PROSECUTORIAL MISCONDUCT: SHOULDN'T THE PUNISHMENT FIT THE CRIME?

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I. INTRODUCTION

Our criminal justice system functions under the premise and purpose of punishing those who commit illegal acts to deter this type of behavior and rehabilitate those who have committed these acts. What has become ironic within our justice system is the belief that punishment corrects and deters unwanted behavior, while at the same time granting prosecutors absolute immunity, regardless of the egregious or illegal nature of their acts.

Prosecutorial misconduct is not a new topic and not one that is misunderstood at all. Extensive studies and scholarship exist on the resulting problems when unethical prosecutors have unchecked authority, coupled with no consequences for their actions. Again, this problem and the far-

reaching damage that results, are not new and are not even debated. What is debated is whether prosecutors should continue to enjoy the privilege of immunity from any liability for their actions.

To fully understand the scope of the problem and the sense of urgency we all should have in correcting it, we must look to history. We must examine the historical origins of a system that can breed such bad actors, who act with an entitlement and confidence that their misconduct and biased application of the law is accepted and condoned. Next, we must look at the magnitude of the harm caused by these rogue prosecutors being able to act with impunity, and the reality that this conduct has gone on for far too long and nothing done to date has worked as a deterrent. With this understanding, there should be no hesitation in finally implementing civil and criminal punishment for prosecutors who intentionally and willfully commit misconduct.

This Article will discuss the purpose and aims of the criminal justice system and role of the prosecutor, examine the historical reality of laws that were unequal when written and as applied, examine what conduct is considered prosecutorial misconduct and the prevalence of these behaviors, outline the physical and financial manifestations of the harm caused by this misconduct, explain the law as it currently applies to prosecutors and the immunity they enjoy and finally propose solutions to finally hold rogue prosecutors accountable.

II. CRIMINAL JUSTICE SYSTEM AND THE ROLE OF THE PROSECUTOR

A. Purpose of the Criminal Justice System

A variety of purposes or goals have been stated over the years for the criminal justice system and the individual state departments of correction. Although the specifics may vary slightly, the overarching purpose and mission has been to function as a mechanism of deterrence and "to promote the correction and rehabilitation of offenders."[1] Further, there is a secondary

1. MODEL PENAL CODE §1.02 (AM. LAW INST. 1985) ("The general purposes of the provisions governing the sentencing and treatment of offenders are: (a) to prevent the commission of offenses; (b) to promote the correction and rehabilitation of offenders; (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment; (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense; (e) to differentiate among offenders with a view to a just individualization in their treatment; (f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders; (g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders; (h) to integrate responsibility for the administration of the correctional system in a state department of correction [or other single department or agency].").

goal to "promote the correction and rehabilitation of offenders, within a scheme that safeguards them against excessive, disproportionate or arbitrary punishment."[2] The emphasis, at least as expressed in the Model Penal Code, has not been on sheer punishment, but to use punishment primarily as a tool to rehabilitate.[3] To further express this mission to all involved, the inscription on the wall inside the Department of Justice building reads, "The United States wins its point whenever justice is done its citizens in the courts."[4] Winning at all costs is not the goal. This objective to rehabilitate citizens in a fair and equitable manner has been expressed as far back as Thomas Jefferson.[5] Jefferson wrote, "The most sacred of the duties of government [is] to do equal and impartial justice to all its citizens."[6] In seeking to do equal and impartial justice, the individual with the most autonomous power to do justice, or injustice, is the prosecutor.[7]

B. Prosecutor: Role and Responsibilities

The prosecutor's role, as defined by the American Bar Association Standards for Criminal Justice, is that of "an administrator of justice, a zealous advocate, and an officer of the court."[8] They go on to describe the prosecutor as one who is to "seek justice within the bounds of the law, not merely to convict."[9] Their overarching objective is articulated as "promoting an accurate result through a fair process" as outlined in the Model Rules of Professional Conduct (MRPC).[10]

2. *Id.* note on purpose of section. Prior to the 1962 Model Penal Code, there was no uniform statement of purpose for the penal system.

3. *See* §1.02.

4. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 3 (2d ed. 2013). The United States Department of Justice building in Washington D.C. has an inscription on the rotunda wall that reads, "The United States wins its point whenever justice is done its citizens in the courts." *Id.*

5. *See About DOJ*, U.S. DEP'T OF JUST., https://www.justice.gov/about [https://perma.cc/6NZK-YB4G].

6. *Id.*

7. *See* discussion *infra* Section II.B.

8. *See* CRIMINAL JUSTICE STANDARDS FOR PROSECUTION FUNCTION §3-1.2(a) (AM. BAR ASS'N 2015).

9. *Id.* at 3-1.2(b) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.").

10. CASSIDY, *supra* note 4 ("[T]he prosecutor's obligation is not to convict at all costs, but rather to take steps to help promote an accurate result through a fair process . . . .").

It is important to note that the prosecutor is said to serve the public.[11] The general public and public interest are the prosecutor's client, not government agencies, law enforcement bodies or personnel, or even the victims of crimes.[12] In addition, the prosecutor is to function as a problem-solver and community advocate, with a duty to remedy inadequacies or injustices in the system once they are identified.[13]

Since the prosecutor's client, to whom they owe a duty, is the general public, they must be able to function in this role in an impartial manner, so that they truly represent the interests of their entire constituency. To do so, the prosecutor must be free from implicit bias, overt bias, and prejudice of all manners (racial, gender, sexual orientation, disability, age, religion and even socioeconomic status).[14] They must also "strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority."[15] Still, they must go one step further and work to eliminate historically persistent biases.[16]

11. *Id.* at 1 ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.") (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). Cassidy goes on to explain that "[t]he office of the prosecutor is a public trust, and the duty to represent the public interest imposes special obligations of fairness and impartiality on the prosecuting attorney. . . . [A] prosecutor is thus both a principal and an agent." *Id.* at 2.

12. CRIMINAL JUSTICE STANDARDS § 3-1.3 ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients. The public's interests and views are [sic] should be determined by the chief prosecutor and designated assistants in the jurisdiction.").

13. *Id.* § 3-1.2(f) ("The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide service to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A prosecutorial office should support such activities, and the office's budget should include funding and paid release time for such activities.").

14. *Id.* § 3-1.6(a).

15. *Id.*

16. *Id.* ("(a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority[;] (b) A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that

However, these rules of professional conduct are merely aspirational.[17] It is clearly stated in the rules that they are not intended to be used as a "basis for the imposition of professional discipline," or "to create a standard of care for civil liability."[18] Since these rules do not subject the prosecutor to any penalties if violated, they essentially function in practice as merely suggestions.

III. HISTORICAL REALITY

A. To Understand Current Issues, We Must Look at Historical Events and Practices

It is impossible to correctly examine the current epidemic of prosecutorial misconduct, without looking back at the history of the nation that bred this disease. Currently, we see instances of prosecutors and district attorneys' offices where bad actors commit a variety of illegal acts, which implicate the wrong individual and result in wrongful convictions.[19] This practice of convicting the innocent disproportionately impacts minorities, particularly Black Americans. Only looking at the problem within the current practice is like treating a health symptom but ignoring the root disease. For multiple centuries, the country enacted and enforced laws that were unequal as written and as applied.[20] The passage of the Thirteenth, Fourteenth and Fifteenth Amendments (the Reconstruction Amendments), were aimed at eliminating slavery, protecting all citizens' right to life, liberty and property, and eliminating voting discrimination against minorities. In theory, if followed as written, this should have eliminated race-based bias in criminal convictions as well. However, states immediately began to enact race-based laws, like the Black Codes and Jim Crow laws aimed at depriving minorities, particularly Black Americans, of their basic rights.[21]

If a jurisdiction is allowed to enact and enforce laws that are biased and target a portion of their citizenry, they signal to everyone involved in that process (legislature, judiciary, prosecutors, and even citizens) that this discriminatory practice is not only accepted but condoned. Below I will

cannot be properly justified.").

17. *See id.* § 3-1.1(b).

18. *Id.* ("These Standards are . . . not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.").

19. *See* discussion *infra* Part IV.

20. *See* discussion *infra* Section III.B.

21. *See* Karla M. McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163, 166 (2010).

discuss the series of bias laws and practices that permeated the country over roughly the past one hundred and fifty years, and how their remnants are a contributing factor in present day prosecutorial misconduct.

B. Bias Laws and Unequal Application of the Law

1. Jim Crow

Even in light of the mandate from the federal government via the Reconstruction Amendments,[22] states, primarily southern states, still refused to tame their bigotry. That deep-rooted shame manifested itself in what we know as the Jim Crow era and Jim Crow laws.

The history of Jim Crow was a formalized practice where states enacted laws specifically geared to deprive a targeted portion of the population of their constitutional rights.[23] The federal government bent to the will of the states, cowering at the yell of "States Rights". By allowing the states to enact these targeted laws, the federal government sanctioned discrimination. This empowered the states and left them essentially free to infringe on Black citizens' rights at will.

This era was fraught with beatings, lynchings, and targeted punishment. By allowing these practices to go unpunished, the "law . . . sends a message to society about what types of behaviors are socially acceptable."[24] This effectively codified discrimination and created a "legal underclass."[25]

22. U.S. CONST. amends. XIII, XIV, XV.

23. McKanders, *supra* note 21.

24. *Id.* at 166. McKanders went on to explain: "Jim Crow specifically refers to the segregation of African Americans and whites that occurred during the post-Reconstruction era, between the mid-1870s and the 1960s. The Reconstruction Amendments were essentially the first attempt by the United States government to recognize the personhood of African Americans. First, the Thirteenth Amendment, passed in 1865, officially abolished slavery. Next, in 1868, the Fourteenth Amendment was passed and essentially overturned *Dred Scott* [referring to Dred Scott v. Sanford, 60 U.S. 393 (1857)]. Last, in 1870, the Fifteenth Amendment was passed and prohibited state and local governments from preventing a citizen from voting based on the citizen's race, color, or previous condition of servitude. Congress, based on its newfound authority under the Reconstruction Amendments, also passed the Congressional Civil Rights Acts to ensure enforcement of the amendments. However, many states, especially in the South, viewed the amendments as an effort by the federal government to infringe on states' rights to determine state citizenship rights. Jim Crow laws arose in reaction, and allowed states to circumvent the restrictions of the Reconstruction Amendments. Although Jim Crow laws seemed to clearly violate the newly enacted constitutional amendments and the laws that accompanied them, post-Reconstruction the federal courts narrowly construed the Reconstruction Amendments and allowed states and localities to pass Jim Crow laws. After the Reconstruction Amendments were passed, Congress was not able to enforce the amendments through legislation, as the Southern states viewed congressional action as an infringement on their rights as states." *Id.* at 178.

25. *Id.* at 166 ("During the Jim Crow era, approximately 2,522 African Americans were lynched. . . . In addition, there were numerous beatings, race riots, and unjustified uses of capital punishment towards African Americans. . . . Jim Crow laws codified discrimination and second-

Further, judicial decisions condoned the discriminatory behavior and chipped away at the constitutional protections of the Reconstruction Amendments.[26]

Examples are plentiful and equally disgusting. Common industries with significant labor needs at the time were cotton, sugar, turpentine and coal.[27] There was an unspoken, but all too common practice at the time, called a recruitment process.[28]

> [T]he [county sheriff] and the [turpentine operators] made up a list of some 80 Negroes known to both as good husky fellows, capable of a fair day's work. Promised five dollars for each one he landed, the sheriff got them all on various petty charges—gambling, disorderly conduct, assault, and the like.[29]

They were then taken "to the local justice, who was in [on] the game."[30] This practice was a coordinated effort between law enforcement, the prosecutor, and the judge, to commit misconduct and effectively incarcerate countless people for no legitimate reason. However, there was a purpose—monetary gain.

2. Convict Leasing

In the mid-1800s land owners in the south were looking for a slavery substitute, and the state accommodated them with convict leasing.[31] Prisons

class status for African Americans, thus giving authority and formal recognition to the irrational hatred and prejudice felt by many Americans. This, in turn, generated new norms and extra-legal discrimination and subjugation. This is evidence that the law does more than proscribe certain behaviors; by performing that basic function, it necessarily sends a message to society about what types of behaviors are socially acceptable. The ratification of the underlying attitudes, the creation of a legal underclass, and the promise that the law would not protect (and in fact would aggressively deny) the rights of African Americans all came together to fuel the creation of the Jim Crow atmosphere of legal and extra-legal subjugation.").

26. *See* Eugene Gressman, *Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1337−41 (1952); *see also* McKanders, *supra* note 21, at 184 ("It is evident that judicial opinions and laws impeded the intended advances for African Americans under the Reconstruction Amendments.").

27. David M. Oshinsky, *Forced Labor in the 19th Century South: The Story of Parchman Farm*, GILDER LEHRMAN CTR. FOR STUDY OF SLAVERY, RESISTANCE & ABOLITION (Oct. 23, 2004), https://glc.yale.edu/sites/default/files/files/events/cbss/Oshinsky.pdf [https://perma.cc/4YPY-M9ZZ].

28. *Id.*

29. *Id.*

30. *Id.*

31. DAVID M. OSHINSKY, "WORSE THAN SLAVERY" PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 20−21 (1996) [hereinafter WORSE THAN SLAVERY]. Shortly after the end of the Civil War, the Governor of Mississippi gave a speech stating, "[u]nder the pressure of federal bayonets . . . the people of Mississippi have abolished the institution of slavery. . . . The Negro is free, whether we like it or not; we must realize that fact now and forever." *Id.* However, Governor Humphreys went on to say that although they may be protected in their "person and property," they were not guaranteed "political or social equality with whites." *Id.* The Mississippi Legislature swiftly enacted Black Codes. *See id.* Enforcement of these laws were targeted specifically at Black

throughout the country—primarily the south—made agreements with local landowners to "lease" prisoners to them, for whatever purpose, and in turn the landowner paid the state for this labor.[32] The prisoners of course were not paid for this work, all of the profits went to the prison and ultimately the state.[33] This steady stream of additional income was a financial incentive for the state to incarcerate as many people as possible, by any means necessary.

Once convicts were leased to a landowner they did a variety of tasks including building levees, plowing fields, clearing swampland and even picking cotton.[34] They were moved to and from their worksites in a "rolling iron cage, which also served as their living quarters during jobs."[35] Convict leasing was often more brutal than slavery because the inmates were viewed as expendable.[36] If a landowner killed an inmate, or worked them to death, they just called the penitentiary and had another one sent over.[37] Because of this allowed brutality, "[n]ot a single leased convict ever lived long enough to serve a sentence of ten or more years" in Mississippi.[38] And, this cruelty was not just for adults. The Mississippi penal code did not differentiate

citizens and were often for trivial or vague offenses like "mischief" or "insulting gestures" and they went so far as to prohibit any Black resident from owning a firearm. *Id.* at 21. Further, the penalty for what was classified as "intermarriage" was "confinement in the State penitentiary for life." *Id.* "At the heart of these codes were the vagrancy and enticement laws, designed to drive ex-slaves back to their home plantations. The Vagrancy Act provided that 'all free negroes and mulattoes over the age of eighteen' must have written proof of a job at the beginning of every year. Those found with 'no lawful employment . . . shall be deemed vagrants.'" *Id.* This was a means to fill the prisons and then "lease" the inmates to land owners. *Id.*

32. *See id.* at 21.

33. *See id.* ("If the vagrant did not have fifty dollars to pay his fine—a safe bet—he could be hired out to any white man willing to pay it for him. Naturally, a preference would be given to the vagrant's old master, who was allowed 'to deduct and retain the amount so paid from the wages of such freedman.'").

34. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1190−91 (2015).

35. *Id.* ("By contrast to this sort of peonage and criminal surety operation, the convict lease operated through a bidding system wherein companies would offer a set amount of money per day per convict, and the highest bidder would win custody of the group of convicts and be entitled to their labor. Leased convicts worked on farms, constructed levees, plowed fields, cleared swampland, and built train tracks across the South. They moved from work site to work site, usually in a rolling iron cage, which also served as their living quarters during jobs. Convict lessors justified their use of convict labor because they claimed free labor was prohibitively costly; but as bidding expanded, the daily price of a convict's labor increased and free labor began to compete. Eventually, it was this trend toward parity in the cost of free and convict labor, more than any outrage at the brutal exploitation of the convict lease, which led to the abolition of the lease and its replacement by the chain gang. Chain gangs, unlike the convict lease, worked on maintaining public roads and performed other hard labor in the public rather than private sector.").

36. Oshinsky, *supra* note 27, at 2.

37. *See id.* at 2−3.

38. *Id.* at 9.

between juvenile or adult offenders,[39] "[b]y 1880, at least one convict in four was an adolescent or a child[,]"[40] with the youngest being only six years old.[41]

3. Prison Profit Motive

Across the country, prisons used inmate labor as a source of revenue.[42] There was, to varying degrees, a significant prison profit motive to incarcerate citizens. For example, in Mississippi in 1917, prison labor generated almost one million dollars in revenue for the state, through the production and sale of cotton, solely by inmate labor.[43] This accounted for roughly half of the state's education budget for that year.[44]

This abhorrent practice provided an endless supply of free labor for states. As many have called it, modern day slavery. Even the federal government used inmate labor for their projects until 1905.[45] Contextually, we must remain cognizant of the reality that this profit machine for the state would not have functioned without the cooperation of the local prosecutors and judges.

4. Prison Statistics

For the reasons discussed above, the prison population was disproportionately made up of minority prisoners. Even with the abolishment of convict leasing in the mid-1900s and the enactment of Civil Rights laws, the prison population remains disproportionately composed of Black Americans, particularly Black men.[46] In a study examining ninety years of

39. *See* WORSE THAN SLAVERY, *supra* note 31, at 46.

40. *Id.* at 46–47.

41. *Id.* at 47.

42. *See, e.g.*, *id.* at 155.

43. *Id.*

44. *Id.* There were horrendous weather conditions in Mississippi that year; crops were wiped out and inmates were forced to re-plant over 5,000 acres in just twelve days. *Id.* at 154. The state focused on their profit margins from cotton sales, rather than the lives of the inmates that were literally worked to death in the cotton fields. *See id.* at 155. The image of Black Americans being forced to work in cotton fields under the supervision of white "trustys" with rifles, to generate income for the land owners and ultimately the state, was proof that the prison system was nothing more than a slavery substitution. *Id.*

45. Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL OF RTS. J. 213, 229 (2009). Convict leasing was such a common and condoned practice, inmate labor was used on federal government projects up until 1905 when Theodore Roosevelt issued an executive order preventing federal agencies from using inmate labor on government projects. *Id.*

46. Morgan Waterman, *Race, Segregation, and Incarceration in the States, 1920–2010*, DARTMOUTH: TOPICS IN DIGITAL HIST. (Oct. 31, 2016), http://sites.dartmouth.edu/censushistory/2016/10/31/rough-draft-race-segregation-and-incarceration-in-the-states-1920-2010 [https://perma.cc/9LSB-2FJJ] ("In 1920, 35.2% of male prisoners were [B]lack, although they only made up 9.2% of the male population. In 2010, 53.6%

prison data, Black male prisoners were overrepresented four to five times their representation in the entire male population and were found to be "six times as likely to be incarcerated" as their white counterparts.[47] Since there is no data indicating a heightened rate of crime among minorities, the only explanation is to point back to systemic bias in policing, charging and convicting. This disproportionate impact is a reality of the combined efforts of multiple layers of the judicial system.[48] "Sentencing policies, implicit bias, and socioeconomic inequity contribute to racial disparities at every level of the criminal justice system."[49]

5. Wrongful Convictions

There are varied reasons wrongful convictions occur, including genuine mistakes, and more often than realized, prosecutorial misconduct. Before we look at the impact prosecutorial misconduct has had on the imprisonment of innocent citizens, we need to understand the gravity of the harm. To date, there have been 2,460 exonerations, resulting in more than 21,645 years lost.[50] Bear in mind, this staggering number of nearly 2,200 Americans whose lives have been unimaginably altered, is just the number of exonerations tracked since 1989.[51] Further, a rough calculation of the number of years these exonerees were wrongly sentenced to serve is 73,585 years, including 121 people sentenced to death.[52] It is impossible to know the exact impact because we're only able to examine the wrongful convictions that have been

of male prisoners were [B]lack, although they only made up 10.4% of the male population. The overrepresentation of [B]lack men in America's prisons suggests that the [U.S.] criminal justice system has a history of discriminating against this subset of the population.").

47. *Criminal Justice Facts*, SENT'G PROJECT, http://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/WUY4-D626].

48. *See* CAMBRIDGE UNIV. PRESS, IMPLICIT RACIAL BIAS ACROSS THE LAW 59 (Justin D. Levinson & Roger J. Smith eds., 2012) ("A reasonable interpretation of the mounting implicit bias literature, read in light of the profound racial disparities that define our criminal justice system, should put to rest any claims that we have arrived at a 'post-racial' or 'color-blind' justice system.").

49. *Criminal Justice Facts*, *supra* note 47 ("Today, people of color make up 37% of the U.S. population but 67% of the prison population. Overall, African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences. Black men are six times as likely to be incarcerated as white men and Hispanic men are more than twice as likely to be incarcerated as non-Hispanic white men.").

50. *Exonerations in the United States Map*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited June 9, 2019) (featuring an interactive map of up-to-date information of U.S. exonerations).

51. *Id.*

52. *Id.* This is a conservative estimate. It adds the actual years sentenced, then factors in only 50 years for each life sentence and also 50 years per death sentence. Knowing that some timeframes, like a life sentence, cannot be accurately estimated ahead of time, this is just a ballpark estimate to demonstrate the severity of the actual sentences, not just the years served.

discovered and made public.[53] Further, most exoneration statistics only track the past three or four decades.[54] However, it is conceivable when considering the history of biased laws, bigoted application and intentional targeting of racial minorities, and the lack of willingness to consider claims in previous decades, or even centuries, to conclude that this is only the tip of the iceberg.

In a system purportedly focused on justice, not only are the wrongful conviction figures staggering, but equally as disturbing is the disproportionate rate of wrongful convictions of Black Americans.[55] The racial disparity is across the board, but most prevalent in three particular crimes.[56] When comparing innocent black and white citizens and their rates of wrongful conviction, Black Americans are seven times more likely to be convicted of murder,[57] three-and-a-half times more likely to be innocent of sexual assault,[58] and twelve times more likely to be convicted of drug crimes.[59]

To give this a local context, a recent review in Harris County looked at 133 drug possession exonerations over the past few years.[60] They discovered that sixty-two percent of the exonerations were of Black Americans, in a county were Black residents comprise only twenty percent of the population.[61] Two things have been discovered in relation to the exoneration rates in Harris County. First, there is an obvious problem of profiling Black residents and this profiling and implicit bias issue begins with law

53. Emily Barone, *The Wrongfully Convicted: Why More Falsely Accused People Are Being Exonerated Today Than Ever Before*, TIME, Feb. 17, 2017, http://time.com/wrongly-convicted [https://perma.cc/8MUQ-UMT5] (estimating that "4.1% of people on death row are innocent while only 1.8% of them have been exonerated."). This estimate is a result of research and mathematical model generated by Samuel Gross. *Id.*

54. *See Exonerations in the United States Map*, *supra* note 50.

55. SAMUEL R. GROSS ET AL., RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/U3MP-TCRK] ("As of October 15, 2016, the National Registry of Exonerations listed 1,900 defendants who were convicted of crimes and later exonerated because they were innocent; 47% of them were African Americans, three times their rate in the population (presently 13% of the population). About 1,900 additional innocent defendants who had been framed and convicted of crimes in 15 large-scale police scandals were cleared in 'group exonerations'; the great majority of those defendants were also [B]lack.").

56. *Id.* at ii ("We see this racial disparity for all major crime categories, but we examine it in this report in the context of the three types of crime that produce the largest numbers of exonerations in the Registry: murder, sexual assault, and drug crimes.").

57. *See id.* at 4.

58. *Id.* at 11.

59. *See id.* at 16–20. This study further discussed the rate of drug possession charges and correlated it to drug use in the community. The researchers found that white and black drug use is roughly equal, yet Black Americans "are about five times as likely to go to prison for drug possession as whites." *Id.*

60. *Id.* at ii, 17.

61. *Id.* at 18.

enforcement officers,[62] but carries through to the prosecutors who choose the charges to bring against which citizens.[63] If profiling were not a factor, the disparate impact of convictions on one community over all others would be impossible. Second, it is suggested that the exoneration rate in Harris County is an indication of the proactive approach the District Attorney's office has taken to conduct post-conviction reviews and their active Conviction Review Unit.[64] These steps have resulted in 128 exonerations, which total 15% of all exonerations in the U.S. since 2010.[65]

6. Benefit to the Prosecutor

For a prosecutor to intentionally and knowingly commit misconduct to secure a wrongful conviction, we must look at their possible motivations. Conviction rates could be used as a performance measuring tool and could determine future advancement within the prosecutor's office.[66] The office culture often feeds the "win at all costs" mentality.[67] This has been called the

62. Barone, *supra* note 53. Samuel Gross, who was interviewed in this article, pointed to the concern of bias policing. "There are issues in the law enforcement and criminal justice system, aside from conviction rates . . . ." One must ask of a particular defendant, "[W]hy were you stopped in the first place? Why were you asked to step out of the car? And why were you searched?" *Id.* He cites this racial bias in policing as a root cause of the racial disparity in wrongful convictions. "[A]lmost half of the exonerations in the national database are [B]lack defendants, compared with 39% who are white." *Id.* That statistic must be viewed in light of the fact that Black Americans only make up 13% of the population with whites making up 77%. He went on to point out that Black Americans "are more likely to be targets of police misconduct. They receive harsher sentences than whites for the same crimes. And, for violent crimes like murder and sexual assault, they spend several years longer in prison before exoneration." *Id.*

63. Samuel R. Gross, *The Staggering Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html?noredirect=on&utm_term=.0c923996d16f [https://perma.cc/ZH3P-BVWS]. Most of the defendants who were exonerated after pleading guilty to drug charges in Harris County were still held in jail because they could not make bail and the prosecutor offered them a "take-it-or-leave-it" plea deal, which they chose over remaining in jail for months or even a year, awaiting trial. *Id.*

64. Barone, *supra* note 53. Many of the drug convictions that were overturned were possession charges where the defendant pled guilty. *Id.* In all the exoneration cases, the actual substances the defendants possessed were not illegal. *Id.* Often they were over-the-counter medications that failed the test administered via a field drug test kit. *Id.* The TIME article goes on to discuss how it is common for these tests to produce a false positive. *Id.* The Harris County District Attorney's Office went back and re-tested the substances in these cases, resulting in a significant number of exonerations. *Id.* Further, they have changed their plea regulations so they will "no longer accept guilty pleas in drug cases until the substance has been tested in a lab." *Id.*

65. *Id.*

66. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–35 (2004).

67. *See* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 543 (1996) ("A prosecutor protective of a 'win-loss' record has an incentive to cut constitutional and ethical corners to secure a guilty

"conviction psychology," where securing convictions is the paramount goal.[68] Frequently, offices calculate the attorney's "batting average" and some even have a bulletin board where they post wins and losses.[69] Aside from just career advancement, conviction rates may be used by district attorneys to negotiate budget increases or resource allocations.[70]

Further, prosecutors with political aspirations often want to be viewed as being tough-on-crime, and their conviction rate could be seen as evidence of this toughness, making the priority, again, convictions not justice.[71] The career advancement potential for prosecutors, even those who commit misconduct, is significant:

> Prosecutors who have committed misconduct, in the pursuit for additional "notches" of conviction on their record, have been promoted or have seen their careers advance. Some have become supervisors for the state's attorney office, circuit court judges, appellate court judges, inspector generals, congressmen, and even chief disciplinary counsel presiding over other lawyers for misconduct.[72]

IV. PROCSECUTORIAL MISCONDUCT?

A. What Is Prosecutorial Misconduct?

In *Berger v. United States*, Justice Sutherland described 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."[73] Examples of prosecutorial misconduct are plentiful and varied.[74] What is undeniable, regardless of the form of misconduct, is the

verdict in a weak case—to win at all costs."); *see also* Evan Moore, *"Win At All Costs" is Smith County's Rule, Critics Claim*, HOUS. CHRON. (June 11, 2000), https://www.chron.com/news/article/Win-at-all-costs-is-Smith-County-s-rule-1632942.php [https://perma.cc/823A-VHQA] (reporting that, in Harris County, Texas, assistant district attorneys must file a written report if they lose a case).

68. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 109−10 (1975); *see* Medwed, *supra* note 66, at 139.

69. Medwed, *supra* note 66, at 137.

70. *Id.* at 135.

71. *Id.* at 153−54.

72. Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors*?, 38 CAL. W. L. REV. 283, 294−95 (2001).

73. Berger v. United States, 295 U.S. 78, 84 (1935); *see Prosecutorial Misconduct*, CALIF. INNOCENCE PROJECT, https://californiainnocenceproject.org/issues-we-face/prosecutorial-misconduct [https://perma.cc/R9SK-9AFU].

74. Maurice Possley & Ken Armstrong, *Part 2: The Flip Side of a Fair Trial*, CHI. TRIB. (Jan. 11, 1999), https://www.chicagotribune.com/news/watchdog/chi-020103trial2-story.html [https://perma.cc/UX9R-MZBL]; *see also* Ferguson-Gilbert, *supra* note 72, at 291−92. Documented by Maurice Possley & Ken Armstrong: "With impunity, prosecutors across the country have

impact it has on achieving a just result. Since, "[p]rosecutorial discretion has become a tool for adversarial gamesmanship. The result is that prosecutorial misconduct is one of the leading causes of wrongful convictions."[75]

Some states use a multi-factored balancing test to determine misconduct, which is: "(1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct."[76]

Further, the Model Rules of Professional Conduct (MPRC) clearly outline what is considered lawyer misconduct in Rule 8.4—"Maintaining the Integrity of the Profession."[77] Misconduct includes violating the Rules of Professional Conduct, knowingly assisting someone in violating these rules, committing a criminal act that reflects on the lawyer's fitness, dishonesty, fraud, deceit, misrepresentation, "engag[ing] in conduct that is prejudicial to the administration of justice[,]" harassment and discrimination.[78] Below I discuss the most common forms of lawyer misconduct, all of which violate this rule.

1. Failure to Disclose Exculpatory Evidence

One of the most prevalent areas of misconduct involves the prosecutor refusing to turn over exculpatory evidence. After *Brady v. Maryland*, prosecutors are now required to turn over to the defense all exculpatory evidence, which is evidence that tends to show the defendant is either not guilty, or is deserving of a lesser sentence.[79] The *Brady* court held that the "suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or

violated their oaths and the law, committing the worst kinds of deception in the most serious cases. They have prosecuted [B]lack 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. They do it to win. They do it because they won't get punished." *Id.*

75. Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J. L. & PUB. POL'Y 53, 56 (2012).

76. McGinn v. State, 2015 WY 140, ¶ 16, 361 P.3d 295, 299−300 (Wyo. 2015) (quoting Barnes v. State, 2011 WY 62, ¶ 11, 249 P.3d 726, 730 (Wyo. 2011)).

77. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2018).

78. *Id.*

79. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). Brady confessed at trial that he was guilty of murder, but that Boblit, his accomplice, was the person who actually did the killing. *Id.* at 84. Since he was not the actual killer, Brady's attorneys were seeking to have him spared the death penalty. *Id.* His counsel asked the prosecutor to allow them to review all of Boblit's statements. *Id.* The prosecutors knowingly withheld Boblit's statement where he admitted he had been the one to kill the victim. *Id.* Brady was convicted and sentenced to death. *Id.*

to punishment."[80] Aside from their common law duty, a current area of debate relates to a prosecutor's ethical obligation related to turning over exculpatory evidence to the grand jury that would be favorable to the defendant.[81] This is not currently a common law or statutory requirement, but should be considered an ethical obligation under the MPRC.

An example of how detrimental intentionally withholding exculpatory evidence can be is the Michael Morton case. Morton was wrongfully convicted of murdering his wife and served nearly twenty-five years in prison before he was exonerated.[82] It was discovered that there were multiple pieces of evidence the prosecutors were obligated to turn over to Morton's attorney, which they chose to intentionally withhold. [83] These included a bloody bandana found near the Morton home, proof that his wife's credit card was used in another city after her death and an officer could identify the user, statements from neighbors about a man behind their home who went into the woods.[84] But, likely the most damaging item was the statement from Morton's three-year-old son, who was present during the murder, testifying that "[d]addy was not home" and that the murderer was not Michael but a "monster."[85]

80. *Id.* at 87.

81. *See* CASSIDY, *supra* note 4, at 31 ("A controversial issue in the area of prosecutorial ethics is whether a government lawyer should inform the grand jury of evidence favorable to the target of the investigation. Prior inconsistent statements made by police officers and eyewitnesses; scientific test results that suggest that someone other than the target may have committed the crime; and, testimony from alibi witnesses placing the target at a location other than the crime scene on the date and time in question are all examples of 'exculpatory evidence' the grand jury might find useful in deciding whether to indict a prospective defendant. . . . [I]f the prosecutor's overriding duty is to insure [sic] that 'justice' is done, he should take reasonable steps to insure [sic] that the grand jury does not indict an innocent person or overcharge a suspect.").

82. *Michael Morton*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/michael-morton [https://perma.cc/8TKS-4UMF].

83. *Id.*

84. *Id.*

85. *Id.* Michael Morton's wife, Christine Morton, was brutally murdered and Michael was convicted for the murder due to exculpatory evidence withheld by the prosecutors, including: (1) The Mortons' three-year-old son, who was present during the murder, told his grandmother that his "[d]addy was not home" when the murder occurred and said that his mother was killed by a "monster." *Id.* The grandmother told the police about this statement. *Id.* (2) A bloody bandana was discovered 100 yards from the Morton home. *Id.* (3) The Mortons' neighbors told police they had repeatedly seen a green van on the street behind the Mortons' home and the man driving the van would go into the nearby wooded area. *Id.* (4) Records indicated that Christine Morton's credit card had possibly been recovered in San Antonio and an officer in San Antonio said he could "identify the woman who attempted to use the card." *Id.* Prior to trial, Morton's attorney suspected there was exculpatory evidence being withheld, so they brought this concern to the judge, who ordered the prosecutor to turn over all reports to the defense. *Id.* Even after receiving the trial judge's order, the prosecution still withheld each piece of exculpatory evidence listed above from the file the prosecutor gave Morton's attorney. *Id.* DNA testing of the bandana found Mrs. Morton's DNA and the DNA of a convicted felon from California who was living in Texas at the time. *Id.* Later, this

The MRPC require fairness to opposing counsel, specifically citing a duty to disclose evidence and not conceal or destroy relevant material,[86] as well as timely disclosure of all evidence "known by the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[87]

In the case of Ralph Armstrong, he spent over 24 years in jail for the rape and murder of a fellow college student, all due to the prosecutor hiding and destroying evidence.[88] Fourteen years into Armstrong's sentence, the prosecutor received a call from a witness telling them that Armstrong's brother had confessed to the killing.[89] The prosecutor did nothing.[90] They did not notify the defense attorney, the court, or follow up on the lead.[91] Subsequently, Armstrong's brother died, and the prosecutor then performed illegal DNA tests, which destroyed the remaining biological evidence that could be used to exonerate Armstrong.[92] Under the MRPC, the prosecutor had a duty to disclose the contact by the witness and was restricted from testing and ultimately destroying the DNA evidence.[93]

2. Introduction of False Evidence

The MRPC prohibit a lawyer from introducing false testimony or evidence.[94] Further, if they represent a client who "engage[s] in . . . fraudulent conduct related to the proceeding[,]" the lawyer is obligated to disclose this falsity to the tribunal.[95] In *Napue v. Illinois*, the prosecutor's witness testified that the witness had not been promised any consideration for their cooperation in testifying against the defendant, when in fact he had.[96] The prosecutor knew this testimony was false and did not bring the error to the court's attention.[97] Further, under the duty of fairness to opposing counsel, this false testimony by the witness should have been disclosed to the defense counsel.[98] Even if the witness does not testify regarding any consideration or immunity they have arranged with the prosecutor, the

same person was linked to a similarly styled murder that occurred two years after Christine's murder. *Id.*

86. MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2018).
87. *Id.* r. 3.8(d).
88. *Ralph Armstrong*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/ralph-armstrong [https://perma.cc/JLV3-S6YX].
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. MODEL RULES OF PROF'L CONDUCT r. 3.8(g) (AM. BAR ASS'N 2018).
94. *Id.* r. 3.3(a)(3).
95. *Id.* r. 3.3(b).
96. Napue v. Illinois, 360 U.S. 264, 265 (1959).
97. *Id.*
98. MODEL RULES, r. 3.4 cmt. 2.

prosecutor has a duty to disclose these arrangements to the defense.[99] In *United States v. Schlei* the prosecutors did not disclose to the defense counsel that their government witness had been promised immunity in exchange for their testimony, in clear violation of the MRPC.[100]

3. Improper Argument

Improper argument is a form of misconduct that can occur at any stage in the trial.[101] It is when a prosecutor misstates facts, misstates the law, asserts facts that have not been introduced into evidence, or criticizes the defendant for not testifying even though it is their constitutional right.[102] These are all violations of MRPC rules 3.3 and 3.4.

4. Use of Perjured Testimony and Witness Tampering

Witness tampering and use of perjured testimony can come in multiple forms. Often, witness tampering occurs when prosecutors have coached witnesses on how they should testify, essentially telling them what to say rather than allowing them to answer truthfully based on their knowledge.[103] This often occurs when prosecutors feed details of a crime to a witness who is going to claim the defendant confessed to them. By the witness having such detailed information about the crime, in the jury's eyes, the witness has more credibility and the belief is that only the person who committed the crime could have described it to a witness with such clear details.

Use of perjured testimony is using testimony the prosecutor knows to be false.[104] In *Mooney v. Holohan*, the prosecutors knowingly used perjured testimony and suppressed evidence that would have impeached this testimony.[105] In *United States v. Bagley*, the misconduct scheme was more elaborate.[106] The prosecutor paid the witnesses for their testimony.[107] Suspecting this was occurring, the defense filed a discovery motion requesting this information, which the prosecution intentionally withheld.[108]

99. *See* United States v. Schlei, 122 F.3d 944, 991–92 (11th Cir. 1997).
100. *See id.* at 992.
101. MODEL RULES, r. 3.4(e).
102. *Id.* r. 3.3–3.4.
103. *See* Gaia Envtl., Inc. v. Galbraith, 451 S.W.3d 398, 408 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (discussing the elements of witness tampering).
104. *See* Mooney v. Holohan, 294 U.S. 103, 110 (1935) (per curiam).
105. *Id.*
106. United States v. Bagley, 473 U.S. 667, 683−85 (1985).
107. *Id.* at 683.
108. *Id.*

The court held this was a violation of the defendant's due process rights and a violation of the Confrontation Clause of the Constitution.[109]

The use of perjured testimony can also trigger other rule violations.[110] In *United States v. Cuffie*, the prosecutors knew their witness lied in prior proceedings involving this same crime, but did not disclose that to the defense counsel.[111] The court held this lack of disclosure also was a *Brady* violation, because as discussed under *Brady*, prosecutors must disclose impeachment evidence as well as exculpatory evidence.[112]

5. Discriminatory Jury Selection

Another form of prosecutorial misconduct is discriminatory jury selection.[113] This occurs when prospective jurors are excluded specifically for a particular characteristic such as race, gender, ethnicity, or religion.[114] Discriminatory actions in jury selection are a Constitutional due process violation, as well as a violation of the criminal code.[115]

6. Abuse of Prosecutorial Discretion

Prosecutors have an immense amount of power and control. They decide who to charge, what charges to bring, what punishment to seek and their trial strategy.[116] They also have the authority to drop cases that they find to be without merit, even up to the trial date.[117] And, they have the authority to offer immunity to a defendant who agrees to testify against another defendant, which can easily be abused.[118] Along with these broad powers, the prosecutor also has an obligation not to knowingly charge or pursue charges against a person who is innocent.[119] Justice Robert Jackson correctly commented that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."[120]

109. *See id.* at 672, 685.
110. *See* United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996).
111. *Id.* at 515.
112. *See id.* at 517.
113. Batson v. Kentucky, 476 U.S. 79, 84 (1986).
114. *See id.* at 83 ("The prosecutor [intentionally] used his preemptory challenges to strike all four [B]lack persons on the venire, and a jury composed only of white persons was selected.").
115. 18 U.S.C. § 243 (2019); *see* TEX. CODE CRIM. PROC. ANN. art 35.261(b).
116. *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414−15 (2010).
117. *See id.*
118. H. Lloyd Jr. King, *Why Prosecutors Are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L. REV. 155, 156−57 (1999).
119. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 2018).
120. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 259 (2011).

An example of abuse of this discretion, which is particularly disturbing, is the case of Cedric Willis in Mississippi.[121] The prosecutor charged him with assault, rape, robbery, and murder.[122] Prior to the trial, DNA testing conclusively proved Willis was innocent.[123] Nevertheless, the prosecutor continued to pursue the false charges against Willis, secured a conviction, and Willis spent twelve years in Parchman, often called one of the most brutal prisons in the country.[124] The prosecutor used this conviction as a stepping stone and went on to become a Mississippi circuit court judge.[125] Further, Willis was epileptic.[126] Without medication he suffered frequent seizures in jail.[127]

B. The Prevalence of Prosecutorial Misconduct

To give an indication of the widespread problem of prosecutorial misconduct that goes unpunished and undeterred, we can look at California as an example. A 2010 study showed, "more than 700 California cases of prosecutorial misconduct from 1997 to 2009 ─ and only six prosecutors in those cases were ever disciplined."[128] Let's look at that carefully. There were seven hundred known cases of misconduct over a twenty-two-year period, in one state alone.[129] It appears California is not an anomaly, which means a cumulative figure of all cases of misconduct throughout the country would be staggering. And, we must note the absolutely minuscule number of cases (six) where prosecutors were disciplined. Just as it is impossible to know the exact number of those wrongfully convicted, it is equally difficult to correctly calculate statistics for prosecutorial misconduct, since we can only account for what has come to light. What we see throughout all the studies, reports, and internal investigations is that prosecutorial conduct is a reoccurring problem that is not new and has not been deterred.

121. Brian Johnson, *Deepest Midnight: Cedric Willis and the Failure of Mississippi Justice*, JACKSON FREE PRESS (July 26, 2006, 4:34 PM), http://www.jacksonfreepress.com/news/2006/jul/26/deepest-midnight-cedric-willis-and-the-failure-of [https://perma.cc/75G7-Q2JC].

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.*

126. *Id.*

127. *Id.*

128. Matt Ferner, *Cheating California Prosecutors Face Prison Under New Law*, HUFFINGTON POST (Oct. 1, 2016, 7:15 PM), https://www.huffingtonpost.com/entry/california-prosecutor-misconduct-felony_us_57eff9b7e4b024a52d2f4d65# [https://perma.cc/HC6G-LZEH].

129. *Id.*

1. Laws Have Changed, But Are Still Unequally Applied

Even with the changes in the laws over the past few decades, which emphasize the rights of the defendant, the prosecutor still holds an enormous amount of control. The *Ruiz* court held that an incarcerated prisoner had no due process right under *Brady* to post-conviction discovery of DNA material."[130] This means an innocent defendant who is trying to use DNA testing to clear his name and overturn his conviction is at the mercy of the prosecutor. The prosecutor can oppose the post-conviction testing of DNA, or just stall.[131] They are the ultimate authority unless the defendant sues to get the court to order the testing.[132]

A number of writers have theorized that once a wrongful conviction has been identified, it may be difficult to pursue due to the prosecutor becoming intransigent once a conviction has been secured.[133] Prosecutors may believe that questioning a conviction, or possibly having one overturned, will negatively reflect on their work and may impact their job security.[134] This is a clear conflict of interest. Their interest in their own livelihood and career success is not paramount to the integrity of the office and the life and liberty of a person who was potentially wrongfully convicted.

Also, beyond just work performance, prosecutors may have a financial incentive to "resist post-conviction innocence claims given the trend toward the adoption of state legislation providing compensation for the wrongfully-convicted."[135] There is no direct correlation between wrongful conviction payments and the budgets of the district attorneys' offices.[136] However, "the impact of these payouts on state coffers could conceivably have an indirect effect on the amount of money allocated to prosecutors partially dependent on state funding."[137]

130. *See* United States v. Ruiz, 536 U.S. 622, 630 (2002); United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009); *see also* United States v. Mathur, 624 F.3d 498, 507 (1st Cir. 2010) (refusing to extend *Brady's* prejudice component to pretrial plea negotiations); United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010); CASSIDY, *supra* note 4, at 61 n.45 ("Some circuits after *Ruiz* have ruled that *Brady* is purely a trial right, and even evidence that supports factual innocence need not be disclosed under the due process clause prior to a guilty plea.").

131. Medwed, *supra* note 66, at 125, 127−28.

132. *Id.* at 127−28 n.10 ("For example, prosecutors in Pennsylvania spent seven years fighting Bruce Godschalk's request for DNA tests on the evidence related to his conviction for two rapes. Ultimately, Godschalk sued in federal court to force the release of the evidence that was uncovered during the investigation of the crime, and DNA tests eventually exonerated him.") (citation omitted).

133. *Id.* at 129−30.

134. *Id.* at 136.

135. *Id.* at 157.

136. *See id.*

137. *Id.*

V. THE EFFECT OF THIS SYSTEM SANCTIONED HARM

Being victimized by a system that is founded on the premise of justice, has a lasting effect. A New York Times study of 115 exonerees found that they face a wide range of challenges once they are released and in their attempt to re-acclimate to life and freedom.[138] Many went to prison when they were either in their teens or twenties and most did not have significant education.[139] Depending on the number of years they have been away, many have had their family dynamics change considerably.[140] Exonerees "struggled to keep jobs, pay for health care, rebuild family ties and shed the psychological effects of the years of questionable or wrongful imprisonment."[141]

A person who has been exonerated may be eligible for compensation,[142] but it varies by state. In addition, some states require a finding of "actual innocence" or "factual innocence," otherwise the compensation requirement is not triggered.[143] Texas allows $80,000 per year of incarceration;[144] Florida allows $50,000 per year, up to $2 million; Nebraska allows $25,000 per year, up to $500,000; Wisconsin provides only $5,000 per year, up to $25,000; and

138. Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), https://www.nytimes.com/2007/11/25/us/25dna.html [https://perma.cc/TS4D-RGNJ].

139. *Id.*

140. *Id.*

141. *Id.*

142. *See* Brandi Grissom, *Comptroller Pays Anthony Graves $1.4 Million*, TEX. TRIB. (June 30, 2011, 3:00 PM), https://www.texastribune.org/2011/06/30/comptroller-pays-anthony-graves-14-million [https://perma.cc/H2WD-5QEB]. When Anthony Graves was exonerated, he was not declared "actually innocent," so the state would not pay him the $1.45 million he was owed to compensate for his eighteen years in prison. *Id.* To resolve this error, the Texas legislature had to pass a law that would allow him to be compensated under the Timothy Cole Compensation Act, even though he had not been declared actually innocent. *Id.* This is an unbelievable hurdle a person who is finally released from prison would have to endure in order to receive the restitution they are owed.

143. *See* Tennison v. Calif. Victim Comp. & Gov't Claims Bd., 152 Cal.App.4th 1164, 1191 (Cal. Ct. App. 2007). In *Tennison*, John Tennison was imprisoned for thirteen years before the court acknowledged five *Brady* violations and vacated his sentence. *See id.* at 1171. After his sentence was vacated and he was released from prison, he filed a claim with the state for his due compensation. *See id.* at 1172. It was denied, because when the judge vacated his sentence, they did not declare that he was factually innocent, just that his sentence was reversed, and he was not going to be retried. *See id.* The appellate court upheld the board decision. *Id.* at 1192. For the thirteen years he spent in prison, Tennison receive nothing.

144. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a)(1).

New Hampshire pays a flat fee of $20,000 regardless of the length of incarceration.[145] Twenty-three states offer zero compensation.[146]

The sensationalism that periodically swirls around media reports when a person who has spent decades of their life in prison is awarded a seven-figure compensation award, is taken out of context. Since they compensate at the highest rate, let's look at Texas. If a person is wrongfully convicted and imprisoned for twenty years, at a rate of $80,000 per year, they would be entitled to restitution of $1,600,000. The rhetoric can foolishly turn to talk about that person becoming a millionaire and that amount of money should compensate them for anything. But, broken down, twenty years in prison is 7,300 days. An award of $1.6 million divided by 7,300 days is roughly $220 per day, or a little over $9 per hour of incarceration. That is not even minimum wage in some states,[147] and they are receiving this mere $9 per hour to compensate for everything they lost as well as the brutality, harm, and fear they endured. Now, contrast that with a state like New Hampshire where for the same 20-year period they would receive a total of $20,000. That equates to compensation of $0.11 per hour of incarceration. As ridiculously low as the New Hampshire compensation is, again, we must remember that in 23 states they would receive absolutely nothing.

Here we must acknowledge the disparity between the value the state places on the life of a person who was wrongfully convicted versus the life of the average citizen who has not gone through that trauma. What has really occurred could be viewed as a combination of multiple torts. If wrongful conviction was viewed as a negligent tort claim where a person is injured, they would be entitled to pursue the offending party for physical injuries (including current and future medical expenses), lost wages (past and future), pain and suffering, loss of consortium, and I am sure, various other causes of actions. These cases are common and insurance companies have standard

145. *81% of Exonerated People Who Have Been Compensated Under State Laws Received Less Than the Federal Standard*, INNOCENCE PROJECT (Dec. 2, 2009), https://www.innocenceproject.org/81-of-exonerated-people-who-have-been-compensated-under-state-laws-received-less-than-the-federal-standard-new-innocence-project-report-shows [https://perma.cc/ZYH5-NVUD].

146. *Id.*

147. 29 U.S.C. § 206 (2016). This low compensation also raises the question, are states violating the wage and hour regulations of the Fair Labor Standards Act? Section 206 of the FLSA requires that all employees are paid a minimum of $7.25 per hour, and if they work more than forty hours in a week, the hours over forty must be paid at one and a half times the regular rate. *Id.* § 206−207. Using the New Hampshire example (above), a person incarcerated for twenty years who receives the flat fee reimbursement of $20,000, equates to only $0.11 per hour for a forty-hour workweek. Depending on the prison, many have contracts with commercial entities to supply labor to make clothing or handcrafts, for example, but they are not required to comply with minimum wage standards.

values they place on loss of life, limb or even impairment.[148] If a person suffers mental impairment that prevents them from working in the future or functioning in society, their lost earning potential can be calculated up to their expected life span.[149] Contrast this with the approach for compensating exonerees. Their compensation in most states is not based on a formula that accounts for the harm they've experienced. Rather, they are just given flat fees set by the state legislatures. This disparity in calculating harm is not explainable. What really is the difference? If you are in an accident, not of your own doing, you did nothing wrong and the harm was inflicted upon you. Similarly, if you are wrongfully convicted due to prosecutorial misconduct, you likewise did nothing wrong and the harm was inflicted upon you.

In the next section, I will discuss the potential magnitude of the physical and financial harm wrongful convictions have on the victim, as well as how calculating this harm in the same manner as a tort claim gets closer to putting a justified value on the injury, rather than an arbitrary number. I believe the best way to examine this is to look at the *Baba-Ali*[150] case in New York, and how the state has instituted a tort and common law approach, codified in §8-b of their Court of Claims Act.[151]

Amine Baba-Ali was wrongfully convicted of sexually assaulting and sodomizing his four-year-old daughter.[152] There were multiple instances of prosecutorial misconduct involved, and in the end, it was discovered that his daughter had not even been assaulted.[153] Ali spent roughly twenty-six months in prison.[154] Upon release, he sought recovery under the state statute.[155]

In their decision, the court discussed the various ways that a person wrongfully imprisoned is harmed and the potential extent of that harm.[156]

148. *See* Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1069 (2004) (discussing the deferential standard evaluated to pain and suffering awards).

149. *Id.* at 1063−64.

150. Baba-Ali v. State, 878 N.Y.S.2d 555 (N.Y. Ct. Cl. 2009), *rev'd in part*, 907 N.Y.S.2d 432, 432 (N.Y. App. Div. 3d Dep't 2010).

151. *See id.* at 558 ("An individual who has been wrongfully convicted and incarcerated and who meets the requirements of the statute is entitled to an award of damages, the amount of which is determined in accordance with 'traditional tort and other common-law principles.'") (quoting Carter v. State, 528 N.Y.S.2d 292, 295 (N.Y. Ct. Cl. 1988), *aff'd* 546 N.Y.S. 2d 648 (N.Y. App. Div. 1989)); *see* N.Y. CT. CL. ACT § 8-b (McKinney 2019).

152. *Baba-Ali*, 878 N.Y.S.2d at 555.

153. *Id.* at 557.

154. *See id.*

155. *Id.*

156. *Id.* at 558 (stating the purpose of the award is " to provide compensation for lost wages, physical or mental problems caused by the incarceration, and pain and suffering, which can encompass the conditions of incarceration (discomfort, fear, lack of privacy), loss of freedom while imprisoned, separation from children, humiliation, interference with personal relationships and damage to reputation.").

A. Physical Manifestations

Enduring this manner of unjustified loss of liberty can trigger continuous feelings of fear, continued danger and the overwhelming belief that one is never safe, because if it can happen once, who is to say it will not occur again. Innocent people who are wrongfully convicted are victims of a systemic failure. Further, if their wrongful conviction is attributed to prosecutorial misconduct, which we've seen many are, they have been intentionally harmed by the very government and government representative who is charged with protecting their rights.

1. Psychological and Sociological Impact

The Canadian Journal of Criminology and Criminal Justice surveyed exonerees to determine the effect their wrongful incarceration had on them psychologically.[157] The results were varied in their severity, but consistent in the commonality of harm.[158] Those studied reported issues with personality deterioration, PTSD, severe depression, panic disorder, and paranoid symptoms.[159] They also developed patterns of isolation, unintentionally alienated themselves from their families, and most were never able to regain the same closeness with their families.[160]

The journal also discussed many exonerees' inability to cope with basic day-to-day tasks once released and feeling, psychologically, the same age they were when they were sent to prison.[161] This also posed significant challenges in trying to relate to their children, who were now much older, and adapt to a life where those around them had learned to manage without them.[162]

After his release, Ali suffered from post-traumatic stress disorder and severe clinical depression.[163] His treating doctor cited the constant fear for his life during his period of incarceration and how it impacted his behavior.[164] He "changed from a socially well adjusted, outgoing person to one who for the first six months after he was released from prison did not even leave his apartment and became isolated and afraid of crowded places."[165]

157. Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. OF CRIMINOLOGY & CRIM. JUST. 165, 167 (2004).
158. *Id.*
159. *Id.* at 169.
160. *Id.* at 171.
161. *Id.* at 171–72.
162. *Id.* at 172.
163. Baba-Ali v. State, 878 N.Y.S.2d 555, 563−64 (N.Y. Ct. Cl. 2009), *rev'd in part*, 907 N.Y.S.2d 432, 432 (N.Y. App. Div. 3d Dep't 2010).
164. *Id.* at 563.
165. *Id.*

2. Health Implications Resulting From Remaining in a Constant State of Fear

It has been argued that this constant state of fear and state of trauma stays with the person for years after their release, some for their entire lives. An article published by the European Molecular Biology Organization (EMBO)[166] cited:

> Psychoneuroimmunological testing in laboratory animals and a range of human epidemiological findings associate stress with a weakened immune system, increased cardiovascular damage, gastrointestinal problems such as ulcers and irritable bowel syndrome, decreased fertility, impaired formation of long-term memories and damage to certain parts of the brain, such as the hippocampus. Other symptoms include fatigue, an increased likelihood of osteoporosis and type 2 diabetes, and aggravated clinical depression, accelerated ageing and even premature death.[167]

In addition to PTSD and clinical depression, the court in *Baba-Ali* also considered the mental anguish associated with being accused of such a heinous crime.[168] This also included public humiliation, humiliation and exposure to danger within the prison, and the mental impact of being falsely incarcerated.[169] Factored into the mental anguish was the constant state of fear during his entire period of incarceration.[170]

3. Familial Loss

As discussed above, when a person is sent to prison for any period of time it impacts their familial relationships. The court factored into the damages calculation the loss of Ali's daughter.[171] They had a very close relationship from the time she was born until he was falsely arrested when she was four years old.[172] There was a ripple effect from the impact of this conviction, including a family court judgment against him.[173] Ultimately, he never was able to regain the relationship he had with his daughter.[174] Most

166. David Ropeik, *The Consequences of Fear*, 5 EMBO REPS. (SPECIAL ISSUE) S56 (2004), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1299209/pdf/5-7400228.pdf [https://perma.cc/9DCL-4PS9].

167. *Id.* at S59 (citing ROBERT M. SAPOLSKY, WHY ZEBRAS DON'T GET ULCERS (2d ed. 1998)).

168. *Baba-Ali*, 878 N.Y.S.2d at 560–61.

169. *Id.*

170. *Id.* at 561.

171. *Id.*

172. *Id.*

173. *Id.* at 562.

174. *Id.* at 561–62.

exonerees, upon release, are never able to repair those relationships, whether with a spouse, child, girlfriend/boyfriend. They also suffer the loss of having close family members, often parents and grandparents, die while they are in prison, never seeing their loved one set free.

To add to the already mounting injury, another unexpected harm some exonerees suffer who were wrongfully convicted when they had young children is the claim of child support.[175] Upon release, as they are trying to adjust and put their life back together, they can be subject to penalties for not paying child support while they were in prison, and even required to pay the state back for any welfare funds paid to support the child.[176] The irony, of course, is that the state is the very actor who took this parent away from their children and imprisoned them so they could not work and pay child support, but then later they are the very entity blaming the exoneree for the situation and their lack of financial means.[177]

4. Multigenerational impact

As discussed throughout this entire paper, the practice of biased application of justice at the hands of prosecutors is not new. This is a practice that has been systematically carried out for multiple generations with an incalculable impact on citizens who are guaranteed equal protection and life, liberty, and the pursuit of happiness. But the impact is not just on the person who was wrongfully imprisoned. There is also a potential ripple effect for family members, friends, and those in the same communities as a person who has been wrongfully charged and convicted due to prosecutorial misconduct. It is feasible that the same harm could befall anyone in the community. This could lead to baseline tension and fear, which would come along with some of the same health implications as cited in the report by EMBO.

B. Financial Impact to the Victim of a Wrongful Conviction

1. Lost Wages and Lost Earning Potential

Another measure of harm to an exoneree is the loss of wages during the time they were incarcerated. This is not just a one to one calculation. You

175. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT, 295 (2003). David Shephard was wrongfully convicted of kidnapping and rape and sent to prison when his son was young. *Id.* Upon release and after getting a job, his wages were garnished. *Id.* When he questioned the deduction, he learned he was classified as a "deadbeat dad" for not paying child support during the years he was in prison. *Id.* The State of New Jersey claimed he owed a total of $18,000 for welfare support. *Id.*

176. *Id.*

177. *See id.*

must account for the wage rate they were making at the time they were imprisoned, plus the potential for increased earnings and promotions over time. In addition, there is future lost earning potential, even after their release. If they had been able to work and advance in their career during their period of incarceration, they would be at a higher salary level and career position than they will be at the time of their release. Further, due to societal bias and misunderstanding, their future career opportunities may be significantly hampered due to their period of incarceration, regardless of the fact that they were exonerated.

The court in *Baba-Ali* awarded past lost earnings which covered the entire period he was incarcerated, as well as an extended period after his release when he was suffering from severe depression and unable to work.[178] The court attributed this physical manifestation of harm to his false imprisonment and awarded total lost wages of $343,428.[179] It should be noted that this figure does not consider future lost earning potential. In Ali's case, he was only in prison for twenty-six months.[180] The lost earning potential for someone who was incarcerated for 20–30 years and been incarcerated since they were eighteen or twenty years old, would be substantial.

2. Legal Expenses

Exonerees face significant legal costs, even after their release. To prevent their conviction from impacting their future prospects, they will need to have it expunged from their record. This will require legal assistance and, depending on the state, can take some time. Further, they must bear the cost of pursuing their wrongful conviction claim with the state. On average this can take upwards of three years for the exoneree to receive any funding from the state.

3. Future Medical Expenses

Given the nature of the prison environment, it is conceivable that most defendants would leave prison, particularly after an extended period, with various health issues. These are likely attributable to the trauma they have endured or could be related to poor nutrition while in prison, or even physical harm they suffered at the hands of another prisoner. Regardless, once they are released, the cost of their current and future medical care becomes their burden.

178. *Baba-Ali*, 878 N.Y.S.2d at 559.
179. *Id.*
180. *Id.*

4. Lack of Opportunity

When a person is wrongfully convicted, the entire trajectory of that person's life has been altered in a way that is irreversible. They experience a lack of opportunity that is difficult to quantify, but painfully evident. Even taking into account the examples of exonerees who have gone on to become successful, some pursue law degrees, others have set up foundations to help fight prosecutorial misconduct and wrongful convictions, we know that those are the exception, not the norm. Monetary compensation cannot put the person back at the age they were, with their undamaged aspirations, the support of family and friends, their future goals and dreams and the plan they began to formulate for their lives.

5. Loss of Liberty

Aside from an exoneree's actual monetary damages, one of their greatest losses is the loss of liberty.[181] For instance, the court in *Baba-Ali* discussed how the loss of liberty is an "incalculable loss" and how false imprisonment is the "most serious deprivation of individual liberty that a society may impose."[182] In trying to arrive at this figure, the court in *Baba-Ali* considered the physical abuse Ali suffered, the constant fear of gang rape, the impact of seeing an inmate next to him stabbed 50 times and the feeling that he would never get of prison alive.[183]

The court awarded Ali damages broken down as follows: for Ali's mental anguish and degradation of being labeled a child molester, the irretrievable loss of his relationship with his daughter, loss of liberty, and psychological damage sustained from the time of conviction to present, the court awarded him $1.75 million; for his past and future lost wages the court awarded him $343,428.[184] The result was an award of $2,093,428 for his 26-month confinement.[185] As we see, using this tort-based method of calculating the harm gives a more just result. As encouraging as the court's holding in *Baba-Ali* is, the reality is that was the first time in the twenty-five years, this

181. *See id.* at 564.

182. *Id.* ("The Law Revision Commission, in recommending the enactment of section 8-b, stated in its report to the Governor that imprisonment resulting from the unjust conviction of an innocent person is 'the most serious deprivation of individual liberty that a society may impose'") (quoting Joseph M. Livermore et al., *On the Justifications for Civil Confinement*, 117 U. PA. L. REV. 75, 75 (1968)).

183. *Id.* at 565.

184. *Id.* at 570.

185. *See id.* On appeal, the non-pecuniary award was reduced from $1.75 million to $1 million. Baba-Ali v. State, 907 N.Y.S.2d 432, 432 (N.Y. App. Div. 3d Dep't 2010). The lost earnings amount was upheld. *Id.*

law has been on the books that an exoneree was able to meet all of the requirements in order to sustain his claim and recover under this law.

VI. THE LAW AS IT APLLIES TO PROSECUTORS

A. Prosecutorial Discretion

The prosecutor has broad powers with minimal limitations or oversight. They have essentially, full discretion to choose the charges they bring and the defendants they pursue.[186] This full discretion with limited oversight can easily be abused at any time throughout the life of a case. One particularly key point in which this power can be abused is during the grand jury process. The work of a grand jury is all done without a judge or even the defense counsel present.[187] The prosecutor presents their case to the grand jury, and it is only the prosecutor's side of the story that the jurors hear.[188] Further, the rules of evidence do not apply, which means the prosecutor can introduce hearsay evidence and even evidence that was obtained through unconstitutional means.[189] I believe the common phrase is, with great power comes great responsibility. True, but in the case of a prosecutor that does not also come with great accountability or liability.

B. Prosecutorial Immunity

1. Civil Liability

When the Civil Rights Act of 1871 (§ 1983) was enacted, it provided a means for state officials to be sued "if their conduct 'under color of state law' deprives the defendant of constitutional or statutory rights."[190] In theory, this provided a basis for a civil action for damages. However, in subsequent cases

186. *See* discussion *supra* Section IV.A.6.

187. CASSIDY, *supra* note 4, at 27.

188. *Id.* ("The grand jury's work happens in secret—outside of the presence of the presiding judge, and beyond the scrutiny of either the defendant's attorney or the public. Counsel for the defendant plays no role in the grand jury inquiry and is not even allowed to be physically present inside the grand jury room. Defense counsel is not allowed to cross examine the government's witnesses before the grand jury, to call witnesses on his own behalf, or to make a closing argument summarizing evidence and urging the grand jury not to indict his client.").

189. *Id.* ("The rules of evidence do not apply to grand jury proceedings, except those pertaining to testimonial privileges. Hearsay evidence is admissible, as is evidence seized pursuant to an unconstitutional search and seizure.").

190. *Id.* at 114 ("Under the Civil Rights Act of 1871, commonly referred to as a §1983 action, state officials may be sued if their conduct 'under color of state law' deprives the defendant of constitutional or statutory rights. A common claim under §1983 is that a prosecutor's misconduct in the investigation or trial of a criminal case deprived the defendant of his right to due process of law under the Fifth and Fourteenth Amendments.").

the Supreme Court has clearly granted prosecutors absolute immunity, removing that potential remedy for the wrongfully accused.[191] The Court even went so far as to say prosecutors were immune from liability even for their intentional acts, knowingly withholding evidence and using perjured testimony.[192]

The Supreme Court in *Imbler* outlined prosecutorial immunity in broad strokes.[193] The Court held: (1) a state prosecutor who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case was absolutely immune from a civil suit for damages for alleged deprivations of the defendant's constitutional rights under 42 U.S.C. § 1983,[194] and (2) such absolute immunity from liability was applicable even where the prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information, or failed to make full disclosure of all facts casting doubt upon the state's testimony.[195]

In *Imbler*, the defendant was convicted of murder and sentenced to death.[196] Later, it was determined that the prosecutor knowingly suppressed evidence that would have been favorable to the defense and had knowingly used false testimony.[197] Again, the Court granted Imbler no recovery and limited the ability for future victims of prosecutorial misconduct to recover.[198]

Under *Imbler*, the Court held that public policy requires prosecutors enjoy the same absolute immunity from civil liability under §1983 that they had at common law in malicious prosecution suits when initiating a prosecution and in presenting the state's case.[199] This decision solidified the popular opinion that a prosecutor has "absolute immunity from §1983 suits for damages when he acts within the scope of his prosecutorial duties."[200]

The Court went on to outline a distinction between absolute and qualified immunity.[201] Absolute immunity applies to conduct intimately associated with the judicial phase of the criminal process, where qualified immunity only applies to conduct administrative or investigative in nature.[202]

191. *See* Imbler v. Pachtman, 424 U.S. 409, 430 (1976).
192. *See id.* at 426–27, 431 n.34.
193. *See id.* at 426–31.
194. *Id.* at 410.
195. *Id.* at 431, n.34.
196. *Id.* at 411−12.
197. *See id.* at 412−13.
198. *See id.* at 431.
199. *See id.* at 427.
200. *See id.* at 420.
201. *See id.* at 418−21.
202. *See id.* at 431; CASSIDY, *supra* note 4, at 114 ("The Supreme Court in *Imbler* thus took a functional approach to prosecutorial immunity, stating that prosecutorial conduct 'intimately associated with the judicial phase of the criminal process' is absolutely immune from suit under

In practice, essentially all of the primary tasks where prosecutorial misconduct has been identified fell under absolute immunity. Even though this idea of varying levels of immunity sounds like it holds the prosecutor to a higher standard, functionally it does not. In virtually every case, absolute immunity applies. The *Imbler* Court listed various policy reasons for this grant of absolute immunity, all centering around not impinging on the prosecutor's ability to effectively perform his or her duties.[203] However, they did not discuss the reality of how this blanket immunity can empower a rogue prosecutor to violate the law with impunity.[204]

To further expand the blanket immunity afforded to prosecutors, the Court in *Van de Kamp v. Goldstein*, found that immunity extended to supervisors.[205] That is, a supervisor who is responsible for overseeing the work of a fellow attorney is granted absolute immunity and cannot be held liable for any prosecutorial misconduct.[206] The Court in *Van de Kamp* reasoned that supervisors deserve absolute immunity because any work performed in a supervisory capacity directly relates to the prosecutor's basic trial advocacy duties.[207]

2. Criminal Liability

Although prosecutors have absolute immunity from civil suits for prosecutorial misconduct, the *Imbler* Court stressed that "the immunity of prosecutors from liability in suits under § 1983 does not leave the public

§1983, but that conduct administrative or investigative in nature may be subject only to qualified immunity. The policy reasons the court cited in *Imbler* for applying absolute immunity to quasi-judicial aspects of a prosecutor's responsibilities were threefold: 1) a concern that the threat of possible lawsuits might cause prosecutors to be less vigilant in close or difficult cases; 2) a concern that defending unfounded litigation might deflect the prosecutor's energies from other important public duties; and 3) a concern that appellate courts reviewing criminal convictions to determine whether the defendant received a fair trial might be unduly affected by the prospect of civil liability against the prosecutor if they ruled in the defendant's favor.").

203. *See Imbler*, 424 U.S. at 424−25.

204. CASSIDY, *supra* note 4, at 114−15 ("The differences between absolute and qualified immunity have important substantive and procedural implications. If absolute immunity applies to the prosecutor's alleged misconduct, he is immune from suit even if the deprivation of rights was willful or malicious. If only qualified immunity applies to the prosecutor's alleged misconduct, he is immune from liability so long as his actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known,' which is essentially an objective standard of good faith.").

205. *See* Van de Kamp v. Goldstein, 555 U.S. 335, 347−48 (2009).

206. *Id.*

207. *Id.* at 346; CASSIDY, *supra* note 4, at 116 ("In *Van de Kamp v. Goldstein*, the Court ruled that absolute immunity, rather than qualified immunity, applies to claims against supervisors in their individual capacities with respect to failure to disclose exculpatory evidence, because 'the management tasks at issue, insofar as they are relevant, concern how and when to make impeachment information available at trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties.'").

powerless to deter misconduct or to punish that which occurs."[208] The Court reasoned that the underlying policy behind civil immunity was never intended to place prosecutors and other public officials beyond the reach of the criminal law.[209] *Imbler* suggests looking to 18 U.S.C. § 242 and pursuing criminal sanctions as a means of deterring and punishing prosecutorial misconduct.[210] The challenge with this approach is whether or not the burden of proof to demonstrate willful conduct could be met and whether a judge or jury would be willing to pursue criminal sanctions against a prosecutor.[211]

The historical reluctance to use the criminal code against prosecutors who commit misconduct is evident in the statistics. In an examination of the reversal of 381 homicide convictions, which were secured through prosecutorial misconduct, zero were brought to trial.[212] So, effectively, this functions as absolute immunity.

C. Ethical Rules

The Model Rules of Professional Conduct outline, in great detail, the ethical guidelines all attorneys should operate within. The rules reiterate the responsibility of a prosecutor to be "a minister of justice" and "see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence"[213]

The American Bar Association Standards for Criminal Justice also requires prosecutors to take "actions that are consistent with applicable law, rules, and the duty to pursue justice,"[214] when new evidence is discovered, even referring them to Model Rule 3.8 of the MRPC.[215] A prosecutor who receives newly discovered evidence must take affirmative action under Model Rule 3.8, but that obligation is just an ethical obligation under the Model Rules.[216] The *Brady* doctrine does not require post-conviction

208. *Imbler*, 424 U.S. at 428−29.

209. *Id.* at 429.

210. *See id.* (alluding to 18 U.S.C. § 242 as the "criminal analog" of § 1983).

211. *See* Shelby A.D. Moore, *Who Is Keeping the Gate – What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold*, 47 S. TEX. L. REV. 801, 827 (2006).

212. Ferguson-Gilbert, *supra* note 72, at 303.

213. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2018) ("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 . . . .").

214. CRIM. JUST. STANDARDS FOR PROSECUTION FUNCTION §3-8.3 (AM. BAR ASS'N 2015). The duty of the prosecutor is to seek justice, not merely to convict. *See id.* §3-1.2(b).

215. *Id.* §3-8.3.

216. CASSIDY, *supra* note 4, at 117 ("Under Model Rule 3.8(g), a prosecutor who receives 'new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense' must take affirmative action. If the conviction occurred *outside* the

disclosure of newly discovered evidence, that is, a prosecutor is not under a constitutional obligation to disclose this new information to the defendant.[217]

Another rule under the MRPC provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[218] Further, a prosecutor cannot counsel or assist a witness to testify falsely.[219]

As discussed previously, one of the most often found areas of misconduct is not turning over exculpatory evidence. Under the MRPC, it is always required to be turned over to the defense, whether the other party requested it or not.[220]

These requirements sound effective in the thoroughness of what is required of a prosecutor and the ultimate goal of fairness in a judicial proceeding. However, as we have seen in the cases of prosecutors who commit misconduct, rules without consequences are ignored. If an attorney violates a rule of professional conduct, he or she can be subject to a written reprimand from the State Bar, or at the very worst, disbarred.[221] However, astonishingly, even if the lawyer is disbarred, often, they are able to reapply for their license a few years later.[222] As a result, have these lawyers truly been punished?

prosecutor's jurisdiction, the prosecutor's sole responsibility is to notify 'an appropriate court or authority,' which Comment 7 [of Rule 3.8(g)] defines to include the chief prosecutor in the jurisdiction where the conviction occurred. If the conviction occurred *inside* the prosecutor's jurisdiction, the prosecutor must: 1) disclose that evidence to the court; 2) disclose that evidence to counsel for that defendant, unless the court authorizes a delay of disclosure; and 3) undertake a further investigation to determine whether the defendant may be innocent.").

217. *Id.* at 116. ("The doctrine of *Brady v. Maryland* does not extend to the post-conviction process, and prosecutors have no constitutional duty under *Brady* to share with the defendant newly discovered evidence that may support innocence.").

218. MODEL RULES, r. 8.4(c).

219. *See id.* r. 3.4(b) ("A lawyer shall not . . . counsel or assist a witness to testify falsely. . . .").

220. R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1434 n.18 (2011) ("Although the Court's decision in *Brady* referenced the prosecutor's constitutional duty to turn over exculpatory evidence 'on request' of the defendant, subsequent cases recognized that this constitutional duty of disclosure exists whether or not the defendant specifically requested the withheld material, only generally requested exculpatory information, or files no discovery requests at all. In other words, the prosecutor's duty to turn over evidence favorable to the accused is *self-executing*; it does not depend on the presence or precision of discovery requests filed by defense counsel.").

221. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 10 (AM. BAR ASS'N 2018).

222. *Id.* r. 25.

D. Prosecutorial Punishment (or the lack thereof)

Multiple studies, some spanning over 30 years, have reviewed roughly 2,000 cases where prosecutorial misconduct was found and was "material to the conviction and overturned it."[223] Among those, only two prosecutors were disbarred and zero were subject to any criminal or civil penalty.[224] Further, a report by the Center for Prosecutor Integrity found that "43% of wrongful convictions [were] attributable to official misconduct."[225] Below are three specific instances of significant prosecutorial misconduct.

Michael Morton

1. Michael Morton

The Michael Morton case received significant publicity after he served almost twenty-five years in prison for the murder of his wife, when he was innocent.[226] There are varying theories as to why this particular case received so much attention, which we will not delve into. This case was heralded as somewhat of a turning point where those seeking justice could sigh with relief and exclaim, "finally!' because the prosecutor who intentionally withheld evidence resulting in Michael Morton's wrongful conviction, was held accountable.[227] Well, that is actually a stretch. Rather, he was the first to receive more than just a slap on the wrist or disbarment.[228] Ken Anderson was the prosecutor in the Morton case.[229] After Morton's conviction, he went on to become a judge.[230] After his prosecutorial misconduct came to light, the punishment he received was disbarment, five hundred hours of community service, and a ten-day jail sentence, making him the first prosecutor to receive criminal punishment.[231] However, this punishment needs to be carefully looked at through the lens of equity. Ken Anderson intentionally caused a

223. *See* Radley Balko, *Another Study Finds Few Consequences for Prosecutor Misconduct*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/03/08/another-study-finds-few-consequences-for-prosecutor-misconduct/?noredirect=on&utm_term=.e2901c39888f [https://perma.cc/4GYV-NCHA].

224. *See id.*

225. CENTER FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT (2013). http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf [http://perma.cc/59FH-3HBP].

226. *Michael Morton*, *supra* note 83.

227. Mark Godsey, *For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man*, HUFFINGTON POST, (Nov. 8, 2013, 4:12 PM) https://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a_b_4221000.html [https://perma.cc/2AAD-D99P].

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

man to lose almost twenty-five years of his life, and for that, he was sentenced to ten days in jail.[232] Michael Morton was innocent, and he spent 8,995 days in prison.[233] This is unjustifiable. To make this gross injustice even worse, Ken Anderson was released from jail after serving only five days due to good behavior and was allowed to reapply for his law license after five years.[234] Considering the gravity of harm Anderson caused, the reciprocal harm he suffered is infinitesimal.

The ripple effect of bad actors like Ken Anderson is often incalculable and could take years to be discovered if at all. Take the case of Troy Mansfield for example.[235] He too was a victim of Ken Anderson withholding exculpatory evidence that was required to be turned over to the defense.[236] Anderson charged Mansfield with molestation of a child, even though he had contradictory evidence indicating Mansfield was innocent.[237] Knowing he faced life in prison if convicted, Mansfield took a plea deal, only serving 120 days in prison and agreeing to ten years of probation.[238] This conviction, forcing him to register as a sex offender, irreparably harmed Mansfield, another result of Ken Anderson's misconduct.[239] However, in this case, Anderson received no punishment.[240]

2. Anthony Graves

Anthony Graves was charged with six murders in a home that been set on fire.[241] He was implicated in this crime by Robert Carter, his co-defendant.[242] Anthony Graves was convicted and sentenced to death, and after eighteen years, he was finally exonerated.[243] What is equally as

232. *Id.*
233. *See id.*
234. Claire Osborn, *How Ken Anderson Was Released After Only Five Days in Jail*, STATESMAN (Sep. 26. 2018, 9:33 AM), https://www.statesman.com/news/local/how-ken-anderson-was-released-after-only-five-days-jail/UGpWcPAITgVFvW2R2S32xK [https://perma.cc/M3YW-8D96].
235. Connor Brown, *Exonerated Man Sues Williamson County for Not Disclosing Evidence*, STATESMAN (Sep. 22, 2018, 4:47 AM), https://www.statesman.com/NEWS/20180124/Exonerated-man-sues-Williamson-County-for-not-disclosing-evidence [https://perma.cc/Y59V-6SZY].
236. *Id.*
237. *Id.*
238. *Troy Mansfield*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5268 [https://perma.cc/232P-UDMX.
239. *Id.*
240. *Id.*
241. *See Anthony Graves*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3253 [https://perma.cc/B6PK-D6HK].
242. *See id.*
243. *See id.*

troubling, as the reality that this man was wrongfully convicted and spent almost two decades in prison, is that the prosecutor received exculpatory evidence indicating Graves' innocence within days of his original arrest.[244] Three days after Carter was arrested he recanted, telling a grand jury that Graves was not involved.[245] Two years later, right before Graves' trial, Carter met with Charles Sebesta, the prosecutor, and told him Graves was not involved in the murders.[246] Neither of these pieces of evidence was turned over to the defense.[247] Carter was executed in 2000.[248] One of his final statements in the execution chamber was that Graves is innocent and he had lied.[249] It still took another ten years for Graves to be exonerated and released.[250]

Prior to the trial, Carter made statements to Sebesta indicating Graves' innocence.[251] Regardless, Sebesta withheld this information from the defense, continued to pursue the charges against Graves, and used the false testimony of Carter during trial.[252] More than two decades after Sebesta's illegal conduct that resulted in Graves' conviction, he was finally disbarred.[253] It is easy to feel this is some semblance of justice, but it must be put in perspective. Sebesta, from the time of Graves' conviction until he was disbarred, had an immensely successful career. He was called "the most powerful elected official in Burleson and Washington counties."[254] Contrast his record of success with what Graves endured during the same time period. Graves spent eighteen years in prison; sixteen of these years spent in solitary confinement and twelve years on death row.[255]

3. Cameron Todd Willingham

In the case of Cameron Todd Willingham, he was charged with arson of his home, which killed his three daughters.[256] He was convicted and

244. *Id.*
245. *Id.*
246. *Id.*
247. *See id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. Pamela Colloff, *Ex-DA Who Sent Exoneree Anthony Graves to Death Row is Disbarred*, TEX. MONTHLY (June 12, 2015), https://www.texasmonthly.com/the-daily-post/ex-da-who-sent-exoneree-anthony-graves-to-death-row-is-disbarred [https://perma.cc/RR9S-A3JA].
255. *Texas Prosecutor Disbarred Following Misconduct in Anthony Graves Case*, INNOCENCE PROJECT (June 6, 2015), https://www.innocenceproject.org/texas-prosecutor-disbarred-following-misconduct-in-anthony-graves-case [https://perma.cc/A6V9-C9KF].
256. *See* Willingham v. State, 897 S.W.2d 351, 354 (Tex. Crim. App. 1995, writ denied).

sentenced to death.[257] Willingham always maintained his innocence, even at his execution in 2004.[258] A decade long investigation was conducted after Willingham's execution, and multiple arson investigators and experts concluded that the fire was not intentionally set, meaning Willingham was innocent.[259] Further, the State Bar of Texas brought claims against the state prosecutor at the time, John Jackson, that he "made false statements, concealed evidence favorable to Willingham's defense and obstructed justice."[260] One item that was withheld was the agreement between Jackson and a jailhouse snitch that he would get favorable treatment on his conviction for testifying that Willingham confessed to him (in 2014 the snitch recanted, admitting he lied to get the leniency Jackson promised).[261]The snitch, Johnny Webb, recalls that Jackson threatened that he would "get a life sentence" for the robbery he committed if he did not testify against Willingham. [262] In 1996, Webb wrote a letter to the lead prosecutor in Willingham's case, threatening to go public with this information if Jackson did not downgrade his conviction as promised.[263] Within days, Jackson had the judge that handled the Willingham case change Webb's conviction, and he was immediately released on parole.[264]

Following the same pattern we have already seen, Jackson went on to become a judge.[265] The State Bar felt the evidence of misconduct was compelling enough to pursue him and seek to have him disbarred.[266] To compare the harm to both parties as a result of this intentional wrongful conviction: John Jackson has not received any punishment at all and still has his law license; Cameron Todd Willingham was executed.[267]

257. *Id.*

258. *See* Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB. (Dec. 9, 2004), https://www.chicagotribune.com/news/nationworld/chi-0412090169dec09-story.html [https://perma.cc/FS5C-MNXC].

259. *See* Maurice Possley, *Jury Clears the Prosecutor Who Sent Cameron Todd Willingham to Death Row*, MARSHALL PROJECT (May 11, 2017), https://www.themarshallproject.org/2017/05/11/jury-clears-the-prosecutor-who-sent-cameron-todd-willingham-to-death-row [https://perma.cc/2TE3-EWNX].

260. *Id.*

261. *Id.*

262. Maurice Possley, *A Dad Was Executed for Deaths of His 3 Girls. Now a Letter Casts More Doubt*, WASH. POST (Mar. 9, 2015), https://www.washingtonpost.com/politics/letter-from-witness-casts-further-doubt-on-2004-texas-execution/2015/03/09/d9ebdab8-c451-11e4-ad5c-3b8ce89f1b89_story.html?utm_term=.3c442c5afe91 [https://perma.cc/8MGN-W43Q].

263. *Id.*

264. *Id.*

265. *See* Maurice Possley, *Jury Clears the Prosecutor Who Sent Cameron Todd Willingham to Death Row*, MARSHALL PROJECT (May 11, 2017), https://www.themarshallproject.org/2017/05/11/jury-clears-the-prosecutor-who-sent-cameron-todd-willingham-to-death-row [https://perma.cc/2TE3-EWNX].

266. *Id.*

267. *See id.*

E. Paying Damages

In all instances of prosecutorial misconduct where the exoneree is able to collect any amount of restitution, those damages are currently paid by the state, which ultimately means the taxpayers.[268] It is important to give this some scale and understand the amount of taxpayer funds that are being diverted from other areas to pay for prosecutorial misconduct. Let us just look at one state as an example. A fairly recent report estimates the cost of wrongful convictions, just in the state of California, to have cost the state $221 million.[269] This figure includes: "cost of incarceration for wrongfully convicted individuals in the state was $80 million, while lawsuit settlements in wrongful conviction cases cost the state $68 million with an additional $68 million spent on trials and appeals."[270] If we add in the cost to the other forty-nine states, the amount would be staggering. There is absolutely no justifiable reason that rogue prosecutors should have such an absolute right to inflict this amount of harm on citizens who are wrongfully imprisoned, and then magnify that harm by making the citizens of the state pay for the prosecutor's harm. It is time to level the playing field and hold these very prosecutors accountable. The burden of remedying the harm they cause needs to be shifted to them.

VII. EQUAL JUSTICE UNDER LAW – PROPOSED SOLUTIONS

A. Comparative Reality: If Prosecutors Were Considered Equal to the Rest of the Country

If prosecutors were not viewed as operating on a separate plane, where they are exempt from all personal responsibility and liability for their actions, including causing intentional harm, how would that reality differ? Well, let us look at average prison sentences that would apply to every other citizen in the country for a variety of crimes. Being convicted of murder results in an average sentence approaching 19 years,[271] manslaughter runs on average 5−6

268. *See* UNIV. CALIF. BERKELEY SCH. OF LAW, CRIMINAL INJUSTICE: A COST ANALYSIS OF WRONGFUL CONVICTIONS, ERRORS, AND FAILED PROSECUTIONS IN CALIFORNIA'S CRIMINAL JUSTICE SYSTEM 6 (2015), https://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI_Criminal_InJustice_booklet_FINAL2.pdf [https://perma.cc/TL2T-M45A].

269. *Id.*

270. *Id.* at 60.

271. This data reflects the 2017 fiscal year. *See* U.S. SENTENCING COMM'N, UNITED STATES SENTENCING COMMISSION QUARTERLY DATA REPORT 9 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2017_Quarterly_Report_Final.pdf [https://perma.cc/ETL6-ZG7A].

years,[272] a robbery conviction is between 6−7 years,[273] assault and/or battery is 2−3 years,[274] fraud is 2−3 years[275] and bribery is 1−2 years.[276] Next, we can correlate these offenses with specific acts of intentional prosecutorial misconduct. Intentionally pursuing a death sentence against someone whom the prosecutor knows is innocent results in murder, at the very least manslaughter. Sending an innocent person to prison results in a form of robbery. They are robbed of their current and future wages, the cost of their defense, any assets they must forfeit to fight the charges brought against them, and many other instances of tangible and intangible valuables taken from the victim. Intentionally targeting an innocent person for conviction also can be correlated to assault and battery. There is undeniably an intent to physically harm the individual and physical harm does result, as well as non-physical harm such as invoking fear and the intentional infliction of emotional distress. Lastly, bargaining with witnesses to falsify their testimony to frame an innocent person is bribery. All of these instances of intentional prosecutorial misconduct fit the crimes stated above. The only difference is they are not subject to any punishment at all. This disparity in punishment, that permits prosecutors to inflict this harm undeterred, must end.

As discussed throughout this Article, it is imperative that we understand the history and historical attitudes which codified a systemic practice of bias and wrongful convictions. From that perspective we can see how laws changed, practices changed, and discrimination, to a degree, was suppressed. But at the same time, we must understand that the current practice of prosecutors feeling entitled and emboldened to blatantly commit instances of misconduct, particularly when targeting minority Americans, is an offshoot of that learned behavior. We must further admit that this learned behavior was for many decades, condoned and rewarded. That can contribute to an unethical prosecutor feeling entitled and validated in committing misconduct. The reality that this behavior will go unpunished, is a further signal of validation. These bad actors are a final bastion of historical shame that must be rooted out. As very poignantly stated by Justice Thurgood Marshall, "We remain imprisoned by the past as long as we deny its influence in the present."[277]

272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. JIM DWYER ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 264–65 (2001).

B. Punishment as a Detterent

Going back to the early portions of this article, we looked at the stated purpose of the criminal justice system and how it uses punishment as a method to deter undesirable behavior.[278] Put simply, unless prosecutorial misconduct is acceptable and the practice is condoned, why would the same practice of punishment as a deterrent not be sought against prosecutors?

This is a hotly debated subject. The revered Judge Learned Hand weighed in on whether prosecutors should be subject to punishment for misconduct.[279] He stated:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[280]

History has proven Learned Hand wrong. In too many instances the balance between these evils has been perilously weighted against the innocent.

I am very aware that the standard reaction has always been not to pursue prosecutorial accountability and punishment, due to the fear of punishing a prosecutor who did not deserve that fate. This Article has discussed several instances of a prosecutor's intentional misconduct being the driving force behind thousands of innocent citizens receiving punishment of which they were undeserving. So far, nothing has deterred this culture of misconduct. So, we are obligated to try another tact.

In always concerning ourselves so much with the fate of a rogue prosecutor, there has been a gross lack of concern for the lost lives that were a result of this very misconduct. We cannot be overcome with concern at the highly unlikely chance that one undeserving prosecutor will be subject to punishment. What is more likely is that the reality of consequences will serve as a significant deterrent and finally stop the gross abuse of those prosecutors who do not seek justice, but rather inflict harm for their own gain or to feed their own bias.

My proposition is simple, remove the immunity shield for prosecutorial misconduct. We need multiple versions of punishment for prosecutors who knowingly commit misconduct, which should include criminal punishment, civil liability, the ability to hold their employers liable under the doctrine of respondeat superior, and disbarment.

278. *See* discussion *supra* note 1 and accompanying text.

279. *See* ALTON LOGAN & BERL FALBAUM, JUSTICE FAILED: HOW "LEGAL ETHICS" KEPT ME IN PRISON FOR 26 YEARS xxvii (2016).

280. *Id.*

1. Subject to Criminal Prosecution

The first step that needs to be taken is the absolute immunity prosecutors enjoy must be abolished and they should be subject to criminal penalties for intentionally or knowingly engaging in misconduct. As every statistical report generated has demonstrated, current methods to deter prosecutorial misconduct have failed miserably.

Some jurisdictions understand that the integrity of their district attorney's office is significantly harmed when rogue prosecutors commit misconduct and go unpunished. Last year, the Governor of California signed a bill into law allowing prosecutors to be charged with a felony and subject to three years in prison if they "intentionally and in bad faith alter, modify, or withhold any information knowing that it is relevant and material to the outcome of the case."[281] This is a great step in the right direction. But we should go further. The punishment should be weighted based on the gravity of the harm. Not that a three-year prison stint is minor, but if the misconduct, for example, caused four defendants to spend twenty years behind bars when they were innocent, then three years would not be sufficient. Criminal punishment for prosecutors needs to be instituted, but the levels set by offense should be proportional to the harm their misconduct caused.

2. Subject to Civil Liability

The next step, strip prosecutors of their immunity related to civil liability and hold them civilly liable for intentionally or knowingly engaging in misconduct. Presently, the financial burden for all of the damages caused by rogue prosecutors either falls to the state and taxpayers, or to the victims themselves and their families.[282] The state bears the cost of the trial, appeals, prison costs, re-trial or exoneration proceedings, media relations surrounding the wrongful conviction, and restitution payments. On the victims' side, they bear their legal costs from the time they are arrested, through all of their appeals and exoneration and even years past release as they fight to have their record cleared and pursue restitution from the state. For an individual or their family, this is a significant expense, particularly when viewed in light of the truth that as an innocent person they should not have been subjected to any of these problems.

The prosecutor is not required to contribute one dime to this enormous expense. To make matters worse, throughout the entire ordeal, which in some

281. Matt Ferner, *Cheating California Prosecutors Face Prison Under New Law*, HUFFINGTON POST (Oct 1, 2016, 7:15 PM), https://www.huffingtonpost.com/entry/california-prosecutor-misconduct-felony_us_57eff9b7e4b024a52d2f4d65# [https://perma.cc/2ZTK-SZ3Q].

282. *See* discussion *supra* Section VI.E.

cases goes on for decades, the prosecutor is allowed to enjoy their full benefits in the district attorney's office and receive their full salary. As we've seen, more often than not, many prosecutors are actually elevated in their career and end up in higher positions with greater salary and benefits. Again, at no point have they been ordered to repay any of the restitution paid to the victim or reimburse the state for the immense expense. That is unjustifiable to all involved. Rogue prosecutors should be held financially liable for their misconduct and all of their assets should be at risk.

3. Respondeat Superior

The third step relates to the liability of the district attorney's office. The doctrine of respondeat superior holds "an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency."[283] In the instance of prosecutorial misconduct, it is ultimately the county who employs the offending attorney. For a standard respondeat superior claim, the only determinations that need to be made are whether the person is an employee (rather than an independent contractor) and if they were acting within the scope of their employment.[284] A prosecutor is never an independent contractor, and the process from deciding who to charge, to trial strategy, to turning over *Brady* material to the other side, lining up witnesses, offering plea bargains and trying the case, all fall within the scope of a prosecutor's scope of employment. Since the elements of respondeat superior are met, the protective cloak of immunity should be removed, and victims of prosecutorial misconduct should be able to pursue the employer under the doctrine of respondeat superior.

In addition to the employer being held liable, due to the history of prosecutorial misconduct going unpunished, more oversight is needed. In an article by Judge Alex Kozinski, he suggested multiple reforms, including adding additional conviction integrity units (CIUs) and establishing an independent prosecutorial integrity unit.[285] So far, there are almost three dozen conviction integrity units throughout the country.[286] CIUs are independent and comprised of attorneys with "no track record to defend," so these units are able to thoroughly examine a case and help identify those who are wrongfully convicted.[287] Kozinski's recommendation to establish

283. *Respondeat Superior*, BLACK'S LAW DICTIONARY 1505 (10th ed. 2014).

284. *See* Greene v. Amritsar Auto Servs. Co., 206 F. Supp. 2d 4, 7−8 (D.D.C. 2002).

285. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., 31−32 (2015).

286. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017 2 (2018), https://www.law.umich.edu/special/exoneration/documents/exonerationsin2017.pdf [https://perma.cc/8VTW-JAAK].

287. Kozinski, *supra* note 286, at 31.

independent prosecutorial integrity units includes moving them under the authority of the Department of Agriculture so that they are wholly independent of the Department of Justice.[288] He stated that "[p]rosecutors need to know that someone is watching over their shoulders ─ someone who doesn't share their values and eat lunch in the same cafeteria."[289]

Conviction integrity units have existed for roughly fifteen years, but during the first decade there were only a few.[290] They have grown in popularity over the past four or five years, currently totaling thirty-three units throughout the country.[291] CIUs have been involved in 269 exonerations through 2017.[292] To give this scale, there are 2,300 prosecutors' offices throughout the United States.[293] With 33 active CIUs, that accounts for only 1.5% of these offices. However, "[t]he three most populous counties all have CIUs (Los Angeles, Cook, and Harris)," and the "top 20 of the top 50" most populous counties have CIUs.[294]

A clear benefit of CIUs is their ability to act quickly.[295] Harris County has been discussed as a model for the effectiveness and efficiency of a CIU.[296] The Harris County CIU learned about hundreds of drug convictions where the defendants pled guilty when in fact they were not even in possession of illegal drugs.[297] Overturning these convictions have resulted in 138 exonerations, most occurring within the past three years.[298] In contrast to Harris County's success, there are a few CIUs that have operated for three to four years and have yet to overturn a conviction. The concern is that a county could use a CIU as mere window dressing, rather than for its stated purpose.

CIUs have multiple missions. Most units primarily investigate claims of innocence, but they also look for "recurrent themes in wrongful convictions, such as faulty eyewitness identification, false confessions, incentivized informants (snitches), prosecutorial misconduct (*Brady* violations), and invalidated forensic science."[299]

CIUs appear to be a potentially impactful method of ensuring that justice was done, and in the event it was not, a tool to correct the injustice. How effective each CIU chooses to be, is left to be seen. To aid in this endeavor

288. *See id.* at 32.
289. *Id.*
290. *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 287, at 11.
291. *Id.*
292. *Id.* at 2.
293. *Id.* at 12.
294. *Id.*
295. *Id.* at 20.
296. *See id.*
297. *Id.*
298. *Id.* at app. tbls.A & B.
299. Inger H. Chandler, *Conviction Integrity Review Units: Owning the Past, Changing the Future*, 31 A.B.A. SEC. CRIM. JUST. 14, 15 (2016).

there are significant resources available. For example, the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School published an extensive study and survey outlining current CIU practices, recommendations, checklists, statistical data, and a proposed unit structure.[300] Further, Barry Scheck, co-founder of the Innocence Project, published an article, discussing in great detail, the potential sources for cases, criteria for selecting cases for review, investigatory methods and processes, and procedures necessary to conduct a root cause analysis to identify case errors.[301]

4. Ethical Penalties

Finally, we must put more "teeth" in either the Model Rules of Professional Conduct, or the manner in which they are applied. Presently, there are numerous rules which speak to the various forms of misconduct as discussed throughout this Article.[302] However, what is missing are the examples of how these rules were applied and how they held rogue prosecutors liable. Penalties such as written reprimands to a prosecutor who commits blatant misconduct are laughable and would never deter that type of person. The most severe punishment the State Bar can effect is disbarment, which sounds serious enough that it should be impactful, but it is not. Out of the thousands of wrongful convictions studied we can count the attorneys who were disbarred on one hand. What is equally egregious is that when rogue prosecutors are disbarred, they are typically eligible to re-apply for their law license within a few years. Why would the State Bar want these individuals to practice law? We owe a duty to the integrity of our profession to identify these bad actors and root them out for good. This is not where they belong, and they have been welcome for far too long.

VIII. CONCLUSION

It has been argued that the uptick in exonerations over the past decade or so is a direct result of a greater level of accountability in prosecutorial offices across the country.[303] Some have instituted post-conviction or "second-look" procedures and even "special review units" that review

300. *See generally* JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (2016).

301. *See* Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705 (2017).

302. *See supra* Section IV.A, Part VI.

303. Barone, *supra* note 53.

"questionable convictions."[304] If this causal connection is true, great. But it is not enough.

First, the prosecutor's office should hold themselves to a higher standard and continue to pursue these secondary review processes. However, a reactionary process of only going back and looking over the prosecutor's shoulder does not solve the problem. It can help unwind some of the harm and right the wrongs, but it does not stop the prosecutorial predatory behavior. The second prong is punishment. A prosecutor who intentionally and willfully commits misconduct must be subject to punishment. The solution is as simple as the basic premise behind the justice system. You, first, stop the harm. Then, make the perpetrator pay restitution. Lastly, prevent future harm. If punishment is believed to be an effective deterrent, then prosecutors should not be immune to punishment.

A remark made by Senator Trumbull during the 39th Congress is as true today as it was when it was made over a hundred and fifty years ago:[305]

> Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the states and local authorities, by legislation or otherwise, deny those rights, it is incumbent on us to see that they are secured.[306]

The impact of Trumbull's comment is two-fold. First, it is unjustifiable to say that every person must be fully protected in all his rights, but then give a prosecutor full immunity and authority to violate the rights of any person they choose. Next, if turning a blind eye to prosecutorial misconduct and gross constitutional rights abuses is the path a jurisdiction chooses to take, the federal government has an obligation to step in and correct the problem. Each state, every city, every small town and municipality, has an obligation to root out those among them who deprive citizens of their rights. But, if these jurisdictions choose complacency or denial and do not correct the systemic problem of prosecutorial misconduct, the federal government has not only the authority, but the obligation, to once again, correct the problem of state-sanctioned discrimination.

As James Baldwin stated so clearly, "not everything that is faced can be changed, but nothing can be changed until it is faced."[307] We owe a

304. *Id.*

305. *See* Eugene Gressman, *Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1327 (1952).

306. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 77 (1866) (statement of Sen. Trumbull)).

307. I AM NOT YOUR NEGRO (Magnolia Pictures 2016).

responsibility to our profession to correct this horrendous wrong and root out this historical remnant, which is embedded like a cancer in the justice system.