THE RELATIONSHIP BETWEEN PROSECUTORIAL MISCONDUCT AND WRONGFUL CONVICTIONS: SHAPING REMEDIES FOR A BROKEN SYSTEM

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> With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases.
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> They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs.
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> They do it to win.
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> They do it because they won't get punished.
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> They have done it to defendants who came within hours of being executed, only to be exonerated.[1]

INTRODUCTION

Citing malfeasance on the part of some prosecutors across the country, two journalists researched thousands of court files and documented hundreds of homicide cases that were reversed because of prosecutors' misconduct that denied the accused fair trials.[2] Since that exposé, the growing number of exonerated persons who were wrongfully convicted due, at least in part, to prosecutorial misconduct provides us with a lens through which we can view the shortcomings of both the

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1. Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win; The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, § 1, at 1.

2. *Chicago Tribune* reporters Ken Armstrong and Maurice Possley produced a five-part series reporting on their national study of approximately eleven-thousand court rulings over thirty-six years in which they found 381 defendants who had their homicide convictions reversed due to prosecutorial misconduct. *See id.*; Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win; Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, § 1, at 1; Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win; Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, § 1, at 1; Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win; Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, § 1, at 1; Ken Armstrong & Maurice Possley, *Trial & Error; How Prosecutors Sacrifice Justice to Win; The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, § 1, at 1.

current norms guiding prosecutors and the remedies for addressing prosecutorial misconduct. Although some of the other factors leading to wrongful convictions, such as mistaken identification, are more prevalent,[3] prosecutorial misconduct is the most troubling, not only because it occurs so frequently, but for both normative and practical reasons as well.

If one agrees that the innocent should not be convicted, then we need to explore ameliorative actions to reduce prosecutorial misconduct as a cause of wrongful convictions. The starting point is to understand the institutional conditions that facilitate prosecutorial misconduct. Once we understand the conditions contributing to prosecutorial misconduct, achievable steps to remedy those conditions can take place.

My thesis is that prosecutorial misconduct is not chiefly the result of isolated instances of unprincipled choices or the failure of character on the part of some prosecutors. Rather, prosecutorial misconduct is largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct. These three conditions converge to create uncertain norms and a general lack of accountability for how prosecutors view and carry out their ethical and institutional obligations.

In this Article, I analyze these institutional conditions and make modest proposals to reduce the incidence of prosecutorial misconduct. The ultimate purpose of the proposals is to prevent wrongful convictions and not to impose unnecessary obligations or unrealistic expectations on prosecutors. I begin in Part I by analyzing the relationship between prosecutorial misconduct and wrongful convictions from both normative and practical perspectives, and I explain why preventing prosecutorial misconduct is important to curbing wrongful convictions. In Part II, I discuss the role of the prosecutor and the ethics rules governing prosecutorial conduct, and place these ethical prescriptions in the context of the evolving nature of lawyer ethics. While other areas of lawyers' ethical obligations have become more defined and now set clearer ethical standards for lawyers' conduct, prosecutorial ethics have not evolved in the same fashion. I argue for the implementation of the recommendation, which was included in a special report commissioned by the American Bar Association (ABA), that there should be a

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3. Innocence Project, Causes and Remedies of Wrongful Convictions, http://www.innocenceproject.org/causes/index.php (last visited Nov. 13, 2005). Mistaken identification was found in sixty-one of the first seventy DNA exonerations. *See id.*

comprehensive review of the ethics rules for prosecutors.[4] As a starting point for such a review, I suggest that the ABA Criminal Justice Standards on the Prosecution Function (ABA Prosecution Function Standards) already identify areas for developing clearer, more specific ethics rules that would provide better guidance to prosecutors.[5]

In Part III, I then examine the discretionary power of the prosecutor and the issue of transparency in the prosecutor's decision-making process and I argue for increasing transparency and setting clearer limits on prosecutorial discretion. I argue that it is necessary for prosecutors' offices to set and enforce their own internal norms for the exercise of discretion, and that both the norms and the enforcement should be public to the extent that public access does not interfere with the prosecution function. In Part IV, I analyze the relative ineffectiveness of current remedies for prosecutorial misconduct, and I argue for more accountability and effective remedies for prosecutorial misconduct.

These proposals are achievable steps to address the recurrent issue of prosecutorial misconduct as a factor leading to wrongful convictions. State supreme courts, legislatures, bar disciplinary authorities, statewide innocence commissions, and prosecutors' offices interested in limiting or eliminating wrongful convictions will find that each of these proposals makes prosecutorial misconduct less likely, therefore addressing one of the leading causes, or contributing causes, of wrongful convictions.

I. UNDERSTANDING PROSECUTORIAL MISCONDUCT AND ITS RELATIONSHIP TO WRONGFUL CONVICTIONS

In *Berger v. United States*, Justice Sutherland defined prosecutorial misconduct as "overstepp[ing] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[6] In the decision, Justice Sutherland identified a laundry list of misconduct by the prosecutor at Berger's trial including:

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4. *See infra* Part II.B.

5. *See* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/pfunc_toc.html. The American Bar Association (ABA) issued the initial set of criminal justice standards in 1968, and "Chief Justice Warren Burger described the Standards project as 'the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history.'" Am. Bar Ass'n, Criminal Justice Standards, http://www.abanet.org/crimjust/standards/home.html (last visited Mar. 15, 2006). The ABA House of Delegates approved the third edition of the Standards in February, 1992. AM. BAR ASS'N, *supra*, at xii.

6. 295 U.S. 78, 84 (1935).

> misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.
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> . . . .
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> The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.[7]

In addition to the types of prosecutorial misconduct the Supreme Court identified in *Berger*, the Court has identified other examples, including: prosecutors knowingly using perjured testimony,[8] suppressing evidence favorable to the accused that might have led to a not guilty verdict,[9] and misstating the law in argument to the jury.[10] Lower courts have identified additional examples of prosecutorial misconduct, including: prosecutors threatening witnesses with loss of immunity if they testify for the defense,[11] ignoring the obligation to disclose to the defense special treatment or promises of immunity given to a government witness in exchange for testimony against the accused,[12] failing to remedy or disclose the government's presentation of false evidence,[13] making inflammatory remarks to the jury based on racial bias against the accused,[14] presenting perjured testimony to the grand jury,[15] and a host of other situations where the prosecutor ignores the obligation to accord procedural justice to the accused.[16]

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7. *Id*. at 84-85.
8. Mooney v. Holohan, 294 U.S. 103, 112-13 (1935).
9. Brady v. Maryland, 373 U.S. 83, 87-88 (1963).
10. Caldwell v. Mississippi, 472 U.S. 320, 332-33 (1985).
11. United States v. Schlei, 122 F.3d 944, 992 (11th Cir. 1997).
12. United States v. Doyle, 121 F.3d 1078, 1082 n.2 (7th Cir. 1997).
13. United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995).
14. United States v. Cannon, 88 F.3d 1495, 1502-03 (8th Cir. 1996).
15. United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974).
16. *See, e.g.*, United States v. Cuffie, 80 F.3d 514, 517-18 (D.C. Cir. 1996) (failing to disclose that the government's witness lied in earlier proceedings involving the same alleged conspiracy); United States v. Duke, 50 F.3d 571, 578 (8th Cir. 1995) (failing to disclose the criminal record of a government witness); Unites States v. Gold,

In the years since the Court's decision in *Berger*, prosecutorial misconduct has proven to be one of the most common factors that causes or contributes to wrongful convictions. An initial study of the first sixty-two persons exonerated by DNA evidence found some degree of prosecutorial misconduct in twenty-six cases,[17] and a subsequent study of seventy persons exonerated by DNA evidence found some degree of prosecutorial misconduct in thirty-four cases.[18] Studies of DNA exonerations have identified wrongful convictions based on prosecutorial misconduct that included: suppressing exculpatory evidence, knowingly using false testimony, fabricating evidence, coercing witnesses, making false statements to the jury, and engaging in improper closing arguments.[19] Similarly, grand jury and journalistic studies into wrongful convictions have found that prosecutorial misconduct is a leading cause of wrongful convictions.[20]

From a normative perspective, we strive to design a criminal justice system that protects the innocent and convicts the guilty. The very concept of justice requires that the innocent should not be prosecuted,

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470 F. Supp. 1336, 1346 (N.D. Ill. 1979) (operating under a conflict of interest); United States v. Horn, 811 F. Supp. 739, 749-50 (D.N.H. 1992) (acquiring defense attorney work product surreptitiously); United States v. Roberts, 481 F. Supp. 1385, 1389 (C.D. Cal. 1980) (misstating the law to the grand jury); *see also* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (2d ed. 2005) (presenting a comprehensive discussion of examples of prosecutorial misconduct).

17. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE app. at 263 (2000).

18. Innocence Project, *supra* note 3.

19. DWYER, NEUFELD & SCHECK, *supra* note 17, app. at 265.

20. *See, e.g.*, Armstrong & Possley, *supra* note 1 (reporting on a study that showed that since 1963 "at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false"); Barry Tarlow, *Some Prosecutors Just Don't Get It: Improper Cross and Vouching*, CHAMPION, Dec. 28, 2004, at 55, 61 (citing a 1990 report by the Los Angeles County Grand Jury that "prosecutors' and investigators' systematic misuse of jailhouse informers caused wrongful convictions in as many as 250 major felony prosecutions between 1979 and 1988").

In addition to being a common factor leading to wrongful convictions, prosecutorial misconduct is a major factor for reversals in capital cases, where one might expect prosecutors to assure each defendant the fairest of trials because they face the most serious of punishments. In a national study of 5760 capital cases from 1973 to 1995, researchers found that prosecutorial misconduct was a major factor contributing to a 68 percent rate of reversible error. *See* JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 4-5 (2000), *available at* http://justice.policy.net/jpreport/executivesummary.html. In an Illinois study of capital appeals, which showed a 66 percent reversal rate, prosecutorial misconduct accounted for 21 percent of all reversals. *See* Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 J. MARSHALL L. REV. 409, 409, 423 (2001).

and, if mistakenly prosecuted, they should go free.[21] The presumption of innocence,[22] the right to remain silent,[23] the right to a public trial by an impartial jury,[24] and the requirement that the prosecutor must prove each case beyond a reasonable doubt all reinforce the public's perception that the criminal justice system operates under the precautionary principle announced by Blackstone more than two hundred years ago: "better that ten guilty persons escape than that one innocent suffer."[25] We teach school children this principle of criminal justice,[26] and law students have it "drilled into [their] head[s] over and over."[27]

The unique role of the prosecutor is a key component in the social compact that requires our justice system to protect the innocent. As the

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21. Justice Brennan in *In re Winship* explained:

> The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

In re Winship, 397 U.S. 358, 363-64 (1970).

22. The presumption of innocence in not expressly found in the U.S. Constitution, but it has long been held as a fundamental principle in the criminal justice system. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

23. "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

24. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI. Indeed, the right to a trial by a jury of one's peers has been called "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

25. WILLIAM BLACKSTONE, 4 COMMENTARIES *358. One commentator has traced the roots of the concept that some guilty should go free rather than punishing the innocent to the Book of Genesis, ancient Greek philosophy, and early Roman commentary. *See* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV 173, 177-78 n.27 (1997). Courts in England and the United States began quoting Blackstone's maxim by the early 1800s. *See id.* at 183-84.

26. *See* Dorsey D. Ellis, Jr., *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 IOWA L. REV. 829, 845 (1970). "The cliché sometimes even takes the form of 'one hundred guilty men . . . ,' and goes back at least to the fifteenth century." *Id.* at 845 n.87 (citing JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 93 (Andrew Amos trans. 1825)).

27. Volokh, *supra* note 25, at 174 n.4 (quoting Hurley Green, Sr., *Shifting Scenes: Pit-Bull Media Continues*, CHI. INDEP. BULL., Jan. 2, 1997, at 4). Although we have this announced norm of fairness, the public's attitudes toward the accused are mixed. *See infra* notes 32-34 and accompanying text.

Supreme Court explained, the prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."[28] Rather than simply acting as a partisan advocate seeking convictions, the ethics rules admonish a prosecutor to be a "minister of justice" and to seek justice.[29] In this role as a minister of justice, the prosecutor has the responsibility "not simply . . . of an advocate," but to adopt a somewhat neutral stance "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of the sufficient evidence."[30]

Yet, from a normative perspective, there are some societal pressures working against a prosecutor's duty to justice. At the state level, nearly all chief prosecutors are elected,[31] thus directly accountable to the public. Despite the ideal that the criminal justice system should protect the innocent and convict only the guilty, public support for the rights of the accused is not clear. Some studies show that the public believes "the courts undo the work of the police to get criminals off the street[s],"[32] and although a majority of African-Americans are concerned with the rights of the accused "only 29 percent of Whites held the view that disregarding a defendant's rights was a problem."[33] On the other hand, the number of Americans who oppose the death penalty because of the potential for wrongful convictions has more than doubled in recent years.[34]

Even if public support for protecting the accused is ambivalent or weak, the Supreme Court has acknowledged that "the moral force of the criminal law" relies on safeguards that keep the innocent from being

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28. Berger v. United States, 295 U.S. 78, 88 (1935).

29. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2003).

30. *Id.*; *see also* United States v. Kalfayan, 8 F.3d 1315, 1323 (9th Cir. 1993) (stating that prosecutors "serve truth and justice first" and their "job isn't just to win, but to win fairly, staying well within the rules").

31. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996) (stating that more than 95 percent of chief prosecutors on the state and local level are elected).

32. Laura B. Myers, *Bringing the Offender to Heel; Views of the Criminal Courts*, *in* AMERICANS VIEW CRIME AND JUSTICE 46, 48 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996).

33. JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 141 (1997).

34. In 1991, 11 percent of Americans cited the possibility of wrongful conviction as their reason for opposing the death penalty; by 2003, 25 percent cited wrongful convictions as their reason for opposing the death penalty. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 147 tbl.2.56 (Kathleen Maguire & Ann L. Pastore eds., 2004). Unfortunately, there have not been studies on public attitudes toward prosecutorial ethics. *See* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1319 n.42 (2002).

convicted.[35] From a practical perspective, this requires the prosecutor to monitor how the enormous resources of the government are used in each prosecution. In this role, the prosecutor has a duty to ensure that police investigators and government witnesses act properly and testify truthfully. Thus, the prosecutor bears oversight responsibility for procedures for searches, obtaining confessions, the making of eyewitness identifications, introducing lab reports, and using jailhouse informants and other cooperating witnesses.[36] The courts even give standing to the prosecutor in some instances to raise a claim that the defense counsel is failing to provide competent representation. For example, a prosecutor may raise a claim if a defense lawyer seeks to represent the accused, but has a conflict of interest based on the representation of a codefendant or government witness.[37]

Practically speaking, the prosecutor is the first line of defense against many of the common factors that lead to wrongful convictions.[38] The prosecutor's supervisory authority to evaluate the quality and quantity of evidence holds the potential for assuring the accused both procedural and, when the accused is actually innocent, substantive justice. When prosecutors do not critically examine the evidence against the accused to ensure its trustworthiness, or fail to comply with discovery and other obligations to the accused, rather than act as ministers of justice, they administer injustice.

It may be impossible to know with any certainty the reasons for prosecutorial misconduct in every case where a prosecutor ignores legal and ethical obligations in order to gain a conviction. But whatever the motivation, the misconduct is wrong. If the prosecutorial misconduct occurs to frame an innocent person, it is corrupt. It is still inexcusable if it is instead designed to facilitate the conviction of a person the

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35. *In re* Winship, 397 U.S. 358, 364 (1970).

36. *See* William F. McDonald, *The Prosecutor's Domain, in* THE PROSECUTOR 15, 17 (William F. McDonald ed., 1979).

37. *See, e.g.*, United States v. Duklewski, 567 F.2d 255, 255-56 (4th Cir. 1977) (allowing the prosecutor to allege conflict of interest of the defense counsel); *In re* Gopman, 531 F.2d 262, 262, 265 (5th Cir. 1976) (finding standing for the prosecutor to raise a conflict of interest claim).

38. After mistaken identification, the other most common factors leading to wrongful convictions in the first seventy DNA exonerations were: serology inclusion (forty cases), police misconduct (thirty-eight cases), prosecutorial misconduct (thirty-four cases), defective or fraudulent science (twenty-six cases), bad defense lawyering (twenty-three cases), microscopic hair comparison matches (twenty-one cases), false witness testimony (seventeen cases), informants or jailhouse snitches (sixteen cases), and false confessions (fifteen cases). *See* Innocence Project, *supra* note 3. In the normal case, the prosecutor reviews the work of the police, decides what scientific evidence to introduce on behalf of the government's case, reviews the testimony of the government's witnesses, and prepares the witnesses to testify at trial.

prosecutor believes is guilty. It is wrong because each act of prosecutorial misconduct is a rejection both of the prosecutor's oath of office to uphold the law and oath as a lawyer to adhere to ethical responsibilities. It is wrong because prosecutorial misconduct undermines the due process afforded to the accused. It often results in relevant evidence being kept from the fact finder and contributes to wrongful convictions. It is also wrong because placing a thumb on the scales of justice not only invades the province of the fact finder but, if the prosecutor is mistaken, it may result in an innocent person going to prison and the actual wrongdoer remaining free to commit future crimes.[39]

II. UNDERSTANDING THE PROSECUTOR'S ROLE AND DEVELOPING MORE EFFECTIVE ETHICS RULES FOR PROSECUTORS

Prosecutors wield enormous power in the criminal justice system. They decide whom to prosecute and what crimes to charge. They chart pretrial and trial strategies. And they decide, or at least greatly influence, what the sentence will be through charging decisions, plea-bargaining, or sentencing guideline choices.[40] Because the prosecutor represents the government whose goal is "not that it shall win a case, but that justice shall be done,"[41] there is a need for special ethics rules to govern the conduct of prosecutors.[42] Yet, the history of ethics rules directed toward prosecutors demonstrates that the ethics rules generally have been

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39. *See, e.g.*, Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1267 n.133 (2005) (citing several examples of where the actual perpetrators were free to commit additional crimes while the wrongfully convicted were imprisoned).

40. The Supreme Court recently curtailed some of the power of state and federal prosecutors to control sentencing through the use of sentencing guidelines. *See* United States v. Booker, 543 U.S. 220, 242-46 (2005) (holding that federal sentencing guidelines are not mandatory but rather advisory unless the facts necessary to enhance a sentence are admitted by the defendant or proven beyond a reasonable doubt at trial); Blakely v. Washington, 542 U.S. 296, 303-04 (2004) (invalidating state sentencing guidelines that permitted prosecutors to enhance punishments without proving to a jury the facts essential to the punishment); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (holding that any increases in the penalty for a crime must be charged and proven beyond a reasonable doubt at trial).

41. Berger v. United States, 295 U.S. 78, 88 (1935); *see also* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999) (discussing the power and special role of the prosecutor and the corresponding duty to "seek justice").

42. *See* NIKI KUCKES, REPORT TO THE ABA COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT CONCERNING RULE 3.8 OF THE ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY: SPECIAL RESPONSIBILITIES OF A PROSECUTOR 1 (1999) (on file with author).

limited to nonspecific pronouncements that the prosecutor has "special" responsibilities, different from other lawyers, and that the prosecutor should "seek justice."[43]

In order to identify areas where the ethics rules for prosecutors may be improved, I begin with a brief discussion of the expectations and role of the prosecutor in the United States and the development of ethics rules applicable to prosecutors. Next, I make several proposals aimed at providing more guidance to prosecutors so that they may fulfill their overarching obligation to see "that justice shall be done."[44]

A. The Development of the Public Prosecutor and Prosecutorial Ethics

Historically, the system of public prosecution is relatively new in the United States. In the colonies, there was "a tradition of allowing crime victims to initiate and prosecute their own cases."[45] While there was some experimentation with, and some form of, publicly funded prosecution throughout much of the country's early history,[46] private lawyers in the employ of victims or their families continued to bring prosecutions in some states until the mid-1800s.[47] And, some public prosecutors hired private lawyers to assist with prosecutions at least into the 1890s.[48] In these early days, it was not uncommon for a lawyer to represent the interests of a victim one day and defend an accused the next.[49]

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43. *See infra* Part II.A.

44. *Berger*, 295 U.S. at 88.

45. Ramsey, *supra* note 34, at 1322.

46. *See id.* at 1322-25; W. Scott Van Alstyne, Jr., Comment, *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125.

47. Ramsey, *supra* note 34, at 1326.

48. *Id.* at 1327-31 (stating that New York legally empowered publicly employed district attorneys to hire private counsel to assist in criminal trials until as late as 1896).

49. Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865*, 22. J.L. & SOC'Y 443, 452-53 (1995). The practice of some prosecutors also serving as defense attorneys has not vanished. As recently as the late 1970s, a majority of prosecutors in the United States were part-time prosecutors who also engaged in private practice that could include representing the accused. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.9.4, at 454-55 (1986). Part-time prosecutors may ethically represent persons facing prosecution provided the offenses are not being prosecuted by the same office in which the part-time prosecutor works nor involve the same laws that the part-time prosecutor must enforce. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1285, at 160 (1974) (stating that prosecutors who only prosecute violations of municipal ordinances may represent criminal defendants facing violations of state law provided the municipality is not directly or indirectly involved or affected); Supreme Court of Ohio, Bd. of Comm'rs on Grievances & Discipline, Op. 88-

As public prosecution evolved from this private prosecution model, the prevailing norm for prosecutors remained one of zealous representation.[50] Since the early 1800s, zealous representation has been commonly understood to mean placing the interests of the client above all other interests, and advancing a client's goals by any means necessary, provided those means are legal.[51] In addition to the norm of zealous representation, prosecutors also experienced public expectations that a good prosecutor was one who garnered high conviction rates.[52]

At the same time that public prosecution became the standard, the ABA promulgated its first set of ethics rules, the 1908 Canons of

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008 (1988), *available at* http://www.sconet.state.oh.us/BOC/Advisory_Opinions/ (stating that a municipal prosecutor may "represent a criminal defendant in cases not involving the city or its ordinances"). The difference between the modern practice of part-time prosecutors and the experience in the 1800s is that today a lawyer may not prosecute charges for a governmental entity and then defend clients against charges involving that same governmental entity.

50. Ramsey, *supra* note 34, at 1311.

51. Legal historians and ethicists trace this concept of zealous representation to the words of Henry Brougham in his defense of Queen Caroline before England's House of Lords in 1820. Brougham threatened to take every step necessary to advance his client's interests, even if the defense of Queen Caroline would cause damage to King George IV. He explained:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

2 THE TRIAL AT LARGE OF HER MAJESTY CAROLINE AMELIA ELIZABETH 3 (London, T. Kelly 1821); *see also* WOLFRAM, *supra* note 49, § 10.3.1, at 580.

The concept of zealous representation derives from a justice system based on a competitive rather than cooperative model. Robert J. Kutak, *The Adversary System and the Practice of Law*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 172, 173 (David Luban ed., 1984). Our justice system assumes that partisan advocates representing each side of a dispute will engage in an adversarial process that most often will result in the best resolution of each dispute. *Id.* A person charged with a crime is at a distinct disadvantage when the resources of the state are brought to bear, however, and a zealous advocate in the form of a defense lawyer is necessary to offset this resource imbalance. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 58 (1988) (endorsing the argument that "zealous adversary advocacy of those accused of crimes is the greatest safeguard of individual liberty against the encroachments of the state"); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975) (contending that the special needs of the accused justify the aggressive approach of defense lawyers).

52. Ramsey, *supra* note 34, at 1352-58 (citing numerous newspaper accounts from the 1800s criticizing prosecutors for being too lenient).

Professional Ethics (1908 Canons).[53] The 1908 Canons embodied the prevailing norm of zealous representation by instructing that the "lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied."[54]

Against this norm of zealous representation, the 1908 Canons suggested some limitation on the public prosecutor by stating that the prosecutor's "primary duty . . . is not to convict, but to see that justice is done."[55] In addition to this aspiration to do justice, the 1908 Canons provided a somewhat more concrete admonition by stating, "[t]he suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."[56] Other than this sole statement condemning the suppression of evidence of innocence, the 1908 Canons did not define what it meant to do justice, or how the prosecutor should reconcile their zealous representation of the government's interest in a conviction with justice for the accused.

The lack of clarity or specificity in the 1908 Canons concerning the prosecutor's ethical obligations was perhaps as much a reflection of the overall structure of the 1908 Canons as an inability to define concrete steps that a prosecutor could take "to see that justice is done." Many of the other 1908 Canons were similarly general and vague, and one commentator described them as "vaporous platitudes . . . which have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room."[57] Analyzing the 1908 Canons in the context of ethical issues specific to prosecutors and defense lawyers, another commentator concluded that "the Canons of Ethics are so vague, so ambiguous, and so contradictory that they are little or no help in resolving these problems [of ethical conduct of prosecutors and defense counsel], and that almost any position, on a given issue, can reasonably be defended with support from the [C]anons."[58]

In response to a growing dissatisfaction with the Canons as too indefinite to provide proper guidance to lawyers, the ABA created the Special Committee on the Evaluation of Ethical Standards (Wright

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53. CANONS OF PROF'L ETHICS (1908).

54. *Id*. at Canon 15.

55. *Id*. at Canon 5.

56. *Id*.

57. WOLFRAM, *supra* note 49, § 2.6.2, at 55 n.29 (citing a letter from Professor Anthony Amsterdam to the grievance committee of Washington D.C., as quoted in TIME, May 13, 1966, at 81).

58. Addison M. Bowman, *Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpoint*, 5 AM. CRIM. L.Q. 28, 28 (1966).

Committee) in 1964.[59] In 1969, the Wright Committee submitted, and the ABA House of Delegates adopted, the Model Code of Professional Responsibility (1969 Model Code).[60] The 1969 Model Code incorporated the general norms of the 1908 Canons with new, mandatory Disciplinary Rules, which stated specific required and prohibited conduct; and Ethical Considerations, which stated aspirations for lawyer's conduct.[61] In spelling out a lawyer's obligations in many practice situations, the 1969 Model Code's Disciplinary Rules marked a move toward a more definite, legalistic approach to ethical standards.[62]

As part of this movement to provide concrete guidance to lawyers, the 1969 Model Code elaborated on the 1908 Canons by developing one Disciplinary Rule specifically directed to the prosecutor.[63] Under that Disciplinary Rule, the public prosecutor "shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause," and "shall make timely disclosure . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."[64]

This Disciplinary Rule provided slightly more definition to a prosecutor's ethical obligations by introducing the requirement that probable cause is necessary before a prosecutor may file a criminal charge.[65] It also expanded on the 1908 Canons' prohibition on suppressing evidence of innocence and affirmatively required disclosure of exculpatory evidence. The 1969 Model Code thus reflected relatively modest gains in clarifying the ethical obligations of the prosecutor.

In addition to the Disciplinary Rules' two concrete ethical requirements, the 1969 Model Code continued to reference the prosecutor's duty to do justice in the non-mandatory Ethical Considerations. Through the Ethical Considerations, the 1969 Model Code set forth the aspirations that the prosecutor's role was different "from that of the usual advocate," and that the prosecutor's "duty is to

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59. STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 523 (2005).

60. MODEL CODE OF PROF'L RESPONSIBILITY, at i-ii (1969).

61. *Id.* at 1.

62. *See id.*

63. Disciplinary Rule 7-103 is entitled "Performing the Duty of Public Prosecutor or Other Government Lawyer." *Id.* DR 7-103.

64. *Id.*

65. Although the Canons did not address the probable cause requirement for a prosecutor to bring charges, they did state that a lawyer must "decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite part or to work oppression or wrong." CANONS OF PROF'L ETHICS Canon 30 (1908).

seek justice, not merely to convict."[66] The Ethical Considerations explained that the "special duty" derives from the prosecutor "represent[ing] the sovereign and therefore [the prosecutor] should use restraint in the discretionary exercise of governmental powers," and "decisions normally made by an individual client, and those affecting the public interest should be fair to all."[67] Thus, the references to exercising restraint and doing justice continued to be aspirations as they were in the 1908 Canons.

The ABA continued its general movement toward more explicit expressions of the lawyer's ethical obligations in the 1980s. Modeling new rules in a restatement of law approach, the ABA House of Delegates recommended developing ethics rules consisting of "black-letter Rules accompanied by explanatory Comments."[68] After much debate, the ABA adopted the Model Rules of Professional Conduct in 1983 (1983 Model Rules),[69] which set forth black-letter rules establishing minimum standards of acceptable conduct in many areas of a lawyer's work.

With respect to the prosecutor's ethical duties, the 1983 Model Rules stated five explicit obligations of the prosecutor,[70] although the ABA had previously adopted two of these obligations.[71] One of the obligations, making timely disclosure of all evidence or information that tends to negate guilt or mitigate sentence,[72] dates in some form to the 1908 Canons.[73] This duty was made more explicit in the 1969 Model Code, and the 1983 Model Rules expanded the disclosure duty by requiring disclosure of "information" as well as "evidence," and by changing the wording "from 'supports innocence' to 'tends to negate the

66. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1969).

67. *Id*.

68. AM. BAR ASS'N, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 1-2 (1987).

69. *Id*. at 2.

70. MODEL RULES OF PROF'L CONDUCT R. 3.8 (1983).

71. *See supra* notes 63-64 and accompanying text.

72. In a rule entitled "Special Responsibilities of a Prosecutor," the 1983 Model Rules of Professional Conduct stated:

> A prosecutor in a criminal case shall:
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> . . . .
>
> (d) 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . . .

Id. R. 3.8(d). This provision has not been amended in the intervening years.

73. *See supra* note 56 and accompanying text.

guilt of the accused' to impose a greater obligation of disclosure on the prosecution."[74] Another provision, which requires probable cause before a prosecutor brought charges,[75] was first made explicit in the 1969 Model Code and the 1983 Model Rules did not expand the duty.[76]

The three new obligations that appeared in the 1983 Model Rules required the prosecutor to:

> (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
>
> (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
>
> . . . .
>
> (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.[77]

Of these three new ethical obligations, two are unique to the position of the prosecutor. The first requires the prosecutor to ensure that the accused understands and has the ability to exercise the right to counsel.[78] The second, which restricts the prosecutor's ability to extract waivers of important pretrial rights from unrepresented persons, is

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74. AM. BAR ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-1998, at 204 (1999).

75. A prosecutor shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." MODEL RULES OF PROF'L CONDUCT R. 3.8(a).

76. *See supra* notes 64-65 and accompanying text.

77. MODEL RULES OF PROF'L CONDUCT R. 3.8. Model Rule 3.6 prohibited a lawyer from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Id*. R. 3.6. Rule 3.6 also delineated areas that were deemed to have a prejudicial effect, such as comments on the credibility of a party or witness, and some safe harbors for releasing certain information, such as the nature of the charges or defense. *See id.*

78. *Id.* R. 3.8(b).

unique to prosecutors because the prosecutor is the only lawyer who is in a position to obtain such a waiver.[79]

The third explicit obligation for the prosecutor requires the prosecutor to prevent those assisting in or associated with the prosecution from making extrajudicial statements the prosecutor could not make. This obligation basically emphasizes the duty on every lawyer to ensure that nonlawyer assistants "employed or retained by or associated with a lawyer" comply with the ethics rules.[80]

In 1990, the ABA adopted one additional ethical obligation for the prosecutor—that the prosecutor shall not subpoena a lawyer to give evidence about a past or present client except under limited circumstances.[81] And, in 1994, the ABA supplemented the existing rule restricting public statements about pending cases to state explicitly that the prosecutor must "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[82]

Although the 1994 Model Rules made some modest progress toward defining the ethical duties of the prosecutor by stating these seven explicit duties,[83] they did not address the larger ethical obligation for the

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79. *Id.* R. 3.8(c).

80. *Id*. R. 5.3. It can be argued, however, that Rule 3.8(e) goes farther. Rule 5.3 comes into play only when the lawyer "ha[s] direct supervisory authority over the [person]." *Id*. R. 5.3(b). Rule 3.8 requires the prosecutor to "exercise reasonable care . . . [over] investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case" when it comes to extrajudicial statements. *Id*. R. 3.8(e).

81. Under the Model Rules, a prosecutor shall not:

> subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless . . . the prosecutor reasonably believes . . . the information sought is not protected from disclosure by any applicable privilege . . . is essential to the successful completion of an ongoing investigation or prosecution . . . there is no other feasible alternative to obtain the information [and] the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (1992). Later, in 1995, the ABA lifted the requirement that the prosecutor receive prior judicial approval to issue the subpoena to a lawyer. *See* AM. BAR ASS'N, *supra* note 68, at 206.

82. MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (1994). A comment to Rule 3.8(g) states that this new paragraph "supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding," but nothing is meant to limit the statements the prosecutor may make that do comply with Rule 3.6. *Id*. R. 3.8 cmt. 5.

83. The seven special duties are to: require probable cause to institute charges, assure the defendant's right to counsel, refrain from seeking a waiver of rights of unrepresented defendants, disclose exculpatory evidence, exercise care to prevent staff from making extrajudicial statements the prosecutor may not make, refrain from subpoenaing a lawyer to give evidence against a client except in rare situations, and

prosecutor to be a "minister of justice." Indeed, a prosecutor may conclude that compliance with these few ethical requirements fulfills all of the special obligations of being a prosecutor. But, is this enough?

As studies of those exonerated by DNA evidence demonstrate, prosecutorial misconduct is a significant cause or contributing factor in wrongful convictions.[84] Yet, there has not been a movement toward improving the ethics rules for prosecutors with the aim of explaining their ethical obligations more clearly. Indeed, commentators usually agree that the ethics rules for prosecutors send mixed signals by commanding prosecutors to be both adversarial and neutral, resulting in unclear norms.[85] Commentators also agree that the rules fail to provide prosecutors with a complete list of what courts would consider prosecutorial misconduct.[86]

When there have been other types of systematic failures in lawyers' conduct, the ethics rules have evolved to address those failures. Most recently, the scandals associated with Enron, Arthur Andersen, and other large corporations led the ABA in 2003 to adopt changes to the 1983 Model Rules intended to address shortcomings in the ethics rules and "enhance the lawyer's ability to exercise and bring to bear independent professional judgment, and thereby enhance the lawyer's ability to promote corporate responsibility . . . so that compliance with law can be most effectively promoted."[87] In a similar fashion, the shortcomings in the ethics rules that define ethical conduct for prosecutors need to be addressed, and the following Part discusses a framework for making recommendations for changes.

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refrain from making extrajudicial comments heightening public condemnation of the accused. *Id*. R. 3.8.

84. *See supra* notes 17-20 and accompanying text.

85. *See, e.g.*, Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1463-68 (2000) (stating that disclosure rules for prosecutors permit prosecutors to take a more adversarial stance than civil litigators); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1557 (1981) (noting that prosecutors "are expected to be more (or is it less?) than an adversary"); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 47 (1991) (discussing prosecutors' various constituencies and potentially conflicting obligations).

86. Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1597.

87. AM. BAR ASS'N, REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 24-25 (2003), *available at* http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf.

B. Proposed Changes to the Prosecutorial Ethics Rules

The ethics rules adopted by each jurisdiction help to establish the norms of acceptable lawyer conduct.[88] An underlying assumption of the ethics rules is that most lawyers will conform their conduct to the rules if they know them.[89] The ethics rules serve both to guide lawyers and, when the rules are not followed, establish the standards by which to judge lawyers' conduct.[90] If one assumes that most prosecutors aspire to act ethically, then one must ask if the current ethics rules governing prosecutors' ethical responsibilities are sufficiently robust to guide prosecutors in their work.[91]

Commentators writing about prosecutorial misconduct agree that current state ethics rules, principally based on the ABA Model Rules of Professional Conduct, inadequately identify all of the ethical obligations for prosecutors.[92] In recognition of these criticisms, the ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission)[93] specifically requested and received a Report on Model Rule 3.8.[94] The Report sought "to present a balanced analysis of the issues" and was "not intended to be an advocacy piece on behalf of any particular constituency."[95]

The Report made a series of recommendations for more explicit ethical guidance concerning each of the seven specified "special

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88. As one commentator explained, "To some extent, the codes define how the legal system expects (or needs) lawyers to act if the system is to work in its intended fashion." Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 228 (1993).

89. The Model Code of Professional Responsibility states this assumption and explains the role of ethics rules by declaring: "The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor . . . ." MODEL CODE OF PROF'L RESPONSIBILITY pmbl. 1 (1969).

90. *Id.*

91. Of course, "unethical lawyers always will ignore the codes when the codes conflict with their self interest; scrupulous attorneys will try to follow the codes' commands." Zacharias, *supra* note 85, at 107.

92. *See* Green, *supra* note 86, at 1597.

93. The ABA Commission on the Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) was appointed in 1997, and submitted its Report on the Evaluation of the Rules of Professional Conduct (Ethics 2000 Report) in August 2001. Am. Bar Ass'n, Ethics 2000 Commission, http://abanet.org/epr/ethics2k.html (last visited Mar. 15, 2006). The ABA House of Delegates adopted almost all of the Ethics 2000 Commission's recommendations in February 2002. *Id.*

94. The full name of the report is *Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Responsibility: Special Responsibilities of a Prosecutor*. *See supra* note 42.

95. KUCKES, *supra* note 42, at 1 n.1.

obligations for prosecutors" under Rule 3.8,[96] though it did not make "formal proposals for change."[97] Rather, the Report noted that a review of the rule "from the ground up from all of the groups involved" would "best ensure acceptance among prosecutors, defense counsel and the courts."[98]

In response to the Report, the Ethics 2000 Commission decided not to make any significant changes to the prosecutorial ethics rule.[99] Some commentators have opined that the Ethics 2000 Commission refrained from strengthening the rule on prosecutorial ethics in order to avoid controversy and opposition,[100] and that the failure to act "cannot be explained on substantive grounds."[101] In the years since the Ethics 2000 Commission, there has not been any movement toward doing the type of "ground up review" of Model Rule 3.8 that was recommended. Nevertheless, the recommendations in the Report for such a review should be considered and followed, if not on a national level, then on a state level by state supreme courts or statewide innocence commissions.

In undertaking such a review, the ABA Prosecution Function Standards provide examples of the types of norms that should be considered in clearly defining the prosecutor's ethical duties.[102] The Standards address the various functions of the prosecutor, and cover all phases of the prosecutor's work, including investigation, the charging decision, plea discussions, trial, and sentencing.[103] The ABA states that the Standards are "to be used as a guide to professional conduct and performance,"[104] but to date the ABA has not promoted adoption of the Standards at the state level as it had the Model Code and the Model Rules. Nevertheless, the Standards are a rich source of thoughtful requirements that, if incorporated into the ethics rules, would greatly

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96. Rule 3.8 is the Model Rule pertaining to prosecutors' ethical responsibilities. *See supra* notes 70-77 and accompanying text.

97. KUCKES, *supra* note 42, at 3.

98. *Id*.

99. The Ethics 2000 Commission consolidated two of the former provisions of Model Rule 3.8, combining the restriction on the prosecutor making extrajudicial statements with the prosecutor's obligation to exercise reasonable care to prevent those associated with the prosecutor from making comments the prosecutor cannot make. Thus, new Model Rule 3.8(f) combines former Model Rules 3.8(e) and (g). MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002), *available at* http://www.abanet.org/cpr/e2k-redline.html (last visited Mar. 15, 2006).

100. *See* Green, *supra* note 86, at 1575; Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 288 (2004).

101. Green, *supra* note 86, at 1575.

102. AM. BAR ASS'N, *supra* note 5.

103. *Id.*

104. *Id*. Standard 3-1.1.

improve upon the minimal guidance currently provided to prosecutors. The Supreme Court has relied upon the Defense Function Standards as norms of practice or guides to determining what is reasonable,[105] and the Prosecution Function Standards similarly set forth reasonable expectations. A brief discussion of some of the Standards will illustrate this point.

The Standards state that a prosecutor shall not "knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense."[106] A norm such as this would provide the grand jury with sufficient evidence to evaluate whether there is sufficient probable cause to issue an indictment. Other provisions in the Standards require the prosecutor not only to have probable cause before instituting a criminal charge but also to have "sufficient admissible evidence to support a conviction" in order to permit the pendency of criminal charges,[107] and prohibit a supervisor from compelling a subordinate "to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused."[108] These provisions are aimed at ensuring that once charges are brought the prosecutor will not pursue them when there are doubts as to the sufficiency of the evidence.

In terms of disclosure obligations to the accused, the Standards require "timely disclosure . . . 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."[109] And, "[a] prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused."[110] These obligations would prohibit two practices that some prosecutors employ: withholding exculpatory evidence until the eve of trial, or indeed during trial, when the defense has too little time to develop the evidence; and failing to follow investigatory leads that may exonerate the accused.

With regard to advocacy obligations during trial, the Standards prohibit the prosecutor from using cross-examination to discredit or undermine a truthful witness,[111] asking a question that implies the

105. *See* Wiggins v. Smith, 539 U.S. 510, 522 (2003); Williams v. Taylor, 529 U.S. 362, 369 (2000).

106. AM. BAR ASS'N, *supra* note 5, Standard 3-3.6(b).

107. *Id*. Standard 3-3.9(a).

108. *Id.* Standard 3-3.9(c).

109. *Id*. Standard 3-3.11(a).

110. *Id*. Standard 3-3.11(c).

111. "The prosecutor's belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination. A prosecutor should not use the power of cross-examination to discredit or undermine a

existence of a fact in which the prosecutor does not have a good faith belief,[112] and making arguments to the jury that would divert them from deciding the case on the evidence.[113] Each of these provisions reinforces the prosecutor's duty to ensure procedural justice for the accused and to be concerned with truth more than winning during the trial process.

As these examples from the Standards indicate, there is room for much more guidance and clearer ethical obligations for prosecutors. Some states have incorporated some aspects of the Standards into their versions of Model Rule 3.8,[114] but no state has done the "ground up review" recommended in the Report on Model Rule 3.8. Until each state does such a review, prosecutors will continue to operate under existing ethics rules that provide minimal guidance. As the following Part discusses, in addition to the minimal ethics rules, the prosecutor often has few internal guideposts or other explicit legal requirements defining how to discharge duties and exercise prosecutorial discretion.

II. INCREASING TRANSPARENCY AND SETTING CLEARER LIMITS ON PROSECUTORIAL DISCRETION

The prosecutor has a great deal of discretion, and in many areas a prosecutor exercises this discretion with little or no oversight or transparency. For example, a prosecutor has discretion over the evidence to present to a grand jury or in a preliminary hearing, and a prosecutor is not required to present any exculpatory evidence in either proceeding.[115] Similarly, a prosecutor has discretion under *Brady* and through most state discovery rules to make the determination of *what* constitutes

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witness if the prosecutor knows the witness is testifying truthfully." *Id*. Standard 3-5.7(b).

112. "A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking." *Id*. Standard 3-5.7(d).

113. "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence." *Id*. Standard 3-5.8(d).

114. *See* AM. BAR ASS'N & THE BUREAU OF NAT'L AFFAIRS, INC., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 61:601 (1997) (analyzing state versions of Model Rule 3.8). Massachusetts adopted some portions of the ABA Prosecution Function Standards in 1979, but repealed the rule that contained them in 1999. MASS. SUP. JUD. CT. R. 3.08; Arnold R. Rosenfeld, Changes in the Rules of Professional Conduct Relating to the Prosecution and Defense Function, http://www.mass.gov/obcbbo/prosecut.htm (last visited Mar. 15. 2006).

115. The Supreme Court has held that a federal prosecutor has no obligation to present exculpatory evidence to the grand jury. United States v. Williams, 504 U.S. 36, 45-55 (1992). Absent a specific state law or rule of procedure, prosecutors at the state level do not have any obligation to present exculpatory evidence to the grand jury or in a preliminary hearing.

exculpatory evidence, and *when* to disclose it.[116] In these and other instances, the prosecutor makes these decisions in secret, based on personal judgment that often is not subject to any established guidelines or public oversight.

As a starting point for more control over the exercise of discretion and transparency, the ABA Prosecution Function Standards recommend that each prosecutor's office adopt a "prosecutor's handbook" that contains "a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law."[117] The Prosecution Function Standards further recommend that: "This handbook should be available to the public, except for subject matters declared 'confidential,' when it is reasonably believed that public access to their contents would adversely affect the prosecution function."[118]

The National District Attorneys Association (NDAA) makes essentially this same recommendation, stating: "The objectives of these policies and procedures are to establish the office as a place for the fair, efficient, and effective enforcement of the criminal law."[119] The NDAA further explains: "The policies and procedures should give guidance in

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116. The Supreme Court has held that a prosecutor's duty to disclose evidence favorable to the defense is only triggered when the evidence is material. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). Thus, one prosecutor may withhold evidence favorable to the defendant, reasoning that it is not "material" if the prosecutor believes that there is sufficient evidence of guilt to overcome the defendant's use of the exculpatory evidence at trial. Another prosecutor facing the same situation may disclose the evidence, reasoning that if it is exculpatory it could be "material" to the fact-finder's overall evaluation of the evidence of guilt Additionally, there is no specific rule governing the timing of disclosures of exculpatory evidence, and a prosecutor need only disclose "exculpatory and impeachment information no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made." United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001); *see also* United States v. Ziperstein, 601 F.2d 281, 291 (7th Cir. 1979) ("As long as ultimate disclosure is made before it is too late for the defendant[] to make use of any benefits of the evidence, Due Process is satisfied."). "With neither a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligation inconsistently, and too often disclosed favorable information on the eve of, during, or after trial—or not at all." Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 94 (2004).

117. AM. BAR ASS'N, *supra* note 5, Standard 3-2.5(a).

118. *Id*. Standard 3-2.5(b).

119. NAT'L DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS, Standard 10.1 (2d ed. 1991), *available at* http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards.pdf.

the exercise of prosecutorial discretion and should provide information necessary for the performance of the duties of the staff."[120] Similar to the ABA Prosecution Function Standards, the NDAA recommends that the policy manual "should be subject to access by the general public and/or law enforcement agencies or the defense bar."[121]

Despite the recommendation of both the ABA and the NDAA, it appears that a relatively small number of the more than 2300 prosecutors' offices that try felony cases in state courts of general jurisdictions[122] have manuals or written standards, or, if they do, those manuals or standards are not available to the public.[123] In contrast, the U.S. Department of Justice publishes the U.S. Attorney's Manual (USAM),[124] which is available to the public.

The USAM states the general principle that a prosecutor "should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction" unless the prosecutor believes: "1. No substantial Federal purpose would be served by prosecution; 2. The person is subject to effective prosecution in another jurisdiction; or 3. There exists an adequate non-criminal alternative to prosecution."[125]

In addition to these general guidelines acknowledging the vast discretion that federal prosecutors have, the USAM provides federal

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120. *Id*.

121. *Id*. Standard 10.3, at 40.

122. CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2001, at 1 (2002), *available at* http://www.ojp.gov/bjs/abstract/psc01.pdf.

123. I have been unable to locate information on the number of prosecutors' offices that have adopted written policies or manuals, though anecdotal experience and related data demonstrate that they are few. In nearly thirty years of experience practicing law in several different cities and counties in two states, I have not found any prosecutor's office that had published guidelines or a manual addressing the exercise of prosecutorial discretion in state courts. Additionally, available data from the Bureau of Justice Statistics demonstrate that only 19 percent of prosecutors' offices have written guidelines for handling juvenile cases. *Id*. at 7. The survey by the Bureau of Justice Statistics did not seek information concerning other written guidelines or manuals. *See generally id*. One state, Minnesota, has a statute requiring every prosecutor's office to adopt "written guidelines governing the county attorney's charging and plea negotiation policies and practices." MINN. STAT. § 388.051(3)(a) (1997). The Minnesota statute requires the guidelines to include "the circumstances under which plea negotiation agreements are permissible," "the factors that are considered in making charging decisions and formulating plea agreements," and "the extent to which input from other persons concerned with a prosecution, such as victims and law enforcement officers, is considered in formulating plea agreements." *Id*.

124. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (2003), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html.

125. *Id*. § 9-27.220(A).

prosecutors with a list of seven factors to consider in exercising their discretion over whether federal prosecution should be pursued:

> 1. Federal law enforcement priorities;
>
> 2. The nature and seriousness of the offense;
>
> 3. The deterrent effect of prosecution;
>
> 4. The person's culpability in connection with the offense;
>
> 5. The person's history with respect to criminal activity;
>
> 6. The person's willingness to cooperate in the investigation or prosecution of others; and
>
> 7. The probable sentence or other consequences if the person is convicted."[126]

Following these seven factors, the USAM explains that the list is "not intended to be all-inclusive," and explains with some detail each of the factors, as well as an eighth factor, "the person's personal circumstances."[127] The USAM also specifically identifies three types of impermissible considerations: "1. The person's race, religion, sex, national origin, or political association, activities or beliefs; 2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or 3. The possible affect of the decision on the attorney's own professional or personal circumstances."[128]

Prosecutors' offices that do not have a written manual or set of guidelines addressing the exercise of discretion would benefit from creating such a document and making it accessible to the public. Such steps would help to establish norms in the offices that could be subject to review and, when necessary, enforcement. As a recent study into police integrity by the Department of Justice's National Institute of Justice found, having a "culture of integrity, as defined by clearly understood and implemented policies and rules, may be more important in shaping the ethics . . . than hiring the 'right' people."[129] This finding is consistent

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126. *Id.* § 9-27.230(A).

127. *Id.* § 9-27.230(B) cmt.

128. *Id.* § 9-27.260(A).

129. NAT'L INST. OF JUSTICE, ENHANCING POLICE INTEGRITY, at ii (2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/209269.pdf. The research was based on a survey of 3235 police officers from thirty different law enforcement agencies responding to hypothetical questions related to misconduct. *Id.* at 1. The survey sample did not

with studies of lawyer ethics that the ethical culture of the law office is critical to the ethical behavior of lawyers.[130]

In addition, prosecutors' offices should consider two recommendations that the National Institute of Justice study found important to enhancing police integrity that would appear equally applicable to prosecutors' offices. First, it is important "to consistently address relatively minor offenses with the appropriate discipline" so that one "may infer that major offenses, too, are likely to be disciplined."[131] Second, "disclose the disciplinary process and resulting discipline to public scrutiny."[132]

Implementing internal policies that value ethical conduct, and implementing and enforcing internal discipline when those norms are violated, would go a long way toward addressing the issue of prosecutorial misconduct. In the absence of such policies, prosecutors simply do not know the limits of their authority, nor do they have guidance on how to exercise discretion. Without internal controls, especially when external controls, such as the ethics rules for prosecutors, are incomplete and underenforced, it is easy for the prosecutor to value winning over ensuring fairness for the accused.

Internal controls, though, are unlikely to be enough. Innocence commissions, state supreme courts, and legislatures should consider changes in some areas, such as the prosecutor's discovery obligation and use of informants and other cooperating witnesses who receive something of value from the prosecutor. For example, an open file discovery obligation would help to eliminate one of the major forms of prosecutorial misconduct—the suppression of material evidence,[133] which is a leading cause of wrongful convictions.[134] Under an open file discovery regime, the prosecutor could still seek a protective order to withhold some information from the defense counsel, but such a system would require a court to review the request.

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include state police agencies, police agencies in the Western and Midwestern parts of the nation, and included only one sheriff's office and one county agency. *Id*. at ii.

130. *See, e.g.*, JEROME E. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 167 (1966) ("The longer a lawyer has been a member of the office, and the more socially cohesive the office, the more likely it is that his behavior will be in line with the attitudes of his colleagues."); FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 173 (1981) ("[A]fter general upbringing, the source given the greatest credit for learning professional responsibility is the 'observation of or advice from other attorneys in your own law office.'").

131. NAT'L INST. OF JUSTICE, *supra* note 129, at 6.

132. *Id*.

133. *See* Green, *supra* note 41, at 619.

134. *See* DWYER, NEUFELD & SCHECK, *supra* note 17, app. at 265. Suppression of exculpatory evidence was found in 43 percent of the exonerations where prosecutorial misconduct was a factor leading to the wrongful conviction. *Id*.

With regard to the use of informants, requiring the prosecutor to file a pretrial notice, much like a notice of alibi that the accused is required to file, could help stem abuses. Such a filing should detail the extent of contact with the informant, information concerning each time the informant has cooperated with the government in the past, and a complete statement of inducements given to the informant for the testimony. Such a rule should expressly forbid "unspoken deals" or the granting of rewards for favorable testimony after the witness has testified that were not delineated in the pretrial filing.

In these and other areas, more bright-line rules or guideposts would provide clearer, better limits on how the prosecutor should exercise discretion. Much like more specific ethics rules, more definite internal guidelines would help to provide prosecutors with a clearer sense of their duties. And, as the following Part argues, more effective remedies are necessary when a prosecutor violates his or her duties.

III. CREATING MORE ACCOUNTABILITY AND EFFECTIVE REMEDIES FOR PROSECUTORIAL MISCONDUCT

Studies of wrongful convictions have demonstrated that when prosecutorial misconduct caused or contributed to a wrongful conviction, the prosecutors involved were rarely disciplined, either internally or through external bodies.[135] Additionally, prosecutors normally have immunity from civil lawsuits, which limits their personal liability for bad acts.[136] And appellate courts impose strict standards of review and rarely reverse a conviction based on prosecutorial conduct, usually finding the misconduct to constitute harmless error.[137] These factors have led courts

135. *Id*. at 175, 229; Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price*, N.Y. TIMES, Mar. 21, 2004, at 25.

136. Under federal law, prosecutors have absolute immunity from claims for conduct that is associated with the judicial phase of the case, such as initiating the prosecution and pursuing the prosecution in court. Imbler v. Pachtman, 424 U.S. 409, 424 (1976). For work as an investigator or administrator, they have qualified immunity. Buckley v. Fitzsimmons, 509 U.S. 259, 273, 278 (1993) (finding qualified immunity for statements about defendants to the press and for allegedly fabricating evidence); Burns v. Reed, 500 U.S. 478, 495 (1991) (finding qualified immunity for providing legal advice to the police). Qualified immunity is lost only when the prosecutor should know that his or her conduct violates clearly established constitutional or statutory rights. *See, e.g*., Doe v. Phillips, 81 F.3d 1204, 1211 (2d Cir. 1996). Similarly, most states provide prosecutors with immunity for their official acts. *See, e.g.*, Am. Transmissions, Inc. v. Attorney Gen., 560 N.W.2d 50, 52 (Mich. 1997) (citing to statutory absolute immunity); Office of the State Attorney v. Parrotino, 628 So. 2d 1097, 1098 (Fla. 1993).

137. Appellate courts usually defer to the trial judge's opinion about the effects of prosecutorial misconduct on the trial. *See, e.g.*, United States v. Wadlington, 233 F.3d 1067, 1077 (8th Cir. 2000) (stating that the trial judge "is in a far better position to measure the effect of an improper question on the jury than an appellate court which

and commentators to observe that current restraints on prosecutorial misconduct "are either meaningless or nonexistent."[138]

The general lack of accountability for prosecutorial misconduct has also been demonstrated by various studies and is the subject of much debate among commentators.[139] As one commentator remarked, there is "the human tendency to push margins when there are no sufficiently demanding external controls."[140] In addition, psychological literature demonstrates that when one is not held accountable for decisions several biases come into play that negatively affect the quality of those decisions.[141] Thus, the overall lack of accountability is a condition contributing to prosecutorial misconduct.

The lack of oversight and accountability for prosecutorial misconduct needs to be addressed by anyone interested in remedying prosecutorial misconduct as a factor contributing to wrongful convictions. A more proactive approach is needed. Prosecutors' offices

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reviews only the cold record" (quoting United States v. Nelson, 984 F.2d 894, 897 (8th Cir. 1993))); United States v. Marshall, 75 F.3d 1097, 1106-07 (7th Cir. 1996) (holding that the trial judge was in the best position to determine whether "an incident was so serious as to warrant a mistrial" (quoting United States v. Humphrey, 34 F.3d 551, 556 (7th Cir. 1994))); United States v. Stewart, 977 F.2d 81, 83 (3d Cir. 1992) (stating that the trial judge was in a better position than the appeals court to weigh the effect of an alleged improper comment by prosecutor).

Most circuits use a three-pronged test to evaluate the seriousness of misconduct and find harmless error if the misconduct was not severe, the trial court took effective curative measures, or if the weight of the evidence made conviction certain absent the improper conduct. *See, e.g.*, United States v. Gonzalez-Gonzalez, 258 F.3d 16, 22 (1st Cir. 2001); United States v. Shareef, 190 F.3d 71, 78 (2d Cir. 1999); Moore v. Morton, 255 F.3d 95, 113 (3d Cir. 2001); United States v. McWaine, 243 F.3d 871, 873 (5th Cir. 2001); *Wadlington*, 233 F.3d at 1077; United States v. Garcia-Guizar, 160 F.3d 511, 521 (9th Cir. 1998); United States v. Maynard, 236 F.3d 601, 606 (10th Cir. 2000); United States v. Creamer, 721 F.2d 342, 345 (11th Cir. 1983); United States v. Watson, 171 F.3d 695, 700 (D.C. Cir. 1999).

138. GERSHMAN, *supra* note 16, at vi; *see also* Darden v. Wainwright, 477 U.S. 168, 205-06 (1986) (Blackmun, J., dissenting) (stating that the "Court must do more than wring its hands" in the face of prosecutorial misconduct).

139. *See, e.g.*, GERSHMAN, *supra* note 16 (discussing instances of prosecutorial misconduct and the lack of effective remedies); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987) (investigating prosecutors' violations of ethical norms and the lack of remedies); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997) (finding the disciplinary process ineffective against prosecutors).

140. Yaroshefsky, *supra* note 100, at 294.

141. Properly structured accountability mechanisms significantly improve decision-making by counteracting psychological biases that occur in the absence of oversight. *See generally* Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999) (reviewing the psychological literature on accountability).

should be required to implement a system of graduated discipline each time there is a finding by a trial judge or appellate court of prosecutorial misconduct. Bar disciplinary authorities should implement a system to review reported instances of prosecutorial misconduct and, when they deem it appropriate, conduct investigations or recommend discipline. Without reasonable attempts to exercise internal and external controls on the conduct of prosecutors, prosecutorial misconduct will continue to contribute to future wrongful convictions.

CONCLUSION

The current ethics rules provide too little guidance to prosecutors, and systems in place to monitor prosecutorial conduct are dysfunctional and rarely hold prosecutors responsible for misconduct. By failing to provide clearer ethical norms for prosecutors, we deprive them of the guidance that they need in making difficult decisions. And, by failing to hold prosecutors responsible for prosecutorial misconduct, we tell prosecutors that their misconduct does not matter.

This inaction in clearly defining and enforcing prosecutorial ethics is problematic from a societal point of view for at least three reasons. First, it contributes to a social attitude that our legal system is indifferent to the legal rights of the accused. Making laws and punishing people for breaking the law send a message that society takes the protection of its citizens seriously, while failing to adopt clear ethics rules or to take action against prosecutors for misconduct sends a signal that society does not hold them morally responsible for legal and ethical breaches of trust. Second, failing to address the issue of prosecutorial misconduct undermines one of our essential "social goods"—trust in the government.[142] Finally, and most importantly, failing to address the issue of prosecutorial misconduct continues to contribute to the injustice of wrongful convictions.

As I have argued, clearer ethics rules, more transparency in the exercise of prosecutorial discretion, and better remedies for prosecutorial misconduct when it occurs are needed. On the national level, the ABA should initiate the "ground up review" of prosecutorial ethics recommended in the Report on Model Rule 3.8.[143] On the state level, innocence commissions and state supreme courts should consider

142. Sissela Bok advanced the idea of trust as a social good, and observed: "[T]rust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse." SISSELA BOK, LYING; MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 26-27 (1978).

143. *See supra* Part II.B.

changes to the ethics rules for prosecutors, open-file discovery, and proposals to require more transparency in the way prosecutors exercise discretion. Locally, chief prosecutors can and should play a prominent role in reducing the harm caused by prosecutorial misconduct, and they can do so by implementing and monitoring clearer guidelines within their offices, and disciplining those prosecutors who do not live up to those obligations. Prosecutors can also join in efforts to develop clearer, more definite prosecutorial ethics rules.

Even if there is continued inaction on the national and state levels, and if chief prosecutors do not take steps to curb prosecutorial misconduct, courts and bar disciplinary bodies can play an important role by enforcing the ethics rules already in place. As Judge Jerome Frank observed decades ago, failure to enforce rules prohibiting prosecutorial misconduct sends the message to the prosecutor that "[the] rules on the subject are pretend-rules."[144] Recent revelations about common causes of wrongful convictions have demonstrated vividly that the lives of innocent people are at stake, and we can no longer afford to ignore prosecutorial misconduct.

144. United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946).