boundaries in disclosure of evidence. \(^{105}\) Also observed, not only among true believers, is the all too human tendency to forget one's role in the midst of a case. The "duty to justice" is often forgotten after the prosecutor has assured herself of the guilt of the defendant and therefore forgets or "fudges" on obligations in order to maximize her chances of winning. \(^{106}\) Legal rather than ethical constraints guide her behavior. As Joseph Weeks describes the dilemma:

\[\text{[Y]ou become convinced to a moral certainty that a criminal defendant has committed a serious crime. Of course, he is at present not yet "guilty" of the crime because he has not been found by a jury to have committed it. To make matters worse, from your perspective, he might never be convicted. The police may have bungled the search warrant and, as a consequence, the evidence that would conclusively establish the defendant's guilt may never be heard by the jury. Miranda warnings may not have been administered and the defendant's confession might never be heard by the jury. Or perhaps a witness claims to have seen someone other than the defendant fleeing the scene of the crime in an account that, while totally implausible to you, may be just enough to establish a reasonable doubt of the defendant's guilt in the minds of the jury. I do not think that it unfairly disparages the honesty and professionalism of prosecutors generally to suppose that a not insubstantial number of them are strongly tempted in such circumstances to serve what they may view as "the higher justice."}^{107}\]

These growing concerns have not resulted in a concomitant examination of prosecutorial accountability.

A fourth reason for the hands off approach to prosecutorial discipline is resource management. The operational principle of most disciplinary committees is that greed and theft from clients are the most egregious violations. Responding to such misconduct assumes priority. Alleged prosecutorial misconduct is rarely perceived as causing harm to a client because, notwithstanding constitutional

\(^{104}\) Thus, courts have decided that prosecutors are not, for example, required to reveal evidence that an eyewitness could not state whether the defendant was one of the perpetrators, United States v. Rhodes, 569 F.2d 384, 388 (5th Cir. 1978), or the names of witnesses to the crime who saw "nothing," Commonwealth v. Satterfield, 364 N.E.2d 1260, 1263 (Mass. 1970), or that a ballistics report on the murder weapon had no latent prints of value, People v. Penland, 381 N.E.2d 840, 843 (Ill. App. 1978). See generally Gershman, Brady, supra note 68.

\(^{105}\) See generally Bennett Gershman, The Prosecutor's Duty to Truth, 14 GEO. J. LEGAL ETHICS 309, 328 (2001).


\(^{107}\) Weeks, No Wrong, supra note 8, at 834 (emphasis added).
rights and procedural protections, indicted defendants are commonly presumed to be guilty. While misconduct may harm the perception of the role of the "ministers of justice," it bears little relationship to "justice" itself. In great measure, this is because there is a tacit acceptance of a wide range of behavior in convicting the guilty. Scant resources cannot be utilized to discipline prosecutors for actions that are best considered an "excess of zeal in pursuing the public good."

Fifth, disciplinary agencies have little expertise in ethics in criminal justice issues and perceive that the disciplinary task would engender second guessing government lawyers who are granted wide latitude in the exercise of discretion. Disciplinary committees are loathe to enter the thicket of judging distinctions between mistakes and intentional violations of law and, indeed, disciplinary authorities appear to assume that they are unable to judge such distinctions.

Finally, the sixth reason not to alter the status quo is the lack of consensus about alternative models. The numerous suggestions for change are rarely examined in a comparative or synthesizing manner.

Despite the fact that there are no comprehensive data to document adequately the extent of police and prosecutorial misconduct and its effect upon the reliability of the criminal justice system, we should not await a full study before addressing the growing need to provide accountability for egregious actions. The systems in place are simply not effective in monitoring and preventing such behavior, and the problems are likely to be exacerbated by the increased power of prosecutors. Continued lack of some transparency and greater accountability will only serve to undermine respect for the prosecutorial function and the criminal justice system.

V. A SYSTEM OF ACCOUNTABILITY

Assuming that wrongful conviction cases lead the bar to reconsider transparency and accountability procedures for prosecutors, will current disciplinary

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108 Some prosecutors equate justice with "convicting the guilty." See id. In such circumstances, the potential harm to the integrity and reliability of the criminal justice system is not considered.

109 Zacharias, Professional Discipline, supra note 8, at 757.

110 Zacharias argues that when there have been cases demonstrating "venal incentives," disciplinary committees have proceeded against prosecutors. Zacharias, Professional Discipline, supra note 8, at 757.

111 Green, Prosecutorial Ethics as Usual, supra note 15; Rosen, supra note 8, at 735-736; Morton, Seeking, supra note 11, at 1114-15; Zacharias, Professional Discipline, supra note 8, at 773-776; see also, Green, Policing, supra note 8; Williams, Civil Regulation, supra note 74, at 3474-76.

112 "Transparency and accountability" are the buzzwords that set standards to establish public trust for corporate entities, international institutions, and many government offices. They are applicable, in great measure, to prosecutors. Faith Stevelman Kahn, Transparency and Accountability: Rethinking Corporate Fiduciary Law's Relevance to Corporate Disclosure, 34 GA. L. REV. 505, 507-08 (2000).
systems undertake that challenge successfully? It is highly unlikely. While there are voices in the bar to amend the disciplinary rules and regulations to keep prosecutors within the "umbrella" of regulation of all lawyers, the unitary model of discipline has not resulted in a system of accountability. If scholars are correct that diffuse regulatory systems result in lack of discipline, and that no institution is in charge, disciplinary committees are unlikely to assume that mantle of control.

Moreover, the existing disciplinary system is not a workable model to regulate prosecutors. First, secrecy is the hallmark of most disciplinary proceedings and significant change in openness of the process is highly unlikely in most jurisdictions. If discipline is to serve as a deterrent to prosecutorial misconduct, the process and its results cannot be secret. It is more likely that the creation of an independent disciplinary body will begin as an open process.

Second, without significant additional resources, state bar disciplinary authorities are unlikely to undertake this work. Even, however, in the unlikely event that sufficient funds were made available to consider adequately allegations of prosecutorial misconduct, and even if such disciplinary committees hired criminal justice professionals, both the lack of perceived influence of those committees in most jurisdictions and the orientation of disciplinary committees as reactive to individual complaints are sufficient reasons to establish an independent commission to monitor disciplinary matters for the prosecutors. Obviously, these issues merit serious discussion in each state.

However configured, a system of highly regarded professionals independent of prosecutors' offices is essential to a workable system of accountability. Only such a commission can assume the mantle of authority and engender the respect necessary to undertake such a task. To be a serious effort, it should be one of peer review by experienced criminal justice professionals with the power to sanction prosecutors who engage in misconduct. While such an alternative to existing dis-

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113 Of course, an adequate disciplinary system cannot eliminate prosecutorial misconduct. The nature of our system suggests that many of the egregious violations will never be discovered. Most cases result in guilty pleas, thus ethical lapses in the investigative, charging and discovery functions are unlikely to see the light of day. As we have moved from an adversarial model of prosecution to an administrative one, as described in Gerard E. Lynch, Our Administrative System of Justice, 66 FORDHAM L. REV. 2117 (1998), there exists a greater incentive for the errant prosecutor to engage in unethical behavior because the likelihood of discovery is lessened. The hope is that, in tandem with hiring, training, supervision, and internal investigatory systems, an effective, independent disciplinary system will set higher standards for practice and thereby deter misconduct. Fred C. Zacharias, The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation, 44 ARIZ. L. REV. 829, 831 (2002) (concluding there is a need for new regulators, not only for prosecutors, but more generally); Rhode, JUSTICE, supra note 9.

114 Green, Policing, supra note 8, at 88.

115 Of course, disciplinary committees in individual states may be organized, funded and motivated to undertake this role. Overall, however, the disciplinary committees are unlikely to provide adequate systems of accountability. See RHODE, JUSTICE, supra note 9.
disciplinary committees might be termed "overenthusiastic," there does not appear to be a realistic alternative. Such commissions should be created by state and federal courts and by legislatures responsible for lawyer discipline. They must also be adequately funded.

The mission of an independent commission should be to:

1. develop protocols for examination of wrongful convictions within the jurisdiction where there are allegations of prosecutorial misconduct;
2. examine those cases and make recommendations for systemic change to deter prosecutorial misconduct;
3. develop clear and enforceable disciplinary standards for prosecutors, and work with courts, legislatures, and bar associations of each state to ensure that these standards are implemented;
4. establish a system for discipline of prosecutors that maintains minimum secrecy;
5. develop a database for disciplinary cases, readily available to judges, lawyers, and the public, that includes information about judicial sanctions and internal office discipline of individuals subject to sanction;
6. assist in development of educational programs for the judiciary, prosecutors, and defense lawyers about reporting lawyer ethical violations;
7. evaluate changes to the Code of Judicial Conduct which would encourage judges to report all instances of misconduct to the commission; and
8. develop a proactive system to examine a wide range of cases involving misconduct, rather than the current system of reliance upon individual complaints.

Obviously, such a proposal is merely a framework for future discussion and action.

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116 Zacharias, Professional Discipline, supra note 8.
117 Obviously, the commissions must reflect the differences between state and federal systems and the differences among states. For instance, in the federal system, district courts have disciplinary committees that subject lawyers to sanctions. Perhaps the federal system could be a circuit-wide one under the aegis of the Circuit Council. Each state could determine the structure that is most effective, or a commission could be created by the chief state judge with authority to create its own structure for discipline.
118 While this essay focuses on prosecutorial misconduct, the commission should also develop protocols to monitor, sanction, and deter ineffective assistance of counsel, which accounted for thirty-two percent of wrongful conviction cases. Actual Innocence, supra note 13, at 361.
119 The definition of types of misconduct subject to reporting and the trigger mechanism should be part of the commission's mandate. The commission could consider a presumption that such misconduct be reported or a mandatory reporting requirement for the most egregious forms of misconduct. A system which encourages, or even requires, reports of every suspicion is unworkable and counterproductive. Doe v. Federal Grievance Committee, 847 F.2d 57, 63 (2d Cir. 1988) (requiring actual knowledge of witness perjury to trigger ethical duty).
Wrongful conviction cases have decreased public confidence in the integrity of the criminal justice system, and, to the extent that police and prosecutors are responsible for wrongful convictions, in those government offices. These cases make plain that the criminal justice system can no longer afford to ignore the ineffectiveness of internal controls, judicial sanctions, and the disciplinary process to monitor, sanction, and deter prosecutorial misconduct. Most prosecutors consider themselves ethically scrupulous. The continuing failure to provide a system with the necessary transparency, consistency, and accountability is a great disservice to them. It is time to establish and fund independent commissions to do so.
HISTORICAL LINKS:
THE REMARKABLE LEGACY AND LEGAL JOURNEY
OF
THE HON. JULIA COOPER MACK

The Hon. Inez Smith Reid