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NEW MODELS FOR PROSECUTORIAL
ACCOUNTABILITY

Ellen Yaroshefsky[†]

There has been significant and increasing attention to prosecutorial accountability for misconduct in recent years by courts and disciplinary authorities, in some prosecutors' offices and by defense organizations, in academia, and of course, in popular media.¹ In great measure, this attention is the result of the remarkable work of the Innocence Project and Innocence networks around the country.² It is also the result of awakening to the fault lines in the criminal justice system—such as mass incarceration—and to the disproportionate targeting of black and brown people for arrest and prosecution.³ Of course, this attention is all exacerbated by the Internet, which makes stories available nearly instantaneously in various social platforms.⁴ The attention has sparked a call to examine the conduct of prosecutors, notably in cases of exonerations.⁵

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¹ Bruce A. Green and Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 94 NOTRE DAME L. REV. (forthcoming 2016) (manuscript at 1–3) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722791).

² *Id.* at 40–42.

³ *Id.* at 60.

⁴ *Id.*

⁵ Radley Balko, *Another Orleans Parish Man Freed Due to Prosecutor Misconduct*, WASH. POST (May 12, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/05/12/another-orleans-parish-man-freed-due-to-prosecutor-misconduct> (describing the release of Reginald Adams, convicted because of the Orleans Parish prosecution's "intentional prosecutorial misconduct," which was a recurring problem under the former District Attorney's leadership); Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System that Protects Them*, HUFFINGTON POST (August 5, 2013), <http://www.huffingtonpost.com/2013/>

Many of the exoneration cases were the results of prosecutors or their agents hiding evidence of innocence—perhaps the most egregious form of prosecutorial misconduct. John Thompson, the Louisiana man nearly put to death for a homicide and robbery that he did not commit—and the man who had his \$14 million dollar civil rights verdict overturned by the Supreme Court in *Connick v. Thompson*—visited Cardozo Law School some years ago to talk about the egregious prosecutorial misconduct in his case; the prosecutor, among other acts, hid blood evidence by taking the blood swab home with him.⁶ John repeatedly asked, “what should happen to prosecutors who do this to people’s lives and significantly, what can change systems to avoid this in the future?”

We explored these questions at our symposium,⁷ and the following pieces will do so too. Of course one must always start by asking the question, “what do we mean by misconduct?” It would seem that it would be a simple term to define, but as we all know it is not. Prosecutors’ offices, courts, and disciplinary authorities are charged with and want to hold prosecutors accountable when their conduct strays from the proverbial mission to “do justice,” or as the Supreme Court famously said in *Berger v. United States*, they strike foul blows instead of fair ones, but that is much too vague a concept.⁸

The term “misconduct” has been used to refer to a wide range of conduct and its definition depends upon the context.⁹ For appellate purposes, prosecutorial misconduct encapsulates not only the actions of the individual prosecutors, but also the failure of various law enforcement agencies to disclose information to the prosecutor. The prosecutor herself may have been diligent, but the agency’s failure to comply with the law is termed “prosecutorial misconduct.”¹⁰

08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html (examining the Orleans Parish prosecution’s suppression of evidence leading to the wrongful conviction of John Thompson, describing other misconduct in the same office, and referring to similar misconduct by other prosecutors’ offices); Michael Powell, *Misconduct by Prosecutors, Once Again*, N.Y. TIMES (Aug. 13, 2012), <http://www.nytimes.com/2012/08/14/nyregion/new-charge-of-prosecutorial-misconduct-in-queens.html>; John Terzano, *The Devastating Consequences of Prosecutorial Misconduct*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/john-terzano/the-devastating-consequen_b_161049.html (discussing the Justice Project’s “Prosecutorial Accountability: A Policy Review,” which recommends comprehensive reform, and urging harsher punishment for prosecutorial misconduct).

⁶ *Connick v. Thompson*, 563 U.S. 51 (2011).

⁷ The Innocence Project, the Jacob Burns Center for Ethics in the Practice of Law, the Center for Rights and Justice at Cardozo School of Law, and the Cardozo Law Review, Symposium: New Models for Prosecutorial Accountability (Apr. 21, 2016).

⁸ *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecutor] 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.”).

⁹ Green & Yaroshefsky, *supra* note 1, at 3–10.

¹⁰ See, e.g., *State v. Maluia*, 108 P.3d 974, 979 (Haw. 2005) (observing that “prosecutorial

Prosecutors often bristle at the use of the term “misconduct” in the context of a law enforcement agency failure because, in popular parlance, misconduct carries with it a notion of that lawyer’s intentional wrongdoing. A better term might be government misconduct.¹¹

As an *ethical* obligation enforced by disciplinary rules, the term misconduct refers generally to a violation of any ethics rule. In particular at the symposium, we discussed violations of Model Rule 3.8(d), regarding the prosecutorial obligation to disclose favorable information.¹² And of course there is the question of whether the misconduct rises to a certain level of mens rea: is it intentional, gross negligence, recklessness, or negligent conduct that we refer to? Is conscious avoidance of information a reason to hold prosecutors accountable?

Journalists, and the media more generally, rarely define the term misconduct and may use it to refer to a host of issues. We did not address these varying definitions, nor did we approach a definition of misconduct at the symposium, although we referenced these issues throughout our discussion. Instead, this conference focused primarily on the most egregious conduct in the truth seeking process. Various courts

misconduct’ is a legal term of art that refers to *any* improper action committed by a prosecutor, however harmless or unintentional” (emphasis in original)).

¹¹ Prosecutors have urged a distinction between misconduct and error. *See, e.g.*, Memorandum from John Kingrey, Exec. Dir., Minn. Cty. Att’ys Ass’n., to Minn. Cty. Att’ys (Apr. 25, 2007), <https://www.scribd.com/document/184897697/2007-05-17-Prosecutorial-Error-Memo5-17-07>. Without necessarily agreeing that intentional misconduct is aberrational, the American Bar Association has supported prosecutors’ efforts to persuade judges to use the term “error” rather than “misconduct” in reference to prosecutors’ unintentional violations of law. Charles Joseph Hynes, *Recommendation 100B*, 2010 A.B.A. SEC. CRIM. JUST., http://www.americanbar.org/content/dam/aba/directories/policy/2010_am_100b.authcheckdam.pdf.

¹² Model Rule 3.8(d) requires the prosecutor to:

[M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

MODEL RULES OF PROF’L CONDUCT r. 3.8(d) (AM. BAR ASS’N 2013). The critique of lack of discipline for prosecutorial ethical violations is robust despite the language in *Connick v. Thompson*, 563 U.S. 51, 66 (2011) (“An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.”). *See also* *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (“[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”); *State ex rel. Okla. Bar v. Miller*, 309 P.3d 108, 120 (Okla. 2013) (noting that “[i]nstances of prosecutorial misconduct from previous decades, such as withholding evidence, were often met with nothing more than a reprimand or a short suspension. Some scholars writing during that time theorized that discipline was imposed so rarely and so lightly that it was not effective in deterring misconduct.” (footnote omitted)); Neil Gordon, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment>. *See generally* CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA’S LOCAL PROSECUTORS (2003).

and disciplinary authorities have referred to this as “significant misconduct,” “egregious misconduct,” or “substantial violations.” In most instances, what we discussed was the intentional or grossly negligent failure to disclose information that negates guilt or mitigates punishment.

The symposium focused upon both the legal obligation and the ethical obligation to disclose. For shorthand, in state and federal courts we often call these “*Brady* violations,” although the contours of the legal obligation pursuant to *Brady v. Maryland* and subsequent cases are often subject to dispute. Beyond the legal obligation, we also discussed the ethical obligation to disclose information that is broader than the legal obligation in most state and federal courts.¹³ Many of our panelists, notably on the first panel, focused on cases involving such ethical violations.¹⁴

We also acknowledged that there is a difference in perception of the extent of misconduct between prosecutors and defense lawyers and, perhaps, by judges and the public.¹⁵ Most prosecutors, notably those who were in attendance at the symposium, work hard to develop systems and practices for the lawyers in their offices to insure best procedures for doing justice and appearing to do justice. They believe the misconduct problem is overblown and the result of rogue individuals, and in some instances, inadequate training and supervision, and unhelpful office culture.

Others, however, believe the issue to be of greater magnitude for which evidence cannot be readily uncovered. Many point out that *Brady* issues are a hidden problem because about 95% of cases result in guilty pleas, thus leaving us with few accountability mechanisms to determine whether evidence was disclosed.¹⁶ Recent exonerations of persons who plead guilty demonstrate the problem all too clearly.¹⁷

Recently Judge Kozinski in the Ninth Circuit famously called this problem an “epidemic.”¹⁸ But the term does not capture its unknowable

¹³ See generally Report of the Working Groups on Best Practices, *New Perspectives on Brady and Other Disclosure Obligations*, 31 CARDOZO L. REV. 1961 (2010) [hereinafter *Cardozo Symposium*].

¹⁴ The first panel, “The Role of Bar Discipline,” included Laura Popps from the State Bar of Texas, Elizabeth Herman from the Bar of the District of Columbia, and Tracy Kepler, immediate past president of the National Organization of Bar Counsel.

¹⁵ Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

¹⁶ *Id.*

¹⁷ Daniel Beekman, *Judge Jed Rakoff Says Plea-Deal Process is Broken, Offers Solution*, N.Y. DAILY NEWS (May 27, 2014 2:30 AM), <http://www.nydailynews.com/news/crime/judge-plea-deal-process-fixed-article-1.1806358#ixzz32v9wIJO4>; Rob Warden, *Christopher Ochoa: DNA Exonerated Christopher Ochoa of a Crime to which he had Confessed*, CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/tx/christopher-ochoa.html>.

¹⁸ *United States v. Olsen*, 737 F.3d 625, 626, 631–32 (9th Cir. 2013) (Kozinski, C.J.,

scope. Brady errors are not an “epidemic” in the sense of tuberculosis or any kind of virus. They may however exist in significant numbers as a result of systems and practices, as well as office culture.

Prosecutors bristle at the notion of an epidemic or a systemic problem and instead believe that the problem is episodic. This contention is the subject of ongoing discussion and debate. These discussions are interesting, but our view is that we will not reach resolution in the criminal justice system about the extent of the problem.¹⁹ Primarily, it is a hidden problem because we do not know in the guilty pleas—that are fundamental to our criminal justice system—whether there is evidence or information that should have been disclosed but was not. Nor do our systems provide effective mechanisms to insure disclosure for cases that go to trial except in rare instances.

Instead we think we are finally at a point where, hopefully, we no longer need to reach resolution about the extent of the problem because we acknowledge that no matter how extensive, it is a problem, it needs to be fixed, and it can be fixed. Many jurisdictions, or at least some jurisdictions, are working towards solutions.²⁰ This is why this conference is styled “New Models of Prosecutorial Accountability.”

We set out to explore these solutions throughout the conference. We looked at disciplinary systems, judicial control over prosecutorial conduct, and internal systems within the prosecutors’ offices. We asked questions such as the extent to which we could avoid such problems through open file discovery,²¹ and by establishing computer-based systems with information flowing directly from the police to the prosecutor, so that it is not a guessing-system of what needs to be disclosed.²²

Some jurisdictions lead the way—like certain Texas counties—through legislation, within certain prosecutors’ offices, and within its disciplinary systems.²³ However, the progress is spotty across the

dissenting).

¹⁹ Yaroshefsky, *supra* note 15 at 1945.

²⁰ Green & Yaroshefsky, *supra* note 1, at 24–27, 32–33 nn.183–187 (discussion of Conviction Integrity Units).

²¹ North Carolina adopted an open file discovery system. A study of the statute’s implementation found that open file discovery increases the “fairness, finality, and efficiency of criminal adjudications.” Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1332 (2012).

²² Yaroshefsky, *supra* note 15 at 1953–54.

²³ See, e.g., Michael Morton Act, S.B. 1611, 83rd Leg., Reg. Sess. (Tex. 2013); Randall Sims, *The Dawn of New Discovery Rules*, 43 THE PROSECUTOR No. 4 (July–August 2013), <http://www.tdcaa.com/journal/dawn-new-discovery-rules>; Jeremy Rosenthal, *How the Michael Morton Act Overhauls the Texas Criminal Discovery Process*, <https://roselawtx.wordpress.com/2013/05/17/how-the-michael-morton-act-overhauls-the-texas-criminal-discovery-process> (last visited Aug. 1, 2016). Some individual prosecutors did grouse both before and after the law was enacted. See, e.g., Terry Breen, *New Discovery Statute SB 1611*, TDCAA (May 23, 2013 4:32 PM), <http://>

country and entrenched cultures in other systems make progress or accountability difficult. In some jurisdictions, there are conviction integrity units that actually function to explore the root causes of convictions.²⁴ The Quattrone Center for the Fair Administration of Justice recently produced a report about effective conviction integrity units.²⁵

Finally, there are two caveats. At the symposium, we focused only on prosecutors, although we know that defense lawyers' actions and inactions contribute to and cause wrongful convictions. When defense lawyers engage in misconduct because they lack fundamental competency and diligence that is required by the ethics rules, it is called ineffective assistance of counsel. Prosecutors balk at the notion that the defense's conduct is not termed "misconduct," while the prosecution is charged with misconduct even in circumstances where the individual lawyer is not blameworthy. The terminology is a function of the Constitution and the law. It is obvious, but it bears repeating, that the respective roles of the prosecution and defense are different and we only focused upon the prosecutor's role—the party with the responsibility of the minister of justice.

Second, we acknowledged at the outset that there is a distinction between misconduct and prosecutorial error. Our last panel discussed systems and practices to reduce both error and misconduct. The goal of the conference is to promote development of systems and practices to reduce both error and misconduct. We hope that throughout the day, interesting exchanges among panelists and attendees sparked ideas and promoted action to improve our practices.

tdcaa.infopop.net/eve/forums/a/tpc/f/157098965/m/7457055016?r=8787055016#8787055016.

²⁴ See, e.g., Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010).

²⁵ John Hollway, *Conviction Review Units: A National Perspective*, QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUSTICE, U. PENN. L. SCH. (2016), <https://www.law.upenn.edu/live/files/5522-cru-final>.