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STOP BLAMING THE PROSECUTORS: THE REAL CAUSES OF WRONGFUL CONVICTIONS AND RIGHTFUL EXONERATIONS

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The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth.
– National Prosecution Standards¹

I. INTRODUCTION

Wrongfully convicted and rightfully exonerated criminal defendants spent an average of ten years in prison before exoneration, and the ramifications to the defendants, the criminal justice system, and society are immeasurable.² Prosecutorial misconduct, however, is not the primary cause of wrongful convictions. To begin with, although more

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1. NAT'L PROSECUTION STANDARDS § 1-1.1 (NAT'L DIS. ATTORNEYS ASS'N 2009). Put in other words: "The duty of the prosecutor is to seek justice, not merely to convict." ABA STANDARDS FOR CRIM. JUSTICE: PROSECUTION FUNCTION AND DEF. FUNCTION § 3-1.2(c) (3d ed. 1993) [hereinafter ABA STANDARDS].

2. See Stephanie Slifer, *How the Wrongfully Convicted Are Compensated for Years Lost*, CBS NEWS (Mar. 27, 2014, 6:33 AM), <http://www.cbsnews.com/news/how-the-wrongfully-convicted-are-compensated>. The average was based on a study of 1281 exonerations over a twenty-five year period:

Of the 1,281 exonerations recorded by the Registry from 1989 through 2013, almost all the individuals had been in prison for years; half for at least [eight] years; more than 75% for at least [three] years. As a group, the defendants had spent nearly 12,500 years in prison for crimes for which they should not have been convicted—an average of [ten] years each.

Id.; see also *DNA Exonerations Nationwide*, INNOCENCE PROJECT (Sept. 3, 2015, 12:30 PM), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide> (concluding that the average time in prison is fourteen years).

than twenty million new adult criminal cases are opened in state and federal courts each year throughout the United States,³ there have been only 1702 total exonerations over the last twenty-five years.⁴ In only six percent of those cases was prosecutorial misconduct the predominant factor resulting in those wrongful convictions.⁵ In cases where DNA has resulted in exoneration, the most frequent causes of the underlying wrongful convictions are eyewitness misidentifications, improper forensics, false confessions, and informants.⁶ Certainly, one could argue that prosecutorial misconduct is inextricably linked to this problem because prosecutors may knowingly rely on this evidence at trial despite its unreliability. That assertion, however, ignores the fact that judges, not prosecutors, determine whether evidence should be admitted into the record and amounts to a claim that prosecutors rely on evidence and elicit testimony that they know is false. As discussed below, such a categorical claim of unethical behavior by prosecutors is not supported by the record.⁷

Of course, even when prosecutorial misconduct is not the driving force behind wrong convictions, prosecutors can—and should—be part of a comprehensive solution that reduces the likelihood of wrongful convictions. This Article proposes the following solutions: DNA testing and functional magnetic resonance imaging (“fMRI”) should be available to defendants who demonstrate a likelihood of proving by a preponderance of the evidence that such testing could demonstrate their innocence.⁸ When DNA samples are too degraded to permit genotyping, investigators should increasingly use DNA phenotyping to create a profile of the likely perpetrator and thereby exclude certain classes of

3. In 2010, 20.4 million new criminal cases were filed in America’s state courts. ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURT: AN ANALYSIS OF 2010 STATE COURT CASELOADS 20 (2012), http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx. Another 77,779 new criminal cases were filed in federal circuit and district courts in 2010. *Sourcebook of Criminal Justice Statistics Online*, U. ALBANY, <http://www.albany.edu/sourcebook/pdf/t5112010.pdf> (last visited Nov. 22, 2015). These data do not include new juvenile and traffic cases filed.

4. *The Registry, Exonerations and False Convictions*, NAT’L REGISTRY EXONERATIONS, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx> (last visited Nov. 22, 2015).

5. See *infra* Part III.

6. See *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction> (last visited Nov. 22, 2015).

7. See *infra* Part III.

8. See *infra* Part V.C.1–2.

people.⁹ Appellate courts should focus on the second prong of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”), which permits reversal of a conviction where a district court’s decision constitutes an unreasonable application of clearly established federal law, even if the decision itself is not contrary to that law.¹⁰ In applying *Strickland v. Washington*’s ineffective assistance of counsel standard, courts should focus more heavily on whether defense counsel’s performance fell below an objectively-reasonable standard of care. The qualified immunity doctrine should be applied uniformly, and supervisory prosecutors should be vicariously liable for a deputy prosecutor’s unethical behavior.¹¹ Simply put, lawmakers, courts, and prosecutors have the power and obligation to reduce the number of wrongful convictions by, among other things, ensuring a fair trial and meaningful appellate review.

To be sure, the term “wrongful conviction” should not be limited to the question of whether a defendant is innocent or guilty. Wrongful convictions should include those where the crime with which a defendant is convicted *or* the resulting sentence does not accurately reflect the defendant’s culpability. This definition is consistent with the criminal justice system’s commitment to due process and will lead to procedures that enhance the fairness and reliability of a defendant’s sentence. Ultimately, where prosecutors, courts, and legislators exercise their power ethically, justice can be achieved; where that power is exercised in a manner that ignores pervasive flaws in the criminal justice system, justice is compromised.

Part II examines the causes of wrongful convictions.¹² Part III discusses the extent to which prosecutors’ conduct is a direct and substantial cause of wrongful convictions, and concludes that this is the case in a startlingly low percentage of cases.¹³ Part IV briefly addresses some ways in which prosecutors consciously or subconsciously allow others’ misconduct to yield wrongful convictions.¹⁴ Part V proposes solutions to decrease the likelihood of wrongful convictions, and increase the likelihood that such convictions will be reversed on appeal.¹⁵

9. See *infra* Part V.C.1.b.

10. See *infra* Part V.C.3.

11. See *infra* Parts V.C.4, V.C.6.a-b.

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

15. See *infra* Part V.

II. EXAMINING THE RECORD: WRONGFUL CONVICTIONS AND RIGHTFUL EXONERATIONS

The National Registry of Exonerations (“Registry”) is a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at the Northwestern University School of Law.¹⁶ Holding itself out as the “most comprehensive collection of exonerations in the United States ever assembled,” the Registry cataloged only 1245 exonerations¹⁷ through late 2013.¹⁸ The Registry continues to grow by about 200 entries per year, as recent exoneration cases are added to the database and as older exonerations are identified and cataloged.¹⁹

The picture that emerges from the Registry’s data is sobering. As stated above, the average time an innocent person spends in prison is ten years.²⁰ In addition, although less than 14% of the American population is African-American,²¹ 47% of those who were wrongfully convicted and later exonerated were African-American.²² This is more than three times the rate of the general population.²³ In fact, that exoneration rate for African-Americans is even higher than the incarceration rate for

16. *About the Registry, Nat’l Registry Exonerations*, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Nov. 22, 2015).

17. The Registry defines “exonerations” quite narrowly:

[A]n exoneration occurs when a person who has been convicted of a crime is officially cleared based on new evidence of innocence. . . . A person has been exonerated if . . . either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. [That is, a pardon, an acquittal, or a dismissal of charges, and the action was] the result, at least in part, of evidence of innocence that either . . . was not presented at the trial . . . ; or . . . if the person pled guilty, was not known to the defendant, the defense attorney and the court at the time the plea was entered.

Glossary, Nat’l Registry Exonerations, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Nov. 22, 2013).

18. NAT’L REGISTRY EXONERATIONS, EXONERATIONS IN 2013: THE NATIONAL REGISTRY OF EXONERATIONS 5 (2014), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf; *The Registry, Exonerations and False Convictions*, *supra* note 4. At first glance, it would appear that wrongful convictions and exonerations are almost impossibly rare since there were only 1245 exonerations, as of late 2013, in the Registry database, which purports to be the most exhaustive repository of American wrongful convictions ever created. Note, that number has grown to 1702 exonerations in the Registry through November 2015. *Basic Patterns, Nat’l Registry Exonerations*, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/Basic-Patterns.aspx> (last visited Nov. 22, 2015).

19. *The Registry, Exonerations and False Convictions*, *supra* note 4.

20. *See supra* note 2 and accompanying text.

21. SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 tbl.1 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-06-pdf>.

22. *See Basic Patterns*, *supra* note 18.

23. *Id.*

African-Americans, which was 37.8% in 2011.²⁴ Although many of the exonerations were obtained by post-conviction DNA testing, 76% of the exonerations did not involve DNA testing.²⁵ The exonerees identified through early 2015 had served a total of over 14,429 years in prison, and 59% of the exonerees had served at least five years in prison—all for crimes they did not commit.²⁶

The Registry has also reviewed each exoneration case to identify the factors that contributed to each wrongful conviction. The contributing factors and the frequency with which each occurs are as follows: perjury or false accusations (56% of cases); mistaken identification (33% of cases); false or misleading forensic evidence (22% of cases); false confessions (13% of cases); and “official misconduct” lumped into a single category (47% of cases.)²⁷

The Registry defines “official misconduct” as having occurred when “[p]olice, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree’s conviction.”²⁸ That broad definition unintentionally blurs the roles of the various officials whose misconduct is subsumed within that category. In this Article, the authors examine that combined category, “official misconduct,” to better define and quantify the role that prosecutorial misconduct plays in yielding wrongful convictions—and rightful exonerations.

24. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, PRISONERS IN 2011, at 7 tbl.7 (2012), <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

25. *Basic Patterns*, *supra* note 18.

26. *Id.* Although each wrongful conviction necessitating exoneration is a tragedy, and although it is equally obvious that the Registry has not yet captured all the wrongful convictions in America since 1989, it is equally clear that wrongful convictions appear to be singularly rare. In 2010, state courts alone (thus, excluding federal courts) processed over twenty million newly filed criminal cases. ROBERT C. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 20 (2011), <http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf>. That was down slightly from the all-time high of 21.4 million in 2006. *Id.* Extrapolating a bit, and conservatively assuming just ten million criminal state cases per year since 1989 (the average per year since 2000 was twice that), American prosecutors have handled 250 million cases during the twenty-five years from 1989-2013, during which just 1245 wrongful convictions (1200 of which were in state prosecutions) had been cataloged by the Registry. Doing the math, based on those data and assumptions, a wrongful conviction yielding an exoneration occurred in less than .0005% of the criminal state cases in twenty-five years.

27. % Exonerations by Contributing Factor, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last updated Nov. 21, 2015).

28. *Glossary*, *supra* note 17.

III. EXAMINING THE RECORD: PROSECUTORS CAUSING WRONGFUL CONVICTIONS

Prosecutors' power permeates every layer of the criminal justice process, including the power to decide when, and against whom, charges will be brought or presented to a grand jury.²⁹ In addition, prosecutors determine the following: what bail to recommend;³⁰ what negotiated pleas to pursue and plea deals to accept;³¹ which witnesses to call and exhibits to offer;³² which co-defendants will receive better deals and which will be granted use immunity;³³ and, upon conviction, which sentences and conditions to recommend.³⁴ Likewise, prosecutors decide which suspects will be diverted into pre-trial programming and intervention.³⁵ In fact, many prosecutors also advise law enforcement

29. See Risa Vetri Ferman, *Lessons from Tragedy: Bridging the Gap Between Public Expectations and Legal Standards Through an Evaluation of Criminal Investigations and Subsequent Charging Decisions*, 19 WIDENER L. REV. 193 *passim* (2013); Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 59 (2012); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (prosecutorial power particularly permeates the plea bargaining process; here, the Court upheld the prosecutor's threat to charge a more serious crime if the defendant declined to plead guilty to the original and lesser charge). Former U.S. Attorney General Robert Jackson has said:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. . . . The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

MacLean & Wilks, *supra* (quoting Robert H. Jackson, U.S. Attorney Gen., Address at The Second Annual Conference of the United States Attorneys: The Federal Prosecutor).

30. See Ebbe B. Ebbesen & Vladimir J. Konečni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOL. 805, 819-20 (1975) (conveying that the single factor most highly-correlated with the bail actually set by the court was the prosecutor's recommended bail).

31. See *Prosecutorial Discretion*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 203, 204-06 (2006).

32. See Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1252 (1997).

33. See *United States v. Serrano*, 406 F.3d 1208, 1217 (10th Cir. 2005); *United States v. Flemmi*, 225 F.3d 78, 87 (1st Cir. 2000); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 8 (2009).

34. See Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 LAW & CONTEMP. PROBS., no. 1, 2013, at 161, 181.

35. See Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 182 (2013) ("Prosecutors are the central gatekeepers, wielding broad discretion over whether defendants get pretrial diversion . . ."); Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 839 (1974) ("Judicial reticence to interfere with the prosecutor's discretion extends to pretrial diversion.").

investigators and help to shape or even direct criminal investigations.³⁶ Thus, there is almost no step in the criminal justice process that is not controlled, or at least influenced, by prosecutors.

Of course, even though prosecutors wield tremendous power, they are required by ethics codes to wield that power as “ministers of justice”³⁷ and “quasi-judicial officers.”³⁸ Examining the Registry database allows one to see the depths to which the unethical and ethically ambivalent will sink. As was mentioned, official misconduct contributed to the wrongful convictions in 47% of the Registry cases.³⁹ But the authors have examined the facts of every case in that “official misconduct” category to place each case into one of three sub-categories of official misconduct: (1) official misconduct cases where prosecutorial misconduct was the predominant factor leading to the wrongful conviction; (2) official misconduct cases where prosecutorial misconduct was a material, but not the predominant, factor; and (3) official misconduct cases where prosecutorial misconduct was not even a material factor.⁴⁰ The authors then computed the role prosecutorial misconduct played as a factor leading to the wrongful convictions in the Registry as a percentage of all exonerations in the Registry. The results are notable. As a percentage of all exoneration cases in the Registry (as of October 2013): in 6%, prosecutorial misconduct was the predominant factor; in 18%, prosecutorial misconduct was a material, but not predominant factor; and in 76%, prosecutorial misconduct was not a material factor.⁴¹ The implications are not as clear as they may appear. Although just 6% of all exonerations were predominantly caused by prosecutorial misconduct, that does not mean prosecutors are blameless. First, prosecutorial misconduct was at least a material factor in 24%⁴² of the wrongful convictions in the database. Second, prosecutors are bound

36. See *United States v. Martinez*, 785 F.2d 663, 670 (9th Cir. 1986) (holding that court review of prosecutorial input to investigations is limited by prosecutorial discretion).

37. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2006) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”).

38. *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976).

39. % Exonerations by Contributing Factor, *supra* note 27.

40. See *Nat'l Registry Exonerations*, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Nov. 22, 2015).

41. See *id.*

42. Prosecutorial misconduct per se was the predominant factor in 6% of the exonerations in the Registry, and prosecutorial misconduct per se was at least a material factor in an additional 18% of the exonerations. Those add up to a total of 24% of the exonerations wherein prosecutorial misconduct per se was at least a material factor.

by ethics rules and policies⁴³ that should compel them to engage only in, or at least guide them toward, ethical decision-making. Third, as revealed below, prosecutorial misconduct falls into some troubling patterns, regionally and categorically.

Regionally, there is stunning inconsistency. Sixty percent of all exonerations arose in just nine jurisdictions.⁴⁴ Perhaps more troubling are the individual jurisdictions that have the highest number of exonerations per 100,000 people in the population for each jurisdiction. Although the average number of exonerations per 100,000 in the population is 0.48 people, the following four jurisdictions, listed from highest to lowest, exceeded that national average by two times or greater: District of Columbia (2.45), Illinois (1.17), Louisiana (0.98), and New York (0.97).⁴⁵ And a total of fifteen jurisdictions exceeded the national average exonerations rate.⁴⁶

All of the prosecutor-predominant cases arose either in federal jurisdiction or within one of just nineteen other jurisdictions, most of which had the death penalty during much or all of the time since 1989. The numbers of prosecutor-predominant exonerations, listed by jurisdiction, in descending order, are as follows: Federal (18); New York (11); Louisiana, Texas (7); California (5); Illinois (4); North Carolina, Pennsylvania (3); Iowa, Virginia (2); and Alabama, Arizona, Georgia, Indiana, Massachusetts, Missouri, Ohio, Oklahoma, Tennessee,

43. Prosecutor ethical decision making is most obviously directed by: (1) the ABA Standards for Criminal Justice: Prosecution Function and Defense Function; (2) the National District Attorneys Association National Prosecution Standards; (3) selected portions of the American Bar Association Model Rules; and (4) the state ethics and procedural rules based thereon. See NAT'L PROSECUTION STANDARDS §§ 1-1.1 to -1.6 (NAT'L DIS. ATTORNEYS ASS'N 2009); MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2006); ABA STANDARDS, *supra* note 1, §§ 3-3.1, -3.11.

44. Those nine states, in order of most to least exonerations in each state, are New York (232), Texas (217), California (155), Illinois (153), Michigan (62), Ohio (54), Florida (57), Pennsylvania (53), and Louisiana (45). The most up-to-date numbers can be found by searching the cases on the National Registry of Exonerations webpage. *Nat'l Registry Exonerations*, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Nov. 22, 2015). Although those jurisdictions accounted for 60% of all exonerations, they only account for 50% of the total United States population. *Id.*; U.S. CENSUS BUREAU, INTERIM PROJECTIONS OF THE TOTAL POPULATION FOR THE UNITED STATES AND STATES: APRIL 1, 2000 TO JULY 1, 2030, <http://www.census.gov/population/projections/files/stateproj/Summary/TabA1.pdf> (last visited Nov. 22, 2015) (using state population projections for July 1, 2015).

45. See *Nat'l Registry Exonerations*, *supra* note 40.

46. The fifteen jurisdictions exceeding the national average exonerations rate per 100,000 persons in the jurisdiction's population are as follows: District of Columbia (2.45), Illinois (1.17), Louisiana (0.98), New York (0.97), Texas (0.81), Oklahoma (0.78), Wisconsin (0.70), Massachusetts (0.60), Wyoming (0.58), Washington State (0.57), Missouri (0.56), Michigan (0.53), Nebraska (0.51), South Dakota (0.51), and West Virginia (0.49).

Washington (1).⁴⁷ Even though the total number of prosecutor-predominant cases identified in the Registry is quite small, those jurisdictions near the top of that list should conduct a thorough investigation to determine and mitigate the causes. That investigation should look not just at the individual cases and prosecutors, but also should evaluate the system as a whole to identify those characteristics that can lead to such misconduct.

Categorically, there is a clear pattern, as well. In the prosecutor-predominant exoneration cases, the prosecutorial misconduct fell into just six categories: (1) where the prosecutor withheld exculpatory evidence (57 exonerations); (2) where the prosecutor affirmatively misled the court, jury, or defendant (7 exonerations); (3) where the prosecutor knowingly offered perjured/false testimony (5 exonerations); (4) where the prosecutor coerced a statement from the defendant or a key witness (4 exonerations); (5) where the prosecutor used the criminal charges to retaliate (3 exonerations); and (6) where the prosecutor's jury selection was racially discriminatory (1 exoneration).⁴⁸ Of course, prosecutors may not withhold exculpatory evidence.⁴⁹ But those rules did not prevent the fifty-seven prosecutors in the first category above from causing wrongful convictions by withholding exculpating evidence from the defense. For example, in an Iowa murder case against Terry Harrington, the prosecutor did not disclose to the defense eight police reports that indicated there was an alternative perpetrator, an early suspect in the investigation, who had shown deception when denying

47. See *Nat'l Registry Exonerations*, *supra* note 40.

48. *Id.*

49. NAT'L PROSECUTION STANDARDS § 2-8.4 (NAT'L DIS. ATTORNEYS ASS'N 2009) ("The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct."); *id.* § 4-9.1 ("A prosecutor should, at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process."); *id.* § 4-9.2 ("If at any point in the pretrial or trial proceedings the prosecutor discovers additional witnesses, information, or other material previously requested or ordered which is subject to disclosure or inspection, the prosecutor should promptly notify defense counsel and provide the required information."); *id.* § 4-9.3 ("[A] prosecutor should not impede opposing counsel's investigation or preparation of the case."); MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2006) ("The prosecutor . . . shall . . . make 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 . . ."); ABA STANDARDS, *supra* note 1, § 3-3.11(a) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused."); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (the Court holding that "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, irrespective of the good faith or bad faith of the prosecution").

involvement in the murder.⁵⁰ In California, in 2004, the prosecutor withheld critical evidence from the defense in a child sex abuse case, including that a complaining witness had recanted prior to trial, but later lied in an attempt to cover up the misconduct; the charges were then dismissed, and the prosecutor's attorney license was suspended for one year.⁵¹

Prosecutors' ethical obligations extend much further than simply the duty to reveal exculpatory evidence. They may not ethically mislead others in the justice system,⁵² knowingly offer perjured testimony,⁵³ or coerce statements from defendants or witnesses.⁵⁴ At the extremes, some prosecutors have violated these rules. In Pennsylvania, a state prosecutor offered knowingly-misleading phone records in court in a robbery case; the prosecutor held up a stack of phone records to the jury pointing out that the alibi call was nowhere on the phone record printout—the prosecutor knew, all the while, that the alibi call was a local call and would not have been included on the phone records printout.⁵⁵ In 2004, a

50. *Harrington v. State*, 659 N.W.2d 509, 517-19, 522 (Iowa 2003) (finding a substantial *Brady* violation, granting Harrington a new trial, and holding: "The prosecutor 'has a duty to learn of any favorable evidence known to . . . others acting on the government's behalf in the case, including the police.'" (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995))). In partial settlement for the prosecutorial misconduct, Harrington and his co-defendant settled a lawsuit in 2013 with the City of Council Bluffs; the total settlement for the two men exceeded \$6 million. David Pitt, *Council Bluffs to Pay \$6 Million to Settle Lawsuit*, YAHOO NEWS (Oct. 15, 2013, 5:49 PM), <http://news.yahoo.com/councilbl-bluffs-pay-6-million-settle-lawsuit-214907844.html>.

51. Attorney Search of Leo Gerald Barone Jr. - #175840, STATE BAR CAL., <http://members.calbar.ca.gov/fal/member/detail/175840> (last visited Nov. 22, 2015) (displaying the attorney profile for Leo Gerald Barone Jr., including a disciplinary summary recounting the facts leading to license suspension); see also Stipulation Re Facts, Conclusions of Law and Disposition and Order Approving Actual Suspension at 7-8, *In re Leo G. Barone, Jr.* #175840, Stip. & Order Approving Actual Suspension (Cal. State. Bar Ct. Aug. 30, 2005), <http://members.calbar.ca.gov/courtDocs/04-O-14030.pdf>.

52. NAT'L PROSECUTION STANDARDS § 1-1.1 ("The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth."); *id.* § 6-1.1 ("A prosecutor shall not knowingly make a false statement of fact or law to a court."); ABA STANDARDS, *supra* note 1, § 3-2.8(a) ("A prosecutor should not intentionally misrepresent matters of fact or law to the court.").

53. NAT'L PROSECUTION STANDARDS § 1-1.1 ("The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth."); *id.* § 3-1.3 ("A prosecutor is ultimately responsible for evidence that will be used in a criminal case."); *id.* § 6-1.3 ("A prosecutor shall not offer evidence that the prosecutor knows to be false. If a prosecutor learns that material evidence previously presented is false, the prosecutor shall take reasonable remedial measures to prevent prejudice caused by the false evidence."); ABA STANDARDS, *supra* note 1, § 3-2.8(a) ("A prosecutor should not intentionally misrepresent matters of fact or law to the court.").

54. NAT'L PROSECUTION STANDARDS § 3-1.4 ("A prosecutor should not knowingly obtain evidence through illegal means, nor should the prosecutor instruct or encourage others to obtain evidence through illegal means."); accord ABA STANDARDS, *supra* note 1, § 3-3.1(c).

55. See Bill Moushey, 'You're Coming Home,' PITTSBURGH POST-GAZETTE, Aug. 13, 2005,

federal prosecutor offered a knowingly-false affidavit that led U.S. District Court Judge John Hughes to determine that “about two dozen government lawyers” had ultimately participated in a conspiracy to withhold evidence, offer false testimony, and refuse to correct it.⁵⁶ These accounts are deeply troubling and should never be tolerated in the criminal justice system. At the same time, they are largely anomalous and not consistent with customary practices among prosecutors throughout the United States.⁵⁷

With their power and ability to control almost all aspects of a criminal case, prosecutors can, and must, meaningfully address misconduct by all players in the criminal justice system. Put differently, prosecutors should be responsible both for their own misconduct and for the misconduct of others over whom they exercise supervisory authority. Part IV of this Article discusses examples of misconduct where prosecutors were not directly involved, but were in a position to prevent such misconduct.⁵⁸

IV. EXAMINING THE RECORD: PROSECUTORS ALLOWING WRONGFUL CONVICTIONS

The prosecutor is “ultimately responsible for evidence that will be used in a criminal case,”⁵⁹ including providing advice to law enforcement officials,⁶⁰ and counseling forensic lab technicians, lay witnesses, and expert witnesses in advance of trial.⁶¹ In so doing, prosecutors have the opportunity to discover weaknesses in the evidence and to implement safeguards that minimize the likelihood of a wrongful conviction. In situations where prosecutors fail to responsibly discharge

at B-1 (quoting the district court judge, who vacated Justin Kirkwood’s robbery conviction, stating that the prosecutor had created a “ruse designed to confuse” the jurors).

56. *United States v. Wilson*, 289 F. Supp. 2d 801, 802, 807-08, 811 (S.D. Tex. 2003) (“[D]ue process[]requires personal and institutional integrity.”). In *United States v. Wilson*, Judge Hughes declared, in obvious frustration:

This opinion refers only to the part of the record that the government has reluctantly agreed may be made public. It does not attempt to recount even that limited range of data in its entirety; the governmental deceit mentioned here is illustrative—not exhaustive.

Id.

57. See Charles E. MacLean, *Anecdote as Stereotype: One Prosecutor’s Response to Professor Monroe Freedman’s Article “The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors’ Offices,”* 52 WASHBURN L.J., no.1, 2012, at 23, 32-34 (discussing a recent piece of prosecutorial ethics scholarship that presented a few egregious prosecutorial misconduct anecdotes as somehow reflective of the behavior and ethics of all prosecutors).

58. See *infra* Part IV.

59. NAT’L PROSECUTION STANDARDS § 3-1.3.

60. See *id.* § 2-5.6.

61. See *id.* §§ 1-4.7 cmt., 2-10.4.

this duty, there should be legal consequences. For example, in Illinois, officers beat, kicked, and suffocated a suspect until he blacked out, all to coerce a confession out of him.⁶² The prosecutors either knew or should have known of this egregious misconduct, or could have found out with minimal effort.⁶³ This was officer misconduct *ab initio*, but the prosecutor became complicit by failing to intervene. Similarly, in West Virginia, a forensic lab technician falsely testified as to a genetic marker match with the defendant; that testimony, as well as testimony that same technician had provided in many other cases in as many as twelve other states, was eventually found to be inaccurate.⁶⁴ Although DNA science is complicated, a prosecutor who intends to offer such evidence must become acquainted with the details of the science. Otherwise, the prosecutor will not be in a position to identify flaws in the evidence and, therefore, consider its admissibility at the criminal trial. When prosecutors fail to carefully scrutinize lay witness testimony and forensic evidence, they become the catalyst for a trial that is less reliable, less fair, and less just. For that reason alone, prosecutors have an ethical and moral obligation to uncover the defects in their cases, even if it comes at the expense of obtaining a conviction or if it requires the prosecutor to bring less serious charges against a defendant. The next Part of this Article examines what prosecutors can and should do to ensure the fairness of the criminal trial process.

V. WHAT IS BEING DONE NOW AND WHAT MORE CAN BE DONE?

There have been many judicial and legislative attempts to adopt remedies—both prophylactic and remedial—to address prosecutorial misconduct. Such attempts, however, must be tailored to individual jurisdictions, as policies that would be effective in curbing misconduct in one jurisdiction might be inapplicable or ineffective in another. Notwithstanding these differences, there can be little doubt that more needs to be done. In fact, on two occasions Congress has attempted to reduce instances of prosecutorial misconduct at the federal level.⁶⁵

62. *People v. Hopley*, 696 N.E.2d 313, 323 (Ill. 1998) In *People v. Hopley*, the Illinois Supreme Court found that the defendants “placed defendant in an interview room, handcuffed him to a wall ring, . . . began to physically abuse and racially harass him.” *Id.* Furthermore, “[w]hen [the] defendant denied setting the fire, Garrity kicked him. . . . Detectives . . . escorted defendant to another room where he was again handcuffed.” *Id.* Once in the other room, “[t]he officers hit and kicked defendant and told him to confess. Lotito put a plastic typewriter bag over his head until he blacked out.” *Id.* When he regained consciousness, Hopley allegedly confessed. *Id.*

63. *See id.* at 323-24.

64. *See* B.J. Reyes, *DNA Tests Free Convicted Rapist*, L.A. TIMES (Oct. 8, 1995), http://articles.latimes.com/print/1995-10-08/news/mn-54709_1_williams-harris.

65. *See, e.g., United States v. Shaygan*, 676 F.3d 1237, 1244, 1251 (11th Cir. 2012) (Martin,

A. *The Citizens Protection Act of 1998*

The Citizens Protection Act of 1998 (“CPA”) was a legislative attempt to protect against prosecutorial misconduct on the part of federal prosecutors.⁶⁶ The CPA mandates that federal prosecutors abide by the same state laws and rules that apply to all attorneys practicing in the jurisdictions in which those federal prosecutors practice.⁶⁷ This means federal prosecutors are subject to, among other things, state ethics rules, which, in some instances, forbids some long-accepted federal prosecution practices.

The CPA came about as a result of the failed prosecution of former U.S. Representative Joseph M. McDade (R-PA), who was indicted in 1992 and charged with “accepting illegal gratuities, conspiracy, and racketeering.”⁶⁸ McDade was acquitted of the charges following a jury trial.⁶⁹ McDade did not surrender his seat in the House of Representatives, and following his acquittal, he introduced and championed legislation that eventually became the CPA.⁷⁰

For victims of prosecutorial misconduct, the CPA offers very little protection, and only to a very few citizens. For one thing, it “does not

J., dissenting) (“In passing the Hyde Amendment Congress sought to respond to patterns of prosecutorial misconduct, including instances where prosecutors ‘keep information from [the defendant] that the law says they must disclose,’ ‘hide information’ and ‘suborn perjury.’” (quoting 143 CONG. REC. H7786, at H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde))). This quote from Representative Henry Hyde was itself a source of contention in the Eleventh Circuit as the court addressed a Hyde Amendment case and debated how best to interpret and apply the law. *See Shaygan*, 676 F.3d at 1243-45; *see also* *United States v. Knott*, 256 F.3d 20, 28 (1st Cir. 2001) (“Congress enacted the Hyde Amendment in 1997 in response to perceived instances of prosecutorial abuse by the United States.” (citation omitted))).

66. The majority of exoneration cases involve prosecutorial misconduct on the part of state, not federal, prosecutors, which of course stands to reason given the vastly larger population of the former.

67. 28 U.S.C. § 530B (2012); 28 C.F.R. § 77.1 (2014). The CPA provides in relevant part:

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

28 U.S.C. § 530B(a)–(b); *see also* 28 C.F.R. §§ 77.1–.5 (setting forth implementing regulations for § 530B).

68. *United States v. McDade*, 827 F. Supp. 1153, 1161-62 (E.D. Pa. 1993), *aff’d in part*, 28 F.3d 283 (3d Cir. 1994).

69. One court suggested that the CPA “should be called ‘McDade’s Revenge,’ because there can be no doubt that Congressman McDade’s personal contempt for Department of Justice prosecutors . . . led to his efforts to pass the Act.” *United States v. Tapp*, No. CR107-108, 2008 WL 2371422, at *8 n.14 (S.D. Ga. June 4, 2008).

70. *See* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 211, 214-15 (2000) (discussing in detail the *McDade* case and the CPA).

mandate the payment of money damages.”⁷¹ Also, the CPA does not “create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, including criminal defendants . . . and shall not be a basis for dismissing criminal or civil charges or proceedings.”⁷²

Only a few courts have even issued rulings regarding the CPA. In *United States v. Lowery*, the Eleventh Circuit held that a violation of state ethics rules was not a valid basis for suppressing evidence in federal court.⁷³ The court explained that “[a]ssuming for present purposes that the [Florida ethics] rule is violated when a prosecutor promises a witness some consideration regarding charges or sentencing in return for testimony, a state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible.”⁷⁴ In *United States v. Syling*, the defendant argued that federal prosecutors violated state ethics rules in Hawaii by not presenting exculpatory evidence to the grand jury that had indicted her; the district court ruled that the CPA “does not override the law governing presentation of evidence in federal grand jury proceedings.”⁷⁵ In *Stern v. United States District Court*, the First Circuit held that a local rule in the District of Massachusetts, modeled after a state ethics rule, requiring judicial approval for subpoenas issued to defense lawyers by federal prosecutors, “impermissibly interferes with federal grand jury practice and transcends district court rulemaking authority, [and] section 530B cannot salvage it.”⁷⁶

71. *Cox v. United States*, 105 Fed. Cl. 213, 218-19 (2012) (explaining that pro se plaintiffs filed suit against United States in U.S. Court of Federal Claims seeking damages pursuant to several statutes including the CPA).

72. *Fleming v. Westfall*, No. Civ.A. 05-2320, 2005 WL 1116060, at *2 (D.N.J. May 10, 2005) (quoting 28 C.F.R. § 77.5 (2004)).

73. 166 F.3d 1119 (11th Cir.), *cert. denied*, 528 U.S. 889 (1999). Defendant Lowery contended that federal prosecutors violated a Florida state ethics rule by offering witnesses certain benefits in exchange for their testimony in the case. *Id.*

74. *Lowery*, 166 F.3d at 1124-25. The Eleventh Circuit further stated that “[f]ederal law, not state law, determines the admissibility of evidence in federal court. ‘Although there is an important state interest in the regulation of attorneys practicing within its borders, there is a competing federal interest in the enforcement of federal criminal law.’” *Id.* (quoting *United States v. Cantor*, 897 F. Supp. 110, 115 (S.D.N.Y. 1995)).

75. *United States v. Syling*, 553 F. Supp. 2d 1187, 1189, 1192 (D. Haw. 2008).

76. 214 F.3d 4, 20 (1st Cir. 2000). *But see* *United States v. Colo. Supreme Court*, 189 F.3d 1281 (10th Cir. 1999) (holding that a Colorado state ethics rule restricting the ability of prosecutors to issue subpoenas to defense attorneys to compel evidence about a past or present client in criminal proceedings, which was adopted by the District of Colorado, could be enforced against federal prosecutors in that jurisdiction pursuant to 28 U.S.C. § 530B).

Although some courts have relied on the provisions of the CPA to remedy certain misconduct by federal prosecutors,⁷⁷ section 530B clearly does not offer much of anything in the way of real reform that addresses the overarching issue of prosecutorial misconduct.⁷⁸ This is especially true because the CPA has no direct effect on those state court cases.

B. The Hyde Amendment

The Hyde Amendment⁷⁹ was enacted as part of the Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1998.⁸⁰ It is named for U.S. Representative Henry Hyde (R-Ill.) and was conceived and enacted in part as a result of political empathy or sympathy for Representative McDade and his ordeal. The Eleventh Circuit summarized this aspect of the legislative history of the amendment as follows:

In response to the prosecution of Joseph McDade, in 1997 Representative John Murtha offered an amendment to an appropriations bill which would have provided reimbursement to members of Congress and their staffs who successfully defend themselves against a federal criminal prosecution. . . . Representative Henry Hyde, Chairman of the House Judiciary Committee, was sympathetic to Murtha's proposal, and apparently shared much of his motivation, because in discussing the measure on the floor of the

77. See, e.g., *Colo. Sup. Ct.*, 189 F.3d at 1284-88; *United States v. Koerber*, 966 F. Supp. 2d 1207, 1225, 1245-46 (D. Utah 2013) (granting defendant's motion to suppress upon finding that federal prosecutor violated state ethical rules, including the state's "no-contact" rule prohibiting prosecutors from contacting represented individuals).

78. One reason the CPA does not have a broader impact is because "regulations promulgated by the Department of Justice pursuant to § 530B(b) confirm that § 530B(a) 'should not be construed in any way to alter federal substantive, procedural, or evidentiary law.'" *United States v. Lopez-Avila*, 678 F.3d 955, 963 (9th Cir. 2012) (quoting 28 C.F.R. § 77.1(b) (2010)). Accordingly, the provisions of the CPA are very narrow in scope. As one court put it, the provisions of the CPA are but a "humble command" that federal prosecutors abide by the state ethics laws and rules of the state in which the prosecutor's federal district resides. *United States v. Grass*, 239 F. Supp. 2d 535, 545 (M.D. Pa. 2003).

79. Hyde Amendment, Pub. L. No. 105-119, 111 Stat. 2440, 2519 (1997) (codified as amended at 18 U.S.C. § 3006A (2012)) (providing historical and statutory notes); see *United States v. Gilbert*, 198 F.3d 1293, 1299-303 (11th Cir. 1999) (discussing the Hyde Amendment's legislative history). The Hyde Amendment is actually a rider that Congress attaches to each year's appropriations legislation. Most recently, it has become synonymous with the mandate that federal funds (including Medicaid funds) may not be used to pay for abortions except in cases of danger to the life of the mother, rape, or incest. See Consolidated Appropriations Act, 2012 Pub. L. No. 112-74, §§ 613-614, 125 Stat. 925-96 (2011); *Planned Parenthood of Ariz. v. Betlach*, 727 F.3d 960, 964 (9th Cir. 2013). It is the 1998 version of the Amendment, obviously, that is relevant to our discussion here.

80. See *United States v. Schneider*, 395 F.3d 78, 85 (2d Cir. 2005).

House, Hyde referred to “someone we all know who went through hell, if I may use the term, for many years of being accused and finally prevailed at enormous expense.” Hyde, however, thought that Murtha’s proposal was too narrow, because it was limited to members of Congress and their staff. He pointed to the case of former Secretary of Labor Ray Donovan, “who was prosecuted again and again and again and won every time.” Acknowledging that it might be impossible for someone in that situation ever to regain their reputation, Hyde declared “at least, if the Government tries to bankrupt someone because of attorney fees, they ought to pay that.”⁸¹

The Hyde Amendment provides that a court may award “reasonable attorney’s fee and other litigation expenses” to a defendant who prevails in a criminal case “where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust.”⁸² This remedy, however, is difficult to obtain because the Hyde Amendment “provides a high standard for an award of attorney’s fees and costs against the United States in a criminal case.”⁸³ As the Eleventh Circuit recognized, “[a]n acquittal, without more, will not lead to a successful Hyde Amendment claim, as it was Congress’s intent to ‘limit Hyde Amendment awards to cases of affirmative prosecutorial misconduct rather than simply any prosecution which failed.’”⁸⁴ As a result, the Hyde Amendment has proved ineffective, largely because of the obstacles plaintiffs face when claiming that they were the victims of a vexatious federal prosecution.⁸⁵ In fact, the Hyde Amendment has been

81. *Gilbert*, 198 F.3d at 1299-300 (citations omitted). Representative Hyde’s comments were made during debate on a version of the legislation that was rejected. A kinder, gentler version was drafted to appease opponents of the law, including many in Hyde’s own party who worried that the proposed bill would make it too easy for federal criminal defendants to sue the government. *Id.* at 1301-05. In *United States v. Shaygan*, the circuit court, en route to overturning sanctions imposed by a lower court on two prosecutors, held that prosecutors are entitled to notice, hearing, and opportunity to cross examine before sanctions may be imposed for various errors and withholding evidence; indeed, the court noted, “it is not apparent to us that either [prosecutor] necessarily violated any ethical rule or constitutional or statutory standard.” *United States v. Shaygan*, 652 F.3d 1297, 1309-12, 1319 (11th Cir. 2011).

82. *Schneider*, 395 F.3d at 85-86 (quoting Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997)).

83. *Shaygan*, 652 F.3d at 1311.

84. *Schneider*, 395 F.3d at 88 (quoting *United States v. Knott*, 256 F.3d 20, 29 (1st Cir. 2001)).

85. *Shaygan*, 652 F.3d at 1311-12 (“The initial proposed version of the Hyde Amendment would have allowed a prevailing defendant to recover attorney’s fees and costs unless the government could establish that its position was ‘substantially justified’ . . . but that version was criticized on the ground that it made recovery for a prevailing defendant too easy.”); see *Gilbert*, 198 F.3d at 1299-303 (explaining the legislative history of the Hyde Amendment). “[I]n response to concern that the initial version of the Hyde Amendment swept too broadly, the scope of the

used very rarely as a remedial measure for prosecutorial misconduct and only in instances when the misconduct was extremely egregious.⁸⁶

C. *More Effective Remedies Are Available*

The Hyde Amendment and the CPA have done very little to curb prosecutorial misconduct, especially given that they do not apply to state prosecutors. More effective and innovative approaches must be conceived, debated, and implemented. Below, this Article proposes the adoption of a number of methods that could effectuate this goal.⁸⁷

1. DNA Genotyping and Phenotyping

a. Traditional DNA Testing (Genotyping)

The relationship between DNA genotyping and exonerations is staggering.⁸⁸ Over the past twenty-five years, 330 criminal defendants have been exonerated based on DNA testing at the post-conviction

provision was curtailed significantly” by Congress in two ways. *Gilbert*, 198 F.3d at 1302. First, instead of the “substantially justified” standard from the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (2012), the Hyde Amendment imposed a standard more favorable to the government: a prosecutor must be “vexatious, frivolous, or in bad faith.” § 617, 111 Stat. at 2519. Second, unlike the Equal Access to Justice Act, the Hyde Amendment placed the burden of satisfying that standard on the defendant, not on the government. 28 U.S.C. § 2412; § 617, 111 Stat. at 2519; *see Gilbert*, 198 F.3d at 1302. The Court in *Gilbert* explained the “daunting obstacle,” a defendant must overcome—at a minimum, satisfying an objective standard that the legal position of the United States amounts to prosecutorial misconduct—for an award of attorney’s fees and costs under the Hyde Amendment. *Gilbert*, 198 F.3d at 1302. The circuit court in *Gilbert* said:

From the plain meaning of the language Congress used, it is obvious that a lot more is required under the Hyde Amendment than a showing that the defendant prevailed at the pre-trial, trial, or appellate stages of the prosecution. A defendant must show that the government’s position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous.

Id. at 1299; *see also* Lorraine Morey, *Keeping the Dragon Slayers in Check: Reining in Prosecutorial Misconduct*, 5 PHOENIX L. REV. 617, 634 (2012) (“Because the Hyde Amendment sets such a high standard and was drafted with such vague and ambiguous language, the Amendment is virtually no help to wronged individuals.”).

86. *See, e.g., United States v. Aisenberg*, 247 F. Supp. 2d 1272, 1303 (M.D. Fla. 2003) (awarding nearly \$2.7 million in fees and costs under the Hyde Amendment where government conceded liability for vexatious prosecution, which was reduced to \$1.5 million following the appeal, *United States v. Aisenberg*, 358 F.3d 1327, 1345, 1352 (11th Cir. 2004)). U.S. District Judge Steven Douglas Merryday’s eighty-five-page order setting out the facts of the case and explaining his reasons for granting the award makes for a fascinating and entertaining read. *See generally Aisenberg*, 247 F. Supp. 2d at 1272.

87. *See infra* Part V.C.1–6.

88. Bruce Budowle & Anglea van Daal, *Extracting Evidence from Forensic DNA Analyses: Future Molecular Biology Directions*, 46 BIOTECHNIQUES 339, 342–43 (2009) (explaining the DNA genotyping process).

phase.⁸⁹ In 161 of those cases, DNA was used to identify the actual perpetrator (or suspect), and “in more than [twenty-five] percent of cases in a National Institute of Justice study, suspects were excluded once DNA testing was conducted *during* the criminal investigation.”⁹⁰ One of the most startling facts is that thirty-one of the exonerees pled guilty, thus accepting punishments for crimes they did not commit, and on average spent fourteen years in prison before being exonerated.⁹¹

The role DNA has played in exposing wrongful convictions—often years after a defendant has been imprisoned—counsels in favor of state-funded DNA testing at the trial level for indigent defendants who make a threshold showing by a preponderance of the evidence that a DNA test will tend to prove innocence.⁹² The fact that DNA testing plays such a vital role in exonerations makes its use at a criminal trial—where a defendant makes the requisite threshold showing—essential to ensuring a full and fair search for truth. At the very least, indigent defendants should be entitled to a DNA expert that can observe and testify regarding the procedures used by the state’s testing lab, and who can perform DNA testing on unused samples.⁹³ Surely, where there is an objective preponderance showing that post-conviction DNA genotyping could demonstrate innocence, it should be deemed actionable misconduct when the responsible prosecutor refuses to permit that testing.

b. DNA Phenotyping

In cases where a DNA sample is so degraded that genotyping is impractical, defense counsel may be able to use DNA phenotyping to indirectly uncover evidence tending to prove innocence. Specifically, DNA phenotyping can predict, to a high degree of probability, a suspect’s externally-visible characteristics, such as sex, age, eye color, hair color, and skin color.⁹⁴ In the near future, DNA phenotyping will

89. See *DNA Exonerations Nationwide*, *supra* note 2.

90. *Id.* (emphasis added).

91. *Id.*

92. See John Devlin, Comment, *Genetics and Justice: An Indigent Defendant’s Right to DNA Expert Assistance*, 1998 U. CHI. LEGAL F. 395, 398-99 (explaining the benefits to using DNA at trial to assist criminal defendants).

93. *Id.* at 399.

94. See generally Charles E. MacLean, *Creating a Wanted Poster from a Drop of Blood: Using DNA Phenotyping to Generate an Artist’s Rendering of an Offender Based Only on DNA Shed at the Crime Scene*, 36 HAMLINE L. REV. 357 (2013); see also Manfred Kayser & Peter de Knijff, *Improving Human Forensics Through Advances in Genetics, Genomics and Molecular Biology*, 12 NAT. REV. GENETICS 179, 179 (2011) (“Forensic DNA profiling [and other recent] advancements in genetics, genomics and molecular biology are likely to improve human forensic case work in the near future.”).

also be able to predict, among other things, a suspect's height, facial morphology, hair structure, dominant handedness, basic fingerprint patterns, skin tone, ethnicity, and age.⁹⁵ Up to this point, DNA phenotyping has allowed investigators to generate a physical likeness of a missing person based only on DNA from skeletal remains and generate a "wanted" poster using DNA shed by an offender at a crime scene.⁹⁶ Thus, DNA phenotyping can be used to create a profile of a suspect based on immutable characteristics such as sex, height, and ethnicity. As such, in those cases where a DNA sample is so degraded that DNA genotyping cannot be performed, phenotyping can still be used to exclude certain groups of people as suspects and, therefore, to support a showing of innocence at the trial level.

2. Functional Magnetic Resonance Imaging

Neuroscience researchers have used fMRI and other techniques to show that a significant number of criminal defendants suffer from brain injuries that impact their ability to form the mental states required for particular violent crimes.⁹⁷ Specifically, defendants with frontal lobe disorders and damage to the limbic system (the neural circuit connecting the amygdala and pre-frontal cortex) are more likely "to lose control over their behavior" and "are predisposed to engage in aggressive behavior, rage attacks, and sudden bursts of anger—precisely the type of behavior we classify as criminal."⁹⁸ In fact, research has shown that "[m]ore often than not, defendants charged with homicide have been exposed to various risk factors in their environment that generate cognitive, neuropsychological, and organic brain impairment."⁹⁹

The recent execution of Cecil Clayton in Missouri underscores the relationship between brain injuries and culpability. Clayton was known as an intelligent and friendly person before being injured in an accident at a sawmill where he worked.¹⁰⁰ Due to the extent of his injuries,

95. See *id.*

96. See, e.g., Debra Cassens Weiss, *Can DNA Be Used to Generate Sketch of Possible Suspect? Cops in South Carolina Give It a Try*, ABA J. (Feb. 26, 2015, 5:45 AM), http://www.abajournal.com/news/article/can_dna_be_used_to_generate_sketch_of_possible_suspect_cops_in_south_caroli; Andrew Pollack, *Building a Face, and a Case, on DNA*, N.Y. TIMES, Feb. 24, 2015, at D1.

97. Adam Lamparello, *Using Cognitive Neuroscience to Predict Future Dangerousness*, 42 COLUM. HUM. RTS. L. REV. 481, 492-501 (2001).

98. *Id.* at 481-82.

99. *Id.* at 505 (quoting John Matthew Fabian, *Forensic Neuropsychological Assessment and Death Penalty Litigation*, CHAMPION, Apr. 2009, at 24, 25).

100. Sarah Kaplan, *The Execution of Cecil Clayton and the Biology of Blame*, WASH. POST (Mar. 18, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/03/18/the-execution-of-cecil-clayton-and-the-biology-of-blame>.

doctors removed twenty percent of Clayton's frontal lobe, the area of the brain responsible for higher-level cognitive functions, including reasoning and impulse control.¹⁰¹ In the days and months following his surgery, Clayton "began drinking alcohol and became impatient, unable to work and more prone to violent outbursts."¹⁰² This behavior continued for years and culminated in the shooting of a sheriff's deputy, for which Clayton received the death penalty.¹⁰³ In a petition to the Supreme Court seeking a stay of execution, Clayton's attorneys argued that the accident and resulting brain injury mitigated Clayton's culpability:

"The effects of his 1972 accident left him blameless for the 1996 murder," read a petition filed by his defense, asking for a stay of execution from the U.S. Supreme Court. It was accompanied by an image of his brain scan, which shows a sizeable chunk of his brain missing from the right-hand side.¹⁰⁴

The Supreme Court denied the petition, and Clayton was executed.¹⁰⁵ Increasingly, however, defense attorneys have used brain scans to demonstrate that a defendant's rational decision-making was sufficiently impaired to justify a lesser sentence. For example, a defendant who shot and killed two people after escaping from an Arizona prison was sentenced to life without parole because brain scans showed structural abnormalities that impaired the defendant's ability to reason.¹⁰⁶ One commentator explains the role that the brain scan played in sparing the defendant the death penalty:

In the sentencing phase of the trial, McCluskey's lawyers argued that, as a result of his brain abnormalities—as well as a slew of other unfortunate circumstances ranging from a breech birth, to abuse as a child, to drug and alcohol addiction—he was incapable of "a level of intent sufficient to allow consideration of the death penalty." Essentially, they argued that his acts were impulsive, that he would have been incapable of planning such things.

....

The defense presented evidence of damage to the cerebellum, a region at the back of the brain best known for its role in balance and coordinating movement. . . . [T]he defense argued that [the defendant's] damage, likely caused by a stroke, was indicative of

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Clayton v. Lombardi, 135 S. Ct. 1697 (2015).

106. See Greg Miller, *Did Brain Scans Just Save a Convicted Murderer from the Death Penalty?* (Dec. 12, 2013, 6:30 AM), <http://www.wired.com/2013/12/murder-law-brain>.

something called cerebellar cognitive affective syndrome, which can cause problems with planning and controlling behavior.¹⁰⁷

The result in this case underscores the relationship between fair processes and wrongful convictions. If defendants, particularly those who are indigent and represented by public defenders, do not have access to testing procedures, such as DNA genotyping and brain imaging, then jury verdicts and sentences will, at least in some cases, be less reliable. Most would agree, for example, that a defendant with traumatic brain injuries—or one missing twenty percent of a region in the brain responsible for higher cognitive thinking—is less culpable than the average individual with normal brain function.

In essence, the term “wrongful convictions” should not simply refer to defendants who are factually innocent but found guilty. It should include instances where the procedures used to convict a defendant are fundamentally unfair and, therefore, undermine reliability in the defendant’s culpability and resulting sentence. This is particularly true in the death penalty context, as “the death penalty is reserved for the worst criminals and it cannot be upheld as a punishment for individuals with diminished culpability.”¹⁰⁸ Indeed, a conviction is wrongful not only because substantial doubts exist about the defendant’s innocence, but also because the sentence a defendant receives may not be reflective of the actual culpability of the defendant. Thus, the state should permit, or courts should order, brain imaging and DNA testing upon a threshold showing that: (1) the defendant suffers from a brain abnormality that is relevant to his culpability for the charged crime; and (2) the test or scan is a reliable method by which to reveal the abnormality. Otherwise, the sentencing phase of criminal trials will, at least for some defendants, fail to include critical evidence that relates directly to culpability.

3. Focusing on the Anti-Terrorism and Effective Death Penalty Act’s Second Prong

The AEDPA makes it nearly impossible for defendants convicted at the federal level to obtain habeas relief.¹⁰⁹ The defendant must show that the lower court’s rulings were either contrary to or involved an unreasonable application of clearly established federal law.¹¹⁰ The problem with this standard is that “even a strong case for relief does not

107. *Id.*

108. Jessica E. Brown, *Classifying Juveniles ‘Among the Worst Offenders’: Utilizing Roper v. Simmons to Challenge Registration and Notification Requirements for Adolescent Sex Offenders*, 39 STETSON L. REV. 369, 391 (2010).

109. See 28 U.S.C. § 2254 (2000).

110. *Id.*

mean that the state court's contrary conclusion [of law] was unreasonable."¹¹¹ As the Eleventh Circuit has held, the federal courts' role is to "guard against extreme malfunctions in the state criminal justice systems,"¹¹² and not to act as a "means of error correction."¹¹³

This approach has led the federal courts to give undue deference to the findings of lower courts. In so doing, it has become difficult, if not impossible, for defendants to obtain habeas relief, even where errors affecting the defendant's constitutional rights occurred at the trial or on direct appeal. For example, Georgia death row inmate Warren Hill was executed despite a finding by a state court, by a preponderance of the evidence, that Hill was mentally retarded.¹¹⁴ The Eleventh Circuit affirmed the Georgia Supreme Court's reversal of these decisions on the grounds that Georgia's statute required defendants to provide proof of mental retardation beyond a reasonable doubt.¹¹⁵ The court held Georgia's high standard did not violate the Supreme Court's prohibition on executing the mentally retarded, stating that "[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the] Court."¹¹⁶ In so holding, the Eleventh Circuit explained that, under the AEDPA, it must be "highly deferential to the state courts,"¹¹⁷ and that the "procedure for determining mental retardation [was] distinct from the Eighth Amendment issue decided in *Atkins*."¹¹⁸

The AEDPA has had an extraordinarily harmful effect on wrongfully convicted defendants because it essentially precludes meaningful appellate review and permits significant violations of a defendant's constitutional rights to go without remedy. Furthermore, the federal courts have made the problem worse by focusing too heavily on whether a lower court's decision was contrary to clearly established federal law, rather than on whether the court's decision involved an unreasonable application of that law. The distinction is significant because the phrase "contrary to clearly established federal law" is, for all intents and purposes, undefinable. Whether a federal law is "clearly

111. *Hill v. Humphrey*, 662 F.3d 1335, 1345 (11th Cir. 2011).

112. *Id.* at 1347 (citation omitted).

113. *Id.*

114. *Id.*

115. *Id.* at 1360.

116. *Id.* at 1338 (citation omitted).

117. *Id.* at 1343 (quoting *Payne v. Allen*, 539 F.3d 1297, 1312 (11th Cir. 2008)).

118. *Id.* at 1352 (referring to *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that execution of mentally retarded defendants was cruel and unusual punishment in violation of the Eighth Amendment)).

established” depends on, among other things, the scope of a particular law, whether all or parts of that law have been called into question, and whether the law is sufficiently ambiguous to permit different applications. Likewise, the term “contrary” is largely subjective, particularly where a law is broad or subject to different interpretations.

4. Modifying *Strickland v. Washington*

The U.S. Supreme Court’s decision in *Strickland v. Washington*¹¹⁹ has resulted in the affirmed convictions of criminal defendants despite egregious violations of the Sixth Amendment’s right to counsel.¹²⁰ In *Strickland*, the Court held that counsel’s performance violates the Sixth Amendment if it falls below a reasonable standard of care and affected the outcome of the trial.¹²¹ Thus, a convicted defendant must show that counsel acted negligently and that, “‘but for’ counsel’s errors, his performance would be material or favorable in foreseeing whether a result at trial would have been different.”¹²²

Unfortunately, the *Strickland* standard has “proved virtually impossible for defendants to meet, and instead of raising the bar for effective counsel, the Court created a bar to nearly all assertions of attorney inadequacy.”¹²³ Indeed, courts have upheld convictions despite grossly negligent representation by counsel, often by deferring to “strategic” decisions made by counsel, even where those decisions are highly questionable.¹²⁴ Some have observed: “Even in capital cases, where life and death literally hung in the balance, courts often deferred to incomprehensible ‘strategic’ decisions provided by trial counsel rationalizing their slothful representation.”¹²⁵ This includes attorneys with substance abuse problems or ethics violations that led to their disbarment:

Lawyers have been found to be drunk or drugged, mentally ill, or asleep while representing a defendant. In addition, several recent studies of capital trials reveal that lawyers who represented death row

119. 466 U.S. 668 (1984).

120. See Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trial*, 62 ME. L. REV. 97, 109-10, 115, 121-22 (2010).

121. See *Strickland*, 466 U.S. at 687, 691.

122. Patrick S. Metze, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163, 217 (2012).

123. Lamparello, *supra* note 120, at 114.

124. *Id.*

125. *Id.* at 115 (quoting John H. Blume & Stacy D. Neumann, “It’s Like *Deja Vu* All Over Again”: *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 142 (2007)).

inmates at trial were subsequently disbarred, suspended, or otherwise disciplined at a rate three to forty-six times the average for the relevant states. . . . For those attorneys whose clients were executed, the rate of disciplinary sanctions was almost forty times that of the bar as a whole.¹²⁶

In fact, “during the sixteen years after *Strickland*, in which ‘the Supreme Court itself failed to find a single instance of constitutionally inadequate representation’ nearly all representation was found to be within *Strickland*’s ‘wide range of professionally competent assistance.’”¹²⁷ Even where courts have found that counsel’s representation fell below a reasonable standard of care, they have nonetheless upheld convictions on the grounds that the attorney’s performance did not affect the outcome of the trial. One commentator states:

The prejudice prong is pure fiction with its genesis in the effort to protect jury verdicts. Nothing more, nothing less. It is an effort to be able to say we still believe in the sacred nature of the right to counsel and the right to effective counsel, while only rarely having to set aside a verdict. It is a rule that is now thirty years old and meaningless, creating a vast amount of litigation that only on rare occasions finds relief.¹²⁸

The problem with *Strickland*’s prejudice prong is that it is “hard to tell if a convicted person ‘would have fared better if his lawyer had been competent.’”¹²⁹ In addition, the purpose of the Sixth Amendment “is not so much to ensure the innocent are not convicted but to guarantee ‘convictions are obtained only through fundamentally fair procedures.’”¹³⁰ The Court’s use of the *Strickland* standard, and its overall approach to Sixth Amendment jurisprudence, fails to recognize that convictions can be wrongful if the processes by which the conviction was obtained were tainted. Furthermore, wrongful convictions result, in part, because counsel’s performance was deficient, and the “prejudice” prong makes it more, not less, difficult to identify flaws that, regardless of their effect on the trial’s outcome, deprived the defendant of due process of law.

126. *Id.* at 115-16.

127. *Id.* at 114-15 (quoting Blume & Neumann, *supra* note 125, at 134, 142).

128. Metz, *supra* note 122, at 218.

129. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting)).

130. *Id.* (quoting *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting)).

5. Habeas and Innocence Projects

Forty-six states and the District of Columbia currently have innocence projects that are members of the non-profit organization Innocence Network.¹³¹ These innocence projects, often sponsored by area law schools, are designed to obtain justice for wrongfully convicted citizens and propose relevant state legislation.¹³² The West Virginia University Innocence Project, for example, is currently lobbying the state legislature to enact a law mandating audio and video recording of all investigative interviews and interrogations of felony suspects.¹³³

The valuable work done by innocence projects can hardly be overstated. They are the absolute last resort of wrongfully convicted citizens. The tremendous work they do is evidenced by the fact that over 1500 individuals have been exonerated in the United States since 1989.¹³⁴

6. The Prosecutor's Accountability

a. Uniform Application of the Qualified Immunity Doctrine

The doctrine of absolute immunity for prosecutors is well-entrenched in American jurisprudence. In the seminal case of *Imbler v. Pachtman*, the Supreme Court emphasized that “the common-law rule of immunity [for public officials] is . . . well settled.”¹³⁵ The Court held in *Imbler* that prosecutors enjoy absolute immunity from suits under § 1983 of Title 42 of the *United States Code* for actions taken in connection with their prosecutorial responsibilities.¹³⁶ But *Imbler* did not give birth to the doctrine of prosecutorial immunity; rather, the common-law rule was first judicially recognized eighty years earlier.¹³⁷

131. See *Innocence Network Member Organizations*, INNOCENCE NETWORK, <http://innocencenetwork.org/members> (last visited Nov. 22, 2015) (providing a complete listing of member organizations); *Innocence Projects by State*, NCSTL.ORG, <http://www.ncstl.org/resources/Innocence%20Projects> (last visited Nov. 22, 2015) (listing state innocence projects).

132. See THE INNOCENCE NETWORK, <http://innocencenetwork.org> (last visited Nov. 22, 2015). The Innocence Network was founded by the Innocence Project, and the latter is a member of the former. *Id.* The organization bills itself as “an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions.” *Id.*

133. See Chris Lawrence, *WVU Law Innocence Project Pushes Bill at Statehouse*, WV METRO NEWS (Feb. 2, 2014, 6:00 PM), <http://www.wvmetronews.com/2014/02/02/wvu-law-innocence-project-pushes-bill-at-statehouse>.

134. *Basic Patterns*, *supra* note 18.

135. 424 U.S. 409, 424 (1976).

136. *Id.* (“[T]he threat of § 1983 suits would undermine performance of [the prosecutor’s] duties no less than would the threat of common-law suits for malicious prosecution.”).

137. JOHN TOWNSEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL § 227, at

The doctrine has aged well, and the extraordinary level of protection it affords prosecutors has been recently reaffirmed and, arguably, fortified.¹³⁸

If Lord Acton was correct that “power tends to corrupt, and absolute power corrupts absolutely,”¹³⁹ then the fittingly-named doctrine of absolute immunity arguably invites prosecutorial misconduct to the extent prosecutors are overly comforted by the knowledge that they will be shielded from liability for virtually any action they take—even actions offensive on their face—so long as those actions are related to furthering a criminal proceeding.¹⁴⁰ The absolute immunity doctrine is intended to ensure the integrity of the prosecutorial process by preventing “a deflection of the prosecutor’s energies from his public

395-96 (3d ed. 1877). The court in *Griffith v. Slinkard* held:

The prosecuting attorney, therefore, is a judicial officer, but in the sense of a judge of a court. The rule applicable to such an officer is thus stated by an eminent author: “Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.”

Griffith v. Slinkard, 44 N.E. 1001, 1002 (Ind. 1896) (quoting TOWNSHEND, *supra*); see also Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 510 & n.11 (2011) (citing *Griffith*, 44 N.E. at 1002).

138. See *Connick v. Thompson*, 131 S. Ct. 1350, 1366 (2011) (finding that a municipality was not liable under § 1983 on failure to train claim following prosecutor’s admitted failure to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963)); *Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009) (extending the doctrine of absolute immunity to prosecutor’s administrative actions when such actions are “directly connected to the conduct of a trial”).

139. John Emerich Edward Dalberg-Acton, usually referred to simply as Lord Acton, expressed his oft-quoted opinion in a letter to Bishop Mandell Creighton, Bishop of the Church of England, in 1887. See JOHN EMERICH EDWARD DALBERG-ACTON, *ESSAYS ON FREEDOM AND POWER* 364 (Gertrude Himmelfarb ed., The Free Press 1948).

140. See *Gordon v. Devine*, No. 08 C 377, 2008 WL 4594354, at *10 (N.D. Ill. Oct. 14, 2008). In *Gordon v. Devine*, the district court in Illinois recognized:

[C]ourts have held that prosecutors are functioning in a “quasi-judicial” role and are protected by absolute immunity in light of the following allegations: knowingly using false testimony at trial and purposefully suppressing exculpatory evidence . . . ; participating in a probable cause hearing, [*Burns v. Reed*, 500 U.S. 478,] 489-90 [(1991)] (noting that prosecutors “were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings . . . , and also for eliciting false and defamatory testimony from witnesses”); willfully suppressing exculpatory evidence at grand jury proceedings . . . ; knowingly using perjured testimony . . . ; providing false and misleading arguments to the court . . . ; destroying and falsifying line-up reports . . . ; “initiat[ing] charges maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence,” . . . ; and misrepresenting facts during plea negotiations

Id. at *10 (citations omitted).

duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.”¹⁴¹ While few would deny that “[t]he overwhelming majority of prosecutors are decent, ethical, honorable lawyers who understand the awesome power they wield, and the responsibility that goes with it,”¹⁴² it is equally undeniable, as the facts and statistics presented in this Article demonstrate, that incidents of prosecutorial misconduct—sometimes egregious misconduct—occur with disconcerting frequency.¹⁴³

In *United States v. Wilson*, the circuit court, after acknowledging misconduct on the part of the federal prosecutor, affirmed the defendant’s conviction in almost lamenting fashion, stating: “We thus find ourselves in a situation with which we are all too familiar: a prosecutor has engaged in misconduct at trial, but no reversible error has been shown.”¹⁴⁴ Indeed, many courts have expressed dismay with incidents of prosecutorial misconduct and the constraints the immunity doctrine places on courts’ ability to effectively sanction that misconduct.¹⁴⁵

141. *Mangiafico v. Blumenthal*, 358 F. Supp. 2d 6, 21-22 (D. Conn. 2005), *aff’d*, 471 F.3d 391 (2d Cir. 2006) (citing *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976)).

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

143. See *supra* notes 20-28 and accompanying text; Part III.

144. 149 F.3d 1298, 1303 (11th Cir. 1998); see also *United States v. Eason*, 920 F.2d 731, 736 (11th Cir. 1990) (citing cases in which the court has affirmed convictions despite prosecutorial misconduct); *United States v. Butera*, 677 F.2d 1376, 1383 (11th Cir. 1982) (“Prosecutor misconduct alone does not require reversal unless the misconduct deprives the defendant of a fair trial.”); *United States v. Modica*, 663 F.2d 1173, 1182 (2d Cir. 1981) (“We thus find ourselves in a situation with which this Court is all too familiar: a prosecutor has delivered an improper summation, despite this Court’s oft-expressed concern over the frequency with which improper summations occur [J]ust as this Court has often brandished the sword of reversal only to resheath it in the absence of substantial prejudice, here, too, we find no basis to reverse the underlying conviction.”).

145. See *United States v. Hasting*, 461 U.S. 499, 506-07 (1983); *United States v. Auch*, 187 F.3d 125, 133 (1st Cir. 1999) (“Although we find the prosecutor’s various transgressions and missteps in the conduct of this trial both disturbing and exasperating, we discern no reversible error. . . . Accordingly, we heed the Supreme Court’s admonition against letting the guilty go free to punish prosecutorial misconduct.”); *Kojayan*, 8 F.3d at 1324-25 (“The prosecutorial misconduct in this case deprived the defendants of due process of law. It contaminated their trial, and we cannot say it was harmless. . . . In a situation like this, the judiciary—especially the court before which the primary misbehavior took place—may exercise its supervisory power to make it clear that the misconduct was serious, that the government’s unwillingness to own up to it was more serious still and that steps must be taken to avoid a recurrence of this chain of events.” (citations omitted)); *United States v. Boyd*, 131 F.3d 951, 955 (11th Cir. 1997) (“The fact that we do not reverse the convictions in these cases does not mean that we condone [improper] remarks of this kind.”); *Eason*, 920 F.2d at 737 (“That we find an error not to be reversible does not transmute that error into a virtue. The error is still an error. Urging the error upon the trial court still violates the United States Attorney’s obligation to the court and to the public.”).

Prosecutors are also protected by qualified immunity, that is, “good-faith immunity.”¹⁴⁶ The Seventh Circuit has said: “An official is entitled to qualified immunity for conduct that ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”¹⁴⁷ In the most general sense, prosecutors, whether state or federal, enjoy absolute immunity for virtually all actions they take, “so long as the action is part of the judicial process,”¹⁴⁸ but they are protected only by the doctrine of qualified immunity for actions taken in their official capacity, but which are not deemed directly related to the judicial process.¹⁴⁹ Put another way, prosecutors’ actions are protected by the shield of absolute immunity if those actions are related to prosecutors’ decisions whether to bring charges against an individual or their actions to prosecute those charges in court; they are entitled to the lesser the protection of qualified immunity for actions taken while investigating potential crimes prior to filing charges.¹⁵⁰ The Supreme Court held in *Buckley v. Fitzsimmons* that “the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. . . . [S]o when a prosecutor ‘functions as an administrator rather than as an officer of the court’ he is entitled only to qualified immunity.”¹⁵¹

Accordingly, the Court explained: “A prosecutor’s administrative duties and those investigatory functions that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.”¹⁵² This distinction may seem clear on its face, but in practice the line separating absolute from qualified immunity has become virtually invisible. In the context of prosecutorial misconduct, one could argue that the doctrine of qualified immunity serves much the same purpose as an umbrella insurance policy, acting as a complement to the doctrine of absolute immunity and affording additional protection to prosecutors for actions they take that are deemed not to fall within the “primary coverage” of absolute immunity.

146. *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982).

147. *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 981 (2013) (quoting *Harlow*, 457 U.S. at 818).

148. *Anderson v. Venango Cnty.*, C.A. No. 10-79 Erie, 2011 WL 147907, at *4 (W.D. Pa. Jan. 18, 2011), *aff’d*, 458 F. App’x 161 (3d Cir. 2012) (citing *Imbler v. Patchman*, 424 U.S. 409, 430-31 (1976)).

149. *Anderson*, 2011 WL 147907, at *4.

150. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

151. *Id.* at 273 (quoting *Imbler*, 424 U.S. at 431 n.33).

152. *Id.* (citing *Burns v. Reed*, 500 U.S. 478, 494-96 (1991)).

Subsequent decisions addressing the issue of qualified immunity have applied the rule broadly, thereby expanding the doctrine and blurring the line between actions protected by absolute immunity and those protected only by qualified immunity (again assuming that any bright-line distinction ever existed in the first place.) For example, in *Van de Kamp v. Goldstein*, defendant Goldstein was released after serving twenty-four years in prison following a successful habeas petition in which he argued that his murder conviction had been based, in large part, on the testimony of a jailhouse informant.¹⁵³ Goldstein complained that the prosecutor failed to turn over to the defense information concerning benefits the informant received in exchange for his testimony and that the prosecutor failed to properly supervise members of his prosecutorial team by ensuring that a system was in place by which prosecutors shared potential impeachment evidence concerning such informants.¹⁵⁴

The district court granted Goldstein's petition and he subsequently brought his civil rights action against the prosecutors pursuant to § 1983.¹⁵⁵ The district court refused to grant a motion to dismiss filed by the prosecutors, who maintained they were entitled to absolute immunity for their actions.¹⁵⁶ The Ninth Circuit affirmed, ruling that the failure of prosecutors to turn over the impeachment evidence and to implement an in-house procedure to ensure that such information was released to the defense violated the prosecutor's constitutional obligations as set forth in *Giglio v. United States*.¹⁵⁷ The Supreme Court, however, reversed and

153. *Van de Kamp v. Goldstein*, 555 U.S. 335, 339 (2009). Ironically, the jailhouse informant who testified against Goldstein had the last name of "Fink." *Id.*

154. *Id.* at 340.

155. *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1171 (9th Cir. 2007).

156. *Van de Kamp*, 555 U.S. at 340; *Goldstein*, 481 F.3d at 1171.

157. *Van de Kamp*, 555 U.S. at 340; *Giglio v. United States*, 405 U.S. 150 (1972). In *Giglio*, the Court explained:

As long ago as *Mooney v. Holohan*, . . . this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas* In *Napue v. Illinois*, . . . we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." . . . Thereafter *Brady v. Maryland* . . . held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." . . . When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. . . . We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict" . . . A finding of materiality of the evidence is required under *Brady* A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury"

Id. at 153-54 (citations omitted); see *Goldstein*, 481 F.3d at 1176.

remanded, holding that the prosecutors were, in fact, entitled to absolute immunity and reasoning that the actions of prosecutors were not administrative in nature, but rather were “intimately associated with the judicial phase of the criminal process.”¹⁵⁸ The Court reasoned as follows:

Here, unlike with other claims related to administrative decisions, an individual prosecutor’s error in the plaintiff’s specific criminal trial constitutes an essential element of the plaintiff’s claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which Goldstein’s claims focus necessarily require legal knowledge and the exercise of related discretion, [for example], in determining what information should be included in the training or the supervision or the information-system management. And in that sense also Goldstein’s claims are unlike claims of, say, unlawful discrimination in hiring employees. Given these features of the case before us, we believe absolute immunity must follow.¹⁵⁹

In a more recent case, a divided Supreme Court held that a chief state prosecutor was not subject to suit under § 1983 when assistant prosecutors under his supervision knowingly failed to disclose exculpatory evidence in the form of a police crime lab report.¹⁶⁰ In 1985, John Thompson was charged with the murder of a man in New Orleans.¹⁶¹ The publicity surrounding the murder charge apparently inspired victims of an attempted armed robbery to identify Thompson as the perpetrator of that crime.¹⁶² He was convicted on the attempted armed robbery charge.¹⁶³ Just weeks later he was tried and convicted on the murder charge and sentenced to death.¹⁶⁴ Thompson chose not to testify on his own behalf at the murder trial because of the recent armed robbery conviction.¹⁶⁵ He spent eighteen years in prison, fourteen of those on death row.¹⁶⁶ Merely a month before he was scheduled to be executed, an investigator working on Thompson’s behalf discovered a report from a crime lab that contained exculpatory evidence—

158. *Van de Kamp*, 555 U.S. at 340–41 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)).

159. *Id.* at 344.

160. *Connick v. Thompson*, 131 S. Ct. 1350, 1355–56, 1366 (2011).

161. *Id.* at 1356.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 1355.

specifically, a blood test on a swatch of clothing from one of the robbery victims containing some of the robber's blood, which did not match Thompson's blood type.¹⁶⁷ Based on this newly discovered evidence, the Louisiana Court of Appeals reversed Thompson's murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial.¹⁶⁸ Thompson was found not guilty of the murder following a retrial.¹⁶⁹

Following this exoneration, Thompson filed suit in federal court against the Orleans Parish District Attorney's Office under § 1983, alleging that the prosecutor's failure to disclose the exculpatory crime lab report, and the prosecutor's failure to train other prosecutors in his office to prevent the withholding of exculpatory evidence, constituted deliberate indifference to Thompson's constitutional rights.¹⁷⁰ A jury found in favor of Thompson and awarded him \$14 million in compensation.¹⁷¹ A sharply divided Fifth Circuit affirmed¹⁷² and certiorari was granted.¹⁷³

The Supreme Court, divided along ideological lines, reversed.¹⁷⁴ The Court acknowledged that the Orleans Parish District Attorney's Office had conceded that, by withholding the crime lab report, the prosecutor had violated *Brady v. Maryland*,¹⁷⁵ but nonetheless concluded that a prosecutor's office cannot be held liable under § 1983 on a failure to train claim based on a single *Brady* violation.¹⁷⁶ The Court reasoned:

It does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to "a decision by the [governmental entity] itself to violate the Constitution." . . . To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact,

167. *Id.* at 1356.

168. *State v. Thompson*, 825 So. 2d 552, 557-58 (La. Ct. App. 2002).

169. *Connick*, 131 S. Ct. at 1357.

170. *Id.*

171. *Id.*

172. *Thompson v. Connick*, 578 F.3d 293, 293 (5th Cir. 2009).

173. *Connick v. Thompson*, 559 U.S. 1004, 1004 (2010).

174. *Connick*, 131 S. Ct. at 1355, 1366. In *Connick v. Thompson*, Justice Thomas wrote the majority opinion, in which Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined; Justice Scalia filed a concurring opinion which Justice Alito joined; and Justice Ginsburg filed a dissenting opinion in which Justices Breyer, Sotomayor, and Kagan joined. *Id.*

175. 373 U.S. 83 (1963).

176. *Connick*, 131 S. Ct. at 1366.

Thompson had to show that it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights. . . . He did not do so.¹⁷⁷

The Court's opinion in *Connick v. Thompson* makes no mention of absolute or qualified immunity.¹⁷⁸ The Court concluded that Thompson's claims were barred by *Monell v. Department of Social Services of New York*¹⁷⁹ due to his failure to prove the presence of a pattern or practice of unconstitutional procedures in the New Orleans District Attorney's Office or deliberate indifference to such constitutional violations on the part of Connick.¹⁸⁰ But if it walks like a duck and quacks like a duck, it's immunity. As one author put it: "Two lines of immunity . . . — prosecutorial immunity under *Imbler* and municipal liability under *Monell*—converged in *Connick v. Thompson* to bar recovery where a prosecutor committed clear constitutional violations."¹⁸¹ The Court in *Connick* expanded (many would say greatly expanded) the doctrine of prosecutorial immunity even without discussing it, and its holding presents yet another obstacle to preventing prosecutorial misconduct.¹⁸²

In light of the seemingly impenetrable fortress of absolute and qualified immunity, a vigorous discussion and debate of potential remedies for prosecutorial misconduct must persist. This would be true even if John Thompson were the only person forced to spend years in prison as a result of prosecutorial misconduct.¹⁸³ But as the statistics

177. *Id.* at 1365 (citations omitted).

178. *Id.* at 1355-66.

179. 436 U.S. 658 (1978).

180. *Connick*, 131 S. Ct. at 1360, 1366.

181. David H. Rittgers, *Connick v. Thompson: An Immunity that Admits of (Almost) No Liabilities*, CATO SUP. CT. REV., 2010-2011, at 226.

182. See David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 203 (2011), <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part-supreme-court/the-myth-of-prosecutorial-accountability-after-connick-v.-thompson-why-existing-professional-responsibility-measures-cannot-protect-against-prosecutorial-misconduct> ("In rejecting Thompson's attempt to hold the New Orleans District Attorney's Office civilly liable for failing to train its prosecutors in proper discovery procedures, the Connick Court substantially narrowed one of the few remaining avenues for deterring prosecutorial misconduct."); Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 FORDHAM L. REV. 715, 715 (2011) ("In *Connick v. Thompson*, the U.S. Supreme Court blocked one of the last remaining paths to prosecutorial accountability for the violation of constitutionally mandated discovery obligations under *Brady v. Maryland*. . . . The decision . . . bodes ill for prosecutorial accountability more generally, and for failure to train liability across the board." (footnote call numbers omitted)).

183. Several years after his exoneration, Thompson started an organization called Resurrection After Exoneration, "an education and outreach program that helps exonerated and formerly incarcerated inmates rebuild their lives." Emmanuella Grinburg, *Life After Death Row: Helping Break the 'Jailhouse Mentality'*, CNN (Apr. 5, 2014), <http://edition.cnn.com/2014/04/04/us/death->

presented and discussed at the beginning of this Article indicate, prosecutorial misconduct does occur.¹⁸⁴ It occurs with a frequency that should give us pause, as it is detrimental to the public perception of the criminal justice system, it undermines the fair administration of justice, and, in far too many real cases, it ruins lives.¹⁸⁵

Professor Margaret Johns, for example, contends that “despite layers of corrective procedures, our current criminal and civil justice process is ineffective in deterring or remedying prosecutorial misconduct.”¹⁸⁶ She proposes abolishing the absolute immunity doctrine in favor of a “uniform application of qualified immunity” for prosecutors.¹⁸⁷ In the conclusion to her article discussing this approach, Professor Johns argues as follows:

In place of absolute immunity, qualified immunity should be uniformly applied. Qualified immunity would protect honest prosecutors from unwarranted litigation while affording victims of deliberate prosecutorial misconduct a remedy for the willful violation of their civil rights. Qualified immunity would be consistent with the common law as it existed in 1871 and with the purposes underlying the adoption of § 1983—providing a federal civil rights remedy for malicious prosecutions. And the uniform application of qualified immunity would simplify and streamline the law by providing an objective standard that could be applied in the early stages of litigation to protect prosecutors not only from liability, but also from the burden of litigation.¹⁸⁸

row-stories-thompson/index.html?hpt=hp_c2. Thompson is quoted in the article explaining that exonerated inmates “come home and the system has nothing in place to help them put their lives back together. They need to be reprogrammed because the survival tactics they learned in prison don’t work in the outside world.” *Id.*

184. See *supra* Parts I–III.

185. On March 29, 2011, the day the Supreme Court issued its opinion in *Connick*, John Thompson, joined by numerous other individuals who were victims of prosecutorial misconduct, wrote a letter to Attorney General Eric Holder, Jr., in which they stated: “We, the undersigned and our families, have suffered profound harm at the hands of careless, overzealous and unethical prosecutors. Unfortunately, today’s ruling only threatens to further embolden those prosecutors who are willing to abandon their responsibility to seek justice in their zeal to win convictions.” Letter from Kennedy Brewer et al., to the Hon. Eric H. Holder, Jr., Attorney Gen. of the U.S., U.S. Dep’t of Justice (Mar. 29, 2011), <http://www.innocenceproject.org/files/imported/exonereeletterrethompson-1.pdf>.

186. Johns, *supra* note 137, at 511 (2011).

187. *Id.* at 527–35.

188. *Id.* at 527, 535. Professor Johns’ theory is based on her premise that “[t]he common law as of 1871 did not confer absolute immunity for prosecutorial misconduct.” *Id.* at 522. Furthermore, Professor Johns believes:

[When Congress enacted § 1983 that year, it] could not have intended to retain a common law rule that did not yet exist. And it certainly did not intend to insulate prosecutors from liability for malicious prosecutions, since that was one of the tactics of

Professor Johns maintains that the Supreme Court's "historical justification for recognizing absolute prosecutorial immunity is just plain wrong."¹⁸⁹ Furthermore, argues Johns, "[u]nder the current doctrine, drawing the line between conduct entitled to absolute immunity and conduct entitled to qualified immunity is a complicated question that has generated multiple conflicting decisions."¹⁹⁰ Professor Johns states as follows:

The simplest solution is to apply qualified immunity in all cases: regardless of whether the prosecutor was acting as an investigator or advocate, did the prosecutor violate clearly established law of which a reasonable prosecutor would have known? If not, qualified immunity protects the prosecutor from liability. If so, the prosecutor should be held liable for violating the accused's well-established constitutional rights. . . . Indeed, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."¹⁹¹

b. Vicarious Liability for Supervisory Prosecutors to Ensure Compliance with Ethical Obligations

Another interesting proposal to curb prosecutorial misconduct has the added advantage of allowing prosecutors' offices to be self-policing. Professors Geoffrey S. Corn and Adam M. Gershowitz propose that "[t]he time has come to apply the lessons of the battlefield to the criminal justice process."¹⁹² They suggest "that state rules committees adopt a rule of imputed ethical responsibility for supervisory prosecutors. Like the doctrine of [military] command responsibility, this rule would impose vicarious liability for the ethical violations of subordinates when evidence establishes that a supervisor should have known such a violation was likely to occur."¹⁹³ The authors are quick to point out that "[t]he purpose of the rule is not to spark a witch hunt every time an ethical violation occurs. Instead, as with the law of war, the purpose is to incentivize supervisory prosecutors to embrace their

southern defiance to Reconstruction that the Ku Klux Klan Act was intended to remedy. To the extent that the doctrine of absolute prosecutorial immunity purportedly rests on historical understandings, it is insupportable.

Id. at 526-27 (footnote call numbers omitted).

189. *Id.* at 521.

190. *Id.* at 527.

191. *Id.* at 534 (quoting *Burns v. Reed*, 500 U.S. 478, 495 (1991)).

192. Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 397 (2009).

193. *Id.*

responsibility to develop a culture of ethical compliance within their organizations.”¹⁹⁴ The idea, as Corn and Gershowitz see it, is for prosecutors’ offices to implement a supervisory structure and office culture modeled on the military command responsibility doctrine. As Corn and Gershowitz explain:

In the realm of war, it has long been understood that the most significant influence on subordinate conduct is the atmosphere toward compliance with codes of conduct created by the superior. Because of this, the doctrine of command responsibility emerged to ensure that commanders risk personal criminal responsibility for failing to establish an environment of compliance. The doctrine of command responsibility imposes criminal responsibility on military commanders, not only for the misconduct of subordinates ordered by the commander, but also for misconduct the commander should have known would occur. The “should have known” standard subjects commanders to criminal responsibility when their own failure to inculcate an appreciation of the significance of compliance produces subordinate misconduct. The law thereby creates an incentive for commanders to provide meaningful training, to promptly respond to indications of subordinate deviation from legal standards, and to maintain “situational awareness” of subordinate conduct.¹⁹⁵

The authors posit that if supervisory prosecutors are subject to vicarious liability for the misconduct of their subordinates, and are thereby subject to various forms of penalties or sanctions as a result of that misconduct, those supervisors are incentivized in the following ways:

[T]o establish what is referred to within the U.S. armed forces as a “positive command climate.” . . . In the U.S. military, all leaders are taught that they may ultimately be held accountable for the dereliction of their subordinates. Perhaps more importantly, they are also taught that their professional and personal credibility will, in large measure, turn on the professionalism of the forces they lead. Accordingly, discharging this “command responsibility” is the ultimate bellwether of competence.¹⁹⁶

Corn and Gershowitz acknowledge that “there is little external or internal pressure on prosecutors to avoid misconduct.”¹⁹⁷ Furthermore, the professors recognize that “[prosecutors] are extremely unlikely to

194. *Id.*

195. *Id.*

196. *Id.* at 426 (footnote call numbers omitted).

197. *Id.* at 412.

face criminal charges, civil liability, bar discipline, reversal of their convictions, judicial shaming, or serious in-house discipline. More creative proposals set forth by scholars have likewise failed to foster change.”¹⁹⁸ According to the professors, they “suggest a more dramatic incentive drawn from the law of war: the prospect of imputed liability.”¹⁹⁹

c. Criminal, Civil, and License Sanctions for Prosecutorial Misconduct

The imposition of civil or criminal sanctions against prosecutors found to have committed misconduct is, quite obviously, a drastic remedy. While such remedies are available, they are rarely imposed.²⁰⁰ That said, recent cases demonstrate that such remedies are available, at least in certain circumstances. In Texas, Ken Anderson, a former state prosecutor (and former state judge) entered a plea of no contest to a charge of contempt of court and agreed to surrender his law license after being accused of withholding exculpatory evidence and making a material misrepresentation to the court in the murder case that sent Michael Morton to prison for twenty-five years for allegedly beating his wife to death.²⁰¹ Morton was cleared when DNA evidence later proved he was not the killer.²⁰² During Morton’s trial, Anderson was reportedly specifically asked by the judge overseeing Morton’s murder trial whether he knew of any exculpatory evidence in the case.²⁰³ Anderson replied that there was no such evidence.²⁰⁴ However, Morton’s attorneys discovered that material exculpatory evidence did in fact exist and was

198. *Id.* at 412. Corn and Gershowitz maintain that “[s]cholars have proposed thoughtful alternative ways to deal with prosecutorial misconduct, yet none have been successfully implemented.” *Id.* at 412 n.117. As examples, the authors reference alternative theories:

[A]dvocating prosecutorial review boards, changes to ethics rules, and other approaches[;] . . . proposing sentence reductions[;] . . . proposing bar disciplinary committees be required to review judicial decisions and institute disciplinary proceedings in egregious cases[;] . . . advocating a prosecutorial review board to handle specific complaints, and to conduct random reviews of routine cases[; and] . . . proposing financial rewards for ethical conduct . . .

Id. (citations omitted).

199. *Id.* at 412.

200. *See, e.g.,* *United States v. Eason*, 920 F.2d 731, 736 (11th Cir. 1990) (citing cases in which the court has affirmed convictions despite prosecutorial misconduct).

201. Chuck Lindell, *Ken Anderson to Serve 10 Days in Jail*, STATESMAN (Nov. 8, 2013, 5:02 PM), <http://www.statesman.com/news/news/ken-anderson-to-serve-10-days-in-jail/nbmsH>.

202. Morton was exonerated with the help of The Innocence Project, which provides a summary of his case on its website. *See* Michael Morton, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Michael_Morton.php (last visited Nov. 22, 2015).

203. *Id.*

204. *Id.*

withheld from the defense.²⁰⁵ This evidence included statements from Morton's then three-year-old son, who had witnessed the killing and said his father was not responsible.²⁰⁶ In addition, Anderson hid the fact that several of Morton's neighbors reported seeing another man near the Morton residence shortly before the murder.²⁰⁷ Anderson's plea agreement called for a ten-day prison sentence, disbarment, and the imposition of "500 hours of community service."²⁰⁸ While some might argue that such a sentence is far too lenient given the ramifications of Anderson's misconduct,²⁰⁹ the point remains that trial courts already have the authority to mete out such sanctions when prosecutorial misconduct is discovered.

Even more recently, the Seventh Circuit issued an important opinion that appears to pierce the protective veil of absolute and qualified immunity and pave the way, albeit in limited circumstances, for wrongfully convicted individuals to recover damages from the prosecutors whose misconduct facilitated that wrongful conviction. In *Fields v. Wharrie*, Nathson Fields was convicted of double murder in Illinois and served seventeen years in prison before he was granted a second trial, at which he was acquitted.²¹⁰ He filed suit against Lawrence Wharrie and David Kelley, the two state prosecutors who had prosecuted him during his first trial in 1986 and his second trial in 1998.²¹¹ Fields brought suit under § 1983, asserting a Fourteenth Amendment due process claim and state law claims of "malicious prosecution, intentional infliction of emotional distress, and conspiracy."²¹²

205. *Id.*

206. Lindell, *supra* note 201; *Ex-Prosecutor Gets 10 Days in Jail over Michael Morton Case*, DALL. MORNING NEWS, (Nov. 8, 2013, 10:33 PM), <http://www.dallasnews.com/news/local-news/20131108-ex-prosecutor-gets-10-days-in-jail-over-michael-morton-case-ece>.

207. *Id.*

208. *Ex-Prosecutor Gets 10 Days in Jail over Michael Morton Case*, *supra* note 206.

209. Chuck Lindell, *Judge Finds That Anderson Hid Evidence in Morton Murder Trial*, STATESMAN (Apr. 19, 2013, 7:12 PM), <http://www.statesman.com/news/news/local/ken-anderson-court-of-inquiry-resumes/nXRLm>. According to the Statesman article, Anderson faced up to ten years in prison for his crimes. *Id.* However, prosecutors concluded that statute of limitations problems would have made it difficult to obtain a conviction. *Id.*

210. *Fields v. Wharrie*, 740 F.3d 1107, 1109 (7th Cir. 2014). Fields was able to obtain a second trial not because of the prosecutorial misconduct in his first trial, but because the judge in that first trial later admitted taking a bribe to acquit Fields's co-defendant, Earl Hawkins—a fact that prompted the Washington Post to refer to this case as "a gory mess of injustice." See Radley Balko, *7th Circuit Pokes a Hole in Prosecutorial Immunity*, WASH. POST (Jan. 30, 2014), <http://www.washingtonpost.com/news/opinions/wp/2014/01/30/7th-circuit-pokes-a-hole-in-prosecutorial-immunity>.

211. *Fields*, 740 F.3d at 1109-10.

212. *Id.* at 1109.

Fields alleged that Wharrie and Kelley fabricated evidence by coercing witnesses to implicate him in the murders.²¹³ More specifically, Fields “accused Wharrie of two separate acts (one in 1985, the other in 1998) of coercing false testimony from witnesses, and Kelley of similar coercion in 1998.”²¹⁴ In 1985, during the investigatory stage of the case against Fields, Wharrie allegedly coerced witnesses to give false testimony against Fields, and that testimony was presented at trial.²¹⁵ Fields claimed that Kelley did the same thing in 1998 in advance of Fields’s second trial.²¹⁶

The two prosecutors filed motions to dismiss in the trial court, arguing that they were entitled to absolute immunity for their actions.²¹⁷ The district court denied both motions.²¹⁸ The Seventh Circuit affirmed the denial of Wharrie’s motion, but reversed the denial of Kelley’s.²¹⁹ The court noted that Kelley’s alleged misconduct took place in 1998, after Fields’s first trial and “in preparation for Fields’s second trial and therefore in the midst of his prosecution.”²²⁰ The court concluded that Kelley was entitled to absolute immunity for his actions because “[o]nce prosecution begins, bifurcating a prosecutor’s role between investigation and prosecution is no longer feasible.”²²¹ Accordingly, Fields could not pursue his claims against Kelley because “[p]resenting evidence at trial is a core prosecutorial function, protected by absolute prosecutorial immunity and therefore an insuperable bar to an award of damages in a suit for malicious prosecution against the prosecutor.”²²²

The case against Wharrie, however, presents another wrinkle—one slightly more complicated and immensely more interesting, especially as it pertains to remedies for prosecutorial misconduct. Wharrie’s actions in procuring false testimony from potential witnesses took place about a year before Fields’s first trial.²²³ Even though the case was in the investigatory stage at that point, Wharrie argued that he was shielded by absolute immunity for his alleged misconduct in 1985 because his actions in fabricating testimony did not cause any harm to Fields, let alone constitutional harm, until that fabricated evidence was introduced

213. *Id.* at 1109-10.

214. *Id.*

215. *Id.* at 1110.

216. *Id.* at 1115.

217. *Id.* at 1109.

218. *Id.* at 1109-10.

219. *Id.* at 1116.

220. *Id.* at 1115.

221. *Id.*

222. *Id.* at 1111.

223. *Id.*

at trial and used to obtain a conviction against him.²²⁴ At that point, Wharrie was clearly entitled to absolute immunity.²²⁵ Put another way, Fields had no cause of action against Wharrie until he suffered direct harm from Wharrie's alleged misconduct; when his cause of action did arise (when the allegedly fabricated testimony was used to convict him), Wharrie argued he was shielded from any liability by absolute immunity.

The court strongly rejected Wharrie's theory, holding as follows:

Wharrie is asking us to bless a breathtaking injustice. Prosecutor, acting pre-prosecution as an investigator, fabricates evidence and introduces the fabricated evidence at trial. The innocent victim of the fabrication is prosecuted and convicted and sent to prison for [seventeen] years. On Wharrie's interpretation of our decision in *Buckley*, the prosecutor is insulated from liability because his fabrication did not cause the defendant's conviction, and by the time that same prosecutor got around to violating the defendant's right he was absolutely immunized. So: grave misconduct by the government's lawyer at a time where he was not shielded by absolute immunity; no remedy whatsoever for the hapless victim.²²⁶

The court further explained:

A prosecutor cannot retroactively immunize himself from conduct by perfecting his wrongdoing through introducing the fabricated evidence at trial and arguing that the tort was not completed until a time at which he has acquired absolute immunity. That would create a "license to lawless conduct," which the Supreme Court has said that qualified immunity is not to do.²²⁷

Recently in Texas, a former state prosecutor, Armando R. Villalobos, was sentenced in the U.S. District Court for the Southern District of Texas to thirteen years in federal prison after he was convicted, in 2013, on multiple counts of racketeering, conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (better known as "RICO"), and extortion.²²⁸ Villalobos was involved in a scheme with other lawyers, as well as a former Texas state judge, Abel Limas (who was also convicted on charges stemming from the

224. *Id.*

225. *Id.*

226. *Id.* at 1113.

227. *Id.* at 1114 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).

228. *Villalobos Gets 13 Years; Taken Into Custody*, BROWNSVILLE HERALD, http://www.brownsvilleherald.com/news/local/article_a30ff7a6-9336-11e3-a5f6_001a4bcf6878.html (last visited Nov. 22, 2015).

scheme),²²⁹ in which the men used the power of their offices to offer favorable treatment to criminal defendants in exchange for money.²³⁰ One of their schemes involved a convicted murderer named Amit Livingston.²³¹ Villalobos and Limas (who was a sitting judge at the time) ensured that Livingston was not taken into custody immediately.²³² Livingston became a fugitive after failing to report to serve his sentence.²³³ A \$500,000 cash bond posted for Livingston was therefore forfeited and the money was split between Villalobos, Limas, and the family of Livingston's victim, Hermila Hernandez.²³⁴ As part of his sentence, the district court ordered Villalobos to pay \$339,000 in restitution and a \$30,000 fine.²³⁵ Included in the restitution amount was \$200,000 to be paid to Hermila Hernandez's children.²³⁶

Immediately following Villalobos's sentencing, Robert Pitman, the U.S. Attorney for the Western District of Texas, issued the following statement:

The most important component of an effective justice system is the public's ability to trust those who are responsible for enforcing the law. But even when there is a breach of that trust, as in this case, the public should take some comfort in knowing that there is a mechanism for detecting, rooting out, and punishing those who would corrupt the process²³⁷

Pitman's words are reassuring to a certain extent, at least in the context of the *Villalobos* case, although it is fair to question the extent to which there really is a "mechanism" to remedy prosecutorial misconduct in light of the statistics and discussion in this Article. And again, the imposition of civil damages or criminal sanctions is mostly remedial

229. See Martha Neil, *Ex-Judge Gets 6 Years in Bribe Case as Ex-DA Awaits Sentencing; Murder Victim's Mom Gets No Apology*, ABA J. (Aug. 27, 2013, 8:15 PM), <http://www.abajournal.com/news/article> (search for article title). For his role in the schemes, Judge Abel Limas was sentenced to six years in prison and ordered to pay restitution in the amount of \$6.7 million. *Id.*

230. Press Release, U.S. Attorney's Office W. Dist. of Tex., Former Cameron County District Attorney Armando Villalobos Sentenced to Federal Prison in Connection with South Texas Bribery Scheme (Feb. 11, 2014), <http://www.justice.gov/usao-wdtx/pr/former-cameron-county-district-attorney-armando-villalobos-sentenced-federal-prison>.

231. Martha Neil, *Former District Attorney Gets 13 Years in Federal Corruption Case Over His Work as a Prosecutor*, ABA J. (Feb. 11, 2014, 10:50 PM), http://www.abajournal.com/mobile/article/ex-da_gets.

232. *Id.*

233. *Id.*

234. *Id.* The victim's family, "who speak little English, didn't understand the plea deal in the criminal case would allow [Hermila's] killer to become a fugitive." *Id.*

235. Press Release, U.S. Attorney's Office W. Dist. of Tex., *supra* note 230.

236. *Villalobos Gets 13 Years; Taken Into Custody*, *supra* note 228.

237. Press Release, U.S. Attorney's Office W. Dist. of Tex., *supra* note 230.

rather than prophylactic (except, of course, to the extent that such proceedings have the desired deterrent effect). Such remedies suture the wound, but do not heal it. Not only that, but by the time offending prosecutors are punished for their transgressions, the harm they caused to individuals and to the entire criminal justice system has already been done. In fact, Greg Surovic, an Assistant U.S. Attorney and one of the lawyers who prosecuted Villalobos, stated after the sentencing that Villalobos, through his actions, “ha[d] done incalculable damage” to the criminal justice system and that citizens may question the integrity of that system for many years.²³⁸ These cases are but a few examples demonstrating that both civil and criminal remedies are available to victims of prosecutorial misconduct, at least in specific circumstances. Still, as a rule, courts are reluctant to levy sanctions against prosecutors and often settle for issuing an admonishment.²³⁹ The holding in *Fields* is much narrower than meets the eye, as the majority’s reasoning was founded on a very specific factual scenario.²⁴⁰

The need for active court participation, especially from the trial courts,²⁴¹ is crucial in preventing and remedying prosecutorial misconduct. In this way, court-imposed sanctions will have, one would hope, a powerful deterrent effect. The Eleventh Circuit recognized this and wrote:

[D]istrict courts must also consider “more direct sanctions to deter prosecutorial misconduct.” . . . The district courts have many potential remedies available: (1) contempt citations; (2) fines; (3) reprimands; (4) suspension from the court’s bar; (5) removal or disqualification from office; and (6) recommendations to bar associations to take disciplinary action. . . . “We encourage the district courts in this circuit

238. *Villalobos Gets 13 Years; Taken Into Custody*, *supra* note 228.

239. See *supra* Part V.C.6.c.

240. Judge Posner, writing for the majority, took great pains to distinguish the scenario in *Fields* from those presented in *Buckley* and *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012). The majority’s reasoning did not persuade Judge Sykes, who wrote a partial dissent in which she concurred with the majority’s conclusion regarding the dismissal of Fields’s case against Kelley but dissented from its conclusion regarding Wharrie, who she believed was also entitled to absolute immunity, notwithstanding his alleged pre-prosecution misconduct. Judge Sykes found: “Absolute immunity can sometimes produce harsh results, but it has long been thought necessary to encourage and protect the vigorous performance of the prosecutorial function.” *Fields v. Wharrie*, 740 F.3d 1107, 1120 (7th Cir. 2014) (Sykes, J., concurring in part and dissenting in part). Judge Sykes was not unsympathetic to Fields’s plight, but her conclusion was based on a different conceptualization of the court’s previous holdings in *Buckley* and *Whitlock* (the latter of which she believes was wrongly decided.) *Id.* at 1124. But this point is proper fodder for its own article.

241. See *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir. 1998) (“On the matter of professional misconduct of prosecutors, the realities require that we defer to our colleagues on the district courts to take the lead. District courts are in a better position to ensure that a prosecutor properly fulfills the duties and obligations of his office.”).

to remain vigilant . . . and consider more [fully these sanctions] in cases of persistent or flagrant misconduct.”²⁴²

Judicial remedies, like all judge-made law, will have to develop over time. And given the clearly stated position of the Supreme Court that the justice system has the tools to deal with the problem and prosecutors’ autonomy should be accorded great deference, why should trial courts not be reluctant to be more proactive on this issue?²⁴³

d. Open-File Discovery

One approach to designing and implementing an effective self-policing plan to combat prosecutorial misconduct would be for prosecutors’ offices to adopt and adhere to an open-discovery policy. Such a policy would do much to prevent the statistically most common form of prosecutorial misconduct—intentionally or unintentionally withholding exculpatory evidence.²⁴⁴ Also, such a policy would benefit prosecutors, who would see far fewer allegations levied against them for allegedly withholding material evidence if all the evidence in the prosecutor’s file, both incriminating and exculpatory, was timely, willingly, and automatically handed over to the defense in every case.

Open-discovery policies are not a novel idea and have already been implemented in some jurisdictions.²⁴⁵ In 2004, North Carolina became

242. *Id.* at 1304 (citations omitted) (quoting *United States v. Butera*, 677 F.2d 1376, 1383 (11th Cir. 1982)).

243. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (observing that a “presumption of regularity supports” prosecutors’ decisions and “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties” (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“[T]he decision to prosecute is particularly ill-suited to judicial review.”); *Butz v. Economou*, 438 U.S. 478, 512 (1978). In *Butz v. Economou*, the Supreme Court said:

[T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. . . . Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.

438 U.S. at 512 (footnote call numbers omitted).

244. See *supra* notes 44-54 and accompanying text.

245. See Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution’s Files*, CHAMPION, May 2013, at 26, 27 (“In 2004, North Carolina became the first state to enact legislation requiring prosecutors to provide full open-file discovery, which requires automatic disclosure of all nonprivileged information in the prosecution’s entire file.”).

the first state to enact a statute mandating open-discovery in criminal cases.²⁴⁶ Ohio also amended its *Rules of Criminal Procedure* in 2010 to mandate open-discovery.²⁴⁷ The rule requires prosecutors to make available to defense counsel, among other things, “written or recorded statement[s] by the defendant or a co-defendant,” police reports, “grand jury testimony by either the defendant or a co-defendant,” the defendant’s criminal history records, relevant laboratory reports, “results of physical or mental examinations, experiments or scientific tests,” and “[a]ny evidence favorable to the defendant and material to guilt or punishment.”²⁴⁸ The requirements for open-discovery, contained in *Ohio Rules of Criminal Procedure* Rule 16(B), are subject to certain limitations.²⁴⁹ For example: “[prosecutors] may designate any material subject to disclosure under this rule as ‘counsel only’ [C]ounsel only’ material may not be shown to the defendant or any other person, [and] [d]efense counsel may orally communicate the content of the ‘counsel only’ material to the defendant.”²⁵⁰ Certain additional restrictions apply in sexual assault cases.²⁵¹ The Ohio rule, however, cuts both ways in that it imposes a duty of disclosure on defense counsel, as well as the prosecutor.²⁵²

More recently, in 2013, the Texas legislature enacted what is known as the “Michael Morton Act,” a law aimed at ensuring open-discovery in criminal cases.²⁵³ Michael Morton spent almost twenty-five years in prison before DNA evidence proved his innocence.²⁵⁴ Morton’s

246. N.C. GEN. STAT. § 15A-903; see also Klinkosum, *supra* note 245 (stating that North Carolina enacted full open-file discovery in 2004).

247. OHIO R. CRIM. PROCEDURE r. 16(B) (2014), <http://www.supremecourt.ohio.gov/LegalResources/Rules/criminal/CriminalProcedure.pdf>. Rule 16 of the *Ohio Rules of Criminal Procedure* reads in relevant part as follows:

Upon receipt of a written demand for discovery by the defendant, . . . the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, . . . items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule

Id.

248. *Id.* at r. 16(B)(1)–(6).

249. *Id.* at r. 16(C).

250. *Id.*

251. See *id.* at r. 16(E).

252. *Id.* at r. 16(A) (“All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal.”).

253. Tex. Leg. SB 1611, 83(R) (Tex. 2013), <http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01611F.htm>.

254. Josh Levs, *Innocent Man: How Inmate Michael Morton Lost 25 Years of His Life*, CNN (Dec. 4, 2013, 2:53 PM), <http://www.cnn.com/2013/12/04/justice/exonerated-prisoner-update->

case, more details of which are presented above,²⁵⁵ served as a catalyst for the enactment of *Texas Senate Bill 1611*—the Michael Morton Act—which significantly amended Article 39.14 of the *Texas Code of Criminal Procedure*.²⁵⁶ The new Texas statute, which took effect on January 1, 2014, mandates open-file discovery in Texas criminal prosecutions.²⁵⁷

The topic of open-file discovery laws is a hot button issue in the debate about how best to curb prosecutorial misconduct and boasts a rapidly growing advocate base.²⁵⁸ This is because such laws would go a long way toward preventing incidents of prosecutorial misconduct by making it much more difficult for prosecutors to hide exculpatory evidence.

e. Removing Prosecutors from the Electoral Process

In many states, counties, and cities, prosecutors (and also judges) are elected officials. Removing prosecutors from the political process, while a controversial proposal since it involves taking away citizens' power to elect their local prosecutors and judges, is another option in attempting to curb prosecutorial misconduct. Recall that the petitioner in *Buckley* alleged, among other things, that the respondent-prosecutor, Fitzsimmons, made false statements about the case during a press conference held less than two weeks before a primary election contest in

michael-morton.

255. *Supra* notes 202-10 and accompanying text.

256. Jessica A. Caird, *Significant Changes to the Texas Criminal Discovery Statute*, 51 HOUS. LAW., Jan.-Feb. 2014, at 10.

257. TEX. CODE CRIM. PROC. ANN., art. 39.14 (West Supp. 2014). The statute states, in relevant part:

[A]s soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers . . .

Id.

258. See, e.g., Klinkosum, *supra* note 245, at 32. In an article for *Champion*, Mike Klinkosum wrote:

As a result of the problem of prosecutorial misconduct involving the nondisclosure of favorable, material evidence, the time has arrived for criminal defense attorneys in every jurisdiction to demand full and total access to the prosecution's file in order to effectively and zealously advocate on behalf of their clients. Requiring full disclosure of the prosecution's file and requiring law enforcement and prosecutorial agencies to turn over their files for review would not only protect the defendants' rights to effective assistance of counsel, confrontation and cross-examination, and due process, but would also help to advance the ultimate endeavors of the criminal justice system—the protection of the innocent, the punishment of the guilty, and the revelation of the truth.

Id.

which Fitzsimmons was running.²⁵⁹ And North Carolina prosecutor Mick Nifong made his infamous and improper extrajudicial statements in the Duke lacrosse rape cases while he was enmeshed in a very close election contest in his bid to continue serving as lead prosecutor in that jurisdiction.²⁶⁰

Recently, U.S. Supreme Court Justice Sonia Sotomayor, in her dissent in a death penalty case out of Alabama, denounced the prevalent system of electing state court judges.²⁶¹ The issue involved the power of Alabama judges to override a jury's sentencing recommendation in death penalty cases.²⁶² Petitioner Mario Dion Woodward was convicted of the murder of a Montgomery police officer.²⁶³ The jury that convicted him determined that he should be spared the death penalty.²⁶⁴ The presiding judge held a sentencing hearing, subsequent to the jury verdict and sentencing recommendation, and imposed the death penalty, ignoring the jury's recommendation.²⁶⁵ Dissenting from the Court's denial of certiorari, Justice Sotomayor (joined by Justice Breyer) wrote:

What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.²⁶⁶

In the debate about solutions to the problem of prosecutorial misconduct, it is important to question the efficacy of electing judges

259. *Buckley v. Fitzsimmons*, 509 U.S. 259, 262 (1993). In *Buckley*, the Court said:

The theory of petitioner's case is that in order to obtain an indictment in a case that had engendered "extensive publicity" and "intense emotions in the community," the prosecutors fabricated false evidence, and that in order to gain votes, Fitzsimmons made false statements about petitioner in a press conference announcing his arrest and indictment [twelve] days before the primary election. Petitioner claims that respondents' misconduct created a "highly prejudicial and inflamed atmosphere" that seriously impaired the fairness of the judicial proceedings against an innocent man and caused him to suffer a serious loss of freedom, mental anguish, and humiliation.

Id.

260. See Duff Wilson, *Hearing Ends in Disbarment for Prosecutor in Duke Case*, N.Y. TIMES, June 16, 2007, at 21.

261. *Woodward v. Alabama*, 134 S. Ct. 405, 405-08 (2013) (Sotomayor, J., dissenting).

262. *Id.* at 405-06.

263. *Id.*

264. *Id.* at 405.

265. *Id.* at 405-06.

266. *Id.* at 408.

and prosecutors. Reform aimed at insulating prosecutors and judges from the partisan political process, thereby removing the “electoral pressures” Justice Sotomayor referred to, is yet another approach to preventing prosecutorial misconduct and one that deserves careful consideration.

D. Examples of Model or Proposed Legislation

A legislative²⁶⁷ approach to curbing prosecutorial misconduct is always possible whenever there are those willing to advocate and lobby for its use. Many proponents of justice system reform, like the Innocence Project,²⁶⁸ draft model legislation and rules they maintain would help prevent prosecutorial misconduct.²⁶⁹

A group of lawyers, law professors, law students, and policy advocates, concerned about prosecutorial misconduct, founded a website called “The Open File,” which they describe as an attempt to “examine the nature of prosecutorial misconduct, the systems that incentivize such behavior, and the processes and institutions which might hold prosecutors accountable when misconduct occurs.”²⁷⁰ The individuals behind the website state that they were inspired to examine and address the topic of prosecutorial misconduct as a result of the Supreme Court’s decision in *Connick v. Thompson*.²⁷¹ As part of its efforts, The Open File website includes model legislation that its members feel would be effective in preventing or remedying prosecutorial misconduct. This

267. We use the word “legislative” to include administrative rulemaking.

268. *What Is the Innocence Project? How Did it Get Started?*, INNOCENCE PROJECT, <http://www.innocenceproject.org/faqs/what-is-the-innocence-project-how-did-it-get-started> (last visited Nov. 22, 2015). According to its website, “[t]he Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice.” *Id.* The Innocence Project is associated with the Benjamin N. Cardozo School of Law at Yeshiva University and was founded in 1992 by Barry Scheck and Peter Neufeld, who currently serve as co-directors. *Barry C. Scheck & Peter J. Neufeld*, INNOCENCE PROJECT (Jan. 16, 2006, 12:00 AM), <http://www.innocenceproject.org/about-innocence-project/staff/barry-c-scheck-peter-j-neufeld>.

269. For example, the Innocence Project has drafted model legislation that states could implement which would mandate compensation for victims of wrongful convictions. *Model Legislation: An Act Concerning Claims for Wrongful Conviction and Imprisonment*, INNOCENCE PROJECT http://www.innocenceproject.org/files/imported/compensation_model_bill.pdf/view (last visited Nov. 22, 2015). The Project has also drafted model legislation regarding post-conviction DNA testing, preservation of evidence, eyewitness identification reform, crime lab oversight, and the formation of state criminal justice reform commissions. *See generally Model Legislation*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/model-legislation> (last visited Nov. 22, 2015).

270. *About Us*, OPEN FILE, <http://www.prosecutorialaccountability.com/about-us> (last visited Nov. 22, 2015).

271. *Id.*

includes, for example, a proposed open-file discovery bill.²⁷² This proposed model is similar to open-file statutes that have been enacted in some jurisdictions, such as Ohio and North Carolina.²⁷³ It reads, in relevant part, as follows:

Concerning the prosecution's obligation to disclose relevant or material evidence under *Brady v. Maryland*, *Kyles v. Whitley*, and *Smith v. Cain*, and the efforts to prevent wrongful convictions and/or death sentences based upon undisclosed exculpatory evidence.

.....

A) Upon motion of the defendant, the court shall order the district attorney to provide to the defendant all information and at no cost, permit or authorize the defendant to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, data photographs, tangible objects, buildings, places, or copies or portions thereof, that—

(i) may reasonably appear to be favorable to the defendant with respect to the determination of guilt, or of any preliminary matter, or of the sentence to be imposed; and

(ii) are within the possession, custody or control of the prosecution or others acting on the government's behalf in the case²⁷⁴

The Innocence Project and The Open File are but two examples of many groups and organizations that advocate legislative reform to curb prosecutorial misconduct, so there is no shortage of such proposed legislation that can serve as fodder for debate about the issue of legislative reforms to prevent and remedy prosecutorial misconduct.²⁷⁵ Of course, advancing such legislation, whether in the U.S. Congress or state legislatures, is no simple task. A bipartisan group of U.S. legislators introduced the Fairness in Disclosure of Evidence Act of 2012, but the bill died in committee and was never enacted.²⁷⁶

272. *Reforms: Model Bills*, OPEN FILE, <http://www.prosecutorialaccountability.com/reforms/model-bills> (last visited Nov. 22, 2015).

273. See, e.g., N.C. GEN. STAT. § 15A-903 (2015); *supra* notes 49-54 and accompanying text.

274. *Id.* (stating that the authors of this model bill contend that it would serve to “remove[] the materiality prong of *Brady*”).

275. See, e.g., *Discovery Reform*, NAT'L ASS'N CRIM. DEF. LAW., <http://www.nacdl.org/discoveryreform> (last visited Nov. 22, 2015) (providing discovery reform proposals); Sidney Powell, *Bipartisan Senators Propose Watchdog for DOJ*, SEEKING JUSTICE (Mar. 17, 2014), <http://seeking-justice.org/bipartisan-senators-propose-watchdog-for-doj>. There are various other state and federal model legislations available on the Center for Prosecutor Integrity website. CTR. PROSECUTOR INTEGRITY, <http://www.prosecutorintegrity.org> (last visited Nov. 22, 2015).

276. The Fairness in Disclosure of Evidence Act was sponsored by Senator Lisa Murkowski (R-AK), with cosponsors including Daniel Akaka (D-HI), Mark Begich (D-AK), Kay Bailey Hutchison (R-TX), Daniel Inouye (D-HI), and Michael Enzi (R-WY), and was introduced as a result of the disastrous prosecution of Senator Ted Stevens. *Text of the Fairness*

VI. CONCLUSION

The proposals above are an important part of reducing the frequency and number of wrongful convictions.²⁷⁷ Ultimately, however, there is one remedy that would directly and immediately serve the victims of prosecutorial misconduct while the scholarly debate about how to prevent misconduct continues to stew in the pages of law journals. That remedy involves the enactment of compensation statutes.

John Thompson spent eighteen years in prison, fourteen of them on death row; Thompson's conviction resulted directly from prosecutorial misconduct.²⁷⁸ Following his exoneration, he was awarded \$14 million in compensation for his years of wrongful incarceration.²⁷⁹ The U.S. Supreme Court's reversal of that award was the second major blow to Thompson's efforts to rebuild his life after his wrongful incarceration.²⁸⁰ The first blow arrived with Hurricane Katrina in 2005:

By 2005, he had a brand new home, a car and a dog. He and his wife were running their own sandwich shop in a hotel in downtown New Orleans.

"I was almost getting to feel the American dream," said Thompson

Then, Hurricane Katrina hit and wiped out his home, his business and the life he'd been struggling to build after nearly two decades locked up.²⁸¹

These events, which could have crushed the spirit of most men, instead motivated Thompson to found his Resurrection After Exoneration program.²⁸² But Thompson was left to rebuild his life without the compensation he had been awarded years earlier.

Just over half of the states in America have enacted compensation statutes to provide an avenue for exonerated individuals to seek

in *Disclosure Evidence Act of 2012*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/s2197> (last visited Nov. 22, 2015).

277. See *supra* Part V.

278. See *Connick v. Thompson*, 131 S. Ct. 1350, 1355 (2011).

279. *Id.* at 1357.

280. One writer referred to the Court's decision in *Connick v. Thompson* as "one of the meanest Supreme Court decisions ever written." Kate McClelland, "Somebody Help Me Understand This": *The Supreme Court's Interpretation of Prosecutorial Immunity and Liability Under § 1983*, 102 J. CRIM. L. & CRIMINOLOGY 1323, 1323 (2012) (quoting Dahlia Lithwick, *Cruel but Not Unusual: Clarence Thomas Writes One of the Meanest Supreme Court Decisions Ever*, SLATE (Apr. 1, 2011 7:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html).

281. Grinburg, *supra* note 183.

282. *Id.*

compensation for their wrongful incarceration.²⁸³ In a report issued in 2009, the Innocence Project noted that, at that time, a staggering twenty-three states in the nation did not offer any compensation to the exonerated.²⁸⁴ In 2013, California became the twenty-eighth state to enact a compensation statute when it passed *Senate Bill 618*, which provides a mechanism for wrongfully incarcerated people to apply for compensation following their release from custody.²⁸⁵ The amounts of compensation available to wrongfully convicted individuals under such statutes vary widely, even dramatically. Under the new California law, victims of unlawful incarceration are entitled to a maximum of \$100 per day for each day they were wrongfully imprisoned.²⁸⁶ Florida's statute provides for compensation up to \$50,000 for each year of incarceration up to a maximum of \$2 million.²⁸⁷ New Hampshire's compensation statute provides for an arguably paltry maximum award of \$20,000, regardless of how long the victim was incarcerated.²⁸⁸

Not only do the amounts of money available vary widely, but a woefully small number of states offer social services to complement monetary awards.²⁸⁹ Louisiana, for example, offers one year of job training, three years of medical and counseling services, and college tuition assistance.²⁹⁰ Connecticut offers job training, counseling services, tuition assistance, "and any other services needed to facilitate reintegration into the community."²⁹¹ Sadly, however, only ten states provide for social services in their compensation statutes.²⁹² Exonerees in many states would receive more benefits from a membership in AARP than they do from the state that wrongfully incarcerated them.

The enactment of statutes that provide remedies for victims of prosecutorial misconduct is not a process that is sweeping the nation. Obviously, political and fiscal issues come into play and, by their nature, severely complicate efforts to enact such legislation. Providing fair compensation—fair meaning monetary compensation, as well as social

283. INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION, AN INNOCENCE PROJECT REPORT 12-13 (2009), http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf.

284. *Id.* at 15.

285. For a copy of the statute, along with its legislative history and other information, see Cal. Leg., SB-618 (Cal. 2013), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB618.

286. *Id.*; INNOCENCE PROJECT, *supra* note 283, app. A at 27.

287. INNOCENCE PROJECT, *supra* note 283, app. A at 28.

288. *Id.* at 29.

289. *Id.* at 4, 27-31.

290. *Id.* at 28.

291. *Id.* at 27.

292. *Id.* at 16, 27-31.

services—to victims of prosecutorial misconduct, and indeed to anyone who is wrongfully imprisoned for whatever reason, is a moral imperative.²⁹³ And again, providing compensation and social services to citizens who suffer the profound, even incomprehensible, injustice of being wrongfully deprived of their freedom, whether for a day or for decades, must be the primary and most immediate remedy offered to exonerees while the discussion and debate continues about how best to prevent such tragedies.

In sum, although prosecutors are not the predominant cause of wrongful convictions that lead to rightful exonerations, prosecutors must be an important part of the solution. Ethical prosecutors have the power, the perspective, and the moral imperative to ensure that the criminal justice system yields just results.²⁹⁴

293. The Innocence Project Report also contains a model compensation statute. *See id.* at app. B at 32.

294. Prosecutors, in increasing numbers, are heeding that call. As recently noted in the Registry:

2014 saw a substantial increase in the number of Conviction Integrity Units (CIUs) - units in prosecutors' offices that review and investigate post-conviction claims of innocence - from 9 CIUs in 2013, to 15 in 2014. CIUs played a role in 49 exonerations in 2014. In all previous years combined, CIUs were responsible for only 41 exonerations.

Recent Findings, Nat'l Registry Exonerations, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/Recent-Findings.aspx> (last updated Oct. 11, 2015). Things are looking up.