

“JUSTICE FOR ALL”: THE NECESSITY OF NEW PROSECUTORIAL ACCOUNTABILITY MEASURES

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We all hold dear to the time-honored notion that ‘no one is above the law.’ Truly horrendous prosecutors who have put innocent people in jail should not be an exception.

—The Honorable Frederic Block

INTRODUCTION

Once upon a time, a prosecutor tried a man six times for the same crime, used his peremptory challenges to strike forty-one of forty-two black prospective jurors, and walked away with no punishment.¹ Unfortunately, this saga is commonplace in the American criminal justice system today. Prosecutors, endowed with virtually limitless power, continuously engage in misconduct and face little or no consequences due to a lack of accountability.

¹ This is the harsh reality of *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234-35 (2019), a case punctuated with severe governmental misconduct where the lead prosecutor still remains free of disciplinary action.

As this Comment demonstrates, the incidence of prosecutorial abuse in the United States is alarming. Fundamental notions of fairness demand a clear set of rules and procedures for disciplining prosecutors who engage in misconduct in the courtroom. The vague standards guiding prosecutorial behavior that are currently in place do not clearly define what behavior is considered inappropriate and worthy of disciplinary action, nor do they lay out specific punishments for different types of misconduct. As a result, prosecutors rarely answer for their bad behavior. This lack of accountability produces negative implications for criminal defendants, many of whom spend years in prison atoning for crimes they did not commit. Failure to discipline prosecutors not only discourages them from upholding their ethical duties and obligations imposed by state bar associations; the lack of enforceable standards promulgates wrongful behavior fueled by public scrutiny and constant pressure to “catch the bad guys.” Such overpowering influences often lead to wrongful convictions based on external pressures to try cases in a timely and efficient manner.

While convictions have been overturned due to prosecutorial misconduct,² these cases are rare and devoid of repercussion for the wayward prosecutor. Prosecutors face no sanctions, license suspensions, or fines, and they are immune from civil liability. Further, waiting for cases to be overturned is inefficient, as a new trial involves extra time, money, and other resources, and ultimately overcrowds the courts’ dockets. Relying on the judiciary to overturn cases on grounds of prosecutorial misconduct is also risky; often judges characterize misconduct as mere harmless error.³ While the outcome of the defendant’s trial may ultimately remain unaltered, the prosecutor’s misconduct escapes

² Multiple scholars contend that the most common cure for a *Brady* violation is a new trial. See, e.g., Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 443-47 (2010).

³ See, e.g., Jessica Brand, *The Epidemic of Brady Violations: Explained*, THE APPEAL (Apr. 25, 2018), <https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/> [<https://perma.cc/X579-8PCC>] (“Courts will only reverse a conviction and send it back for a new trial based on a *Brady* violation if the suppressed evidence was ‘material’—if there is a reasonable probability that, had it been disclosed, it could have affected the case’s outcome. . . . But courts regularly apply this standard in the strictest way possible.”).

undocumented, thus precluding any potential repercussion. As a result, relying on the passive criminal justice system to work itself out is an inefficient solution to the malignant problem of prosecutorial misconduct.⁴

This Comment proceeds by (1) giving examples of types of prosecutorial misconduct; (2) analyzing state bar ethics rules and disciplinary systems; (3) advocating for legislation in all fifty states and Washington D.C. that mandates the collection of data from prosecutors, similar to a recent Connecticut bill; (4) advocating for reform at the Attorney General level; and (5) acknowledging barriers to implementation of the proposed reforms.

I. BACKGROUND

A. *Prosecutorial Misconduct Analysis*

In 2018 alone, 151 wrongfully convicted inmates were exonerated.⁵ Those exonerated each spent an average of nearly

⁴ Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 426 (2006) (“[A]ppellate courts . . . rarely reverse a conviction based on prosecutorial conduct, usually finding the misconduct to constitute harmless error.”). Appellate courts also place great faith in trial judges’ opinions on the impact of prosecutorial misconduct on the outcome of the trial, relying on the notion that the trial judge is in the best position to determine such effects. *See, e.g.*, *United States v. Wadlington*, 233 F.3d 1067, 1077 (8th Cir. 2000); *United States v. Marshall*, 75 F.3d 1097, 1106-07 (7th Cir. 1996); *United States v. Stewart*, 977 F.2d 81, 83 (3d Cir. 1992). *See also* David Keenan et. al, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. F. 203, 212 (2011) (“In order to win a reversal, a defendant must not only prove misconduct, but must also show that the misconduct substantially prejudiced the outcome of his or her trial. Courts can therefore avoid making a finding of misconduct altogether by finding that the alleged error, even if proven, was harmless. By reducing the likelihood of reversal, the harmless error standard substantially weakens one of the primary deterrents to prosecutorial misconduct. Knowing that ‘minor’ misconduct is unlikely to jeopardize a conviction on appeal, prosecutors may be more likely to bend the rules in the pursuit of victory.”).

⁵ NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2018 (Apr. 9, 2019), <http://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf> [<https://perma.cc/2DPE-9AUV>] (“Official misconduct encompasses a wide range of behavior—from police officers threatening witnesses, to forensic analysts falsifying test results, to child welfare workers pressuring children to claim sexual abuse where none occurred. But the most common misconduct documented in the cases in the Registry involves police or prosecutors (or both) concealing exculpatory evidence.”).

eleven years in captivity, for a record total of 1,639 years lost.⁶ The root of the tragedy is clearly traceable: The National Registry of Exonerations indicates that in a record-breaking 107 cases, official misconduct occurred.⁷ In other words, nearly 71% of exonerations in 2018 were at least in part due to misconduct. These numbers alone are appalling and indicate that the problem of prosecutorial misconduct still persists today.⁸

Sadly, in the years since 2013, there has been an upward trend in recorded instances of prosecutorial misconduct. Recent data estimates that from 1989 to 2020, there were 2,746 exonerations in the United States that collectively resulted in the loss of 24,840 years.⁹ The data speaks for itself: in 2013, there were 87 exonerations;¹⁰ in 2014, there were 125 exonerations;¹¹ and in 2015, there were 149 exonerations.¹² In 2017, there were 139 exonerations as compared to 171 in 2016.¹³ Studies indicate that official misconduct occurred in over 43% of the 2015 exonerations,¹⁴ over 40% of the 2016 exonerations,¹⁵ and over 60%

⁶ *Id.* One exoneree spent over 45 years in prison for a murder that he did not commit. *Id.* Similarly, it is estimated that defendants exonerated in 2017 spent an average of 10.9 years incarcerated for their convictions, for a total of 1,639 total years lost. *Id.*

⁷ *Id.*

⁸ See Brand, *supra* note 3 (“The National Registry of Exonerations estimates that over 50 percent of wrongful convictions occur because of official misconduct.” Brand, *supra* note 3.).

⁹ The National Registry of Exonerations, *Exonerations by Year: DNA and Non-DNA*, <http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> [https://perma.cc/4YE5-6B74] (last visited Oct. 21, 2019).

¹⁰ NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2013 (Feb. 4, 2014), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf [https://perma.cc/CUS3-PJAU].

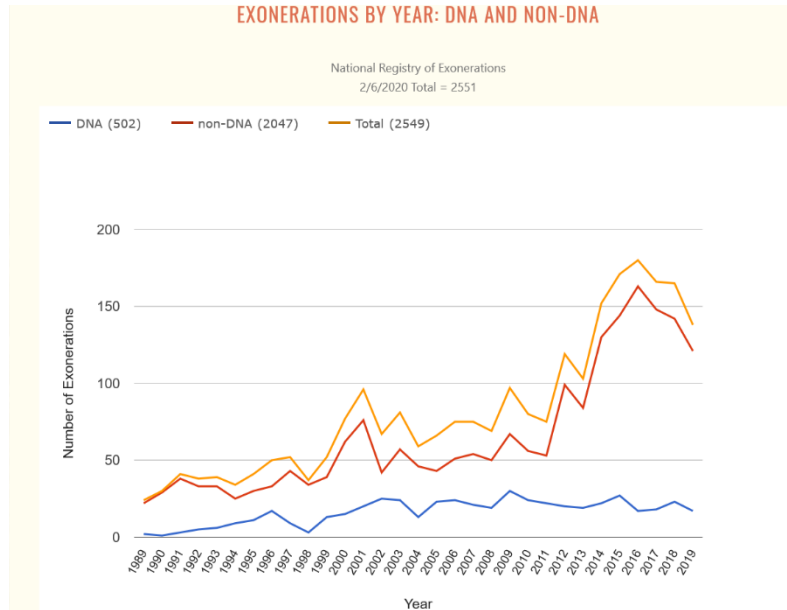
¹¹ NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014 (Jan. 27, 2015), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf [https://perma.cc/R4NL-EKMV].

¹² NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015 (Feb. 3, 2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf [https://perma.cc/48UA-L9QL]. The annual number of exonerations more than doubled between 2011 and 2015. In 2015, there was an average of three exonerations per week. *Id.*

¹³ NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017 (Mar. 14, 2018), <http://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf> [https://perma.cc/8RMZ-987M].

¹⁴ NAT’L REGISTRY OF EXONERATIONS, *supra* note 12 (“Seventy-five percent of homicide exonerations in 2015 included official misconduct (44/58) 82% of

of the 2017 exonerations.¹⁶ The National Registry of Exonerations graphed exoneration incidents in America over the past decades:¹⁷



A 2003 study conducted by the Center for Public Integrity revealed “over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals.”¹⁸ However, only forty-four of those cases resulted in disciplinary action against prosecutors, and seven of those actions were dismissed.¹⁹ Another survey of American capital convictions

homicide exonerations in 2015 with false confessions also involved misconduct by government officials (18/22).”

¹⁵ See NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016 (Mar. 7, 2014), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf [<https://perma.cc/L328-JA74>].

¹⁶ See *Exonerations in 2017*, *supra* note 13. (84% of homicide exonerations in 2017 included official misconduct).

¹⁷ NAT'L REGISTRY OF EXONERATIONS, *supra* note 10.

¹⁸ Keenan et. al, *supra* note 4, at 211.

¹⁹ *Id.* at 220.

between 1973 and 1995 indicated that state post-conviction courts uncovered “prosecutorial suppression of evidence that the defendant is innocent” in an astounding one of every six cases “where the conviction was reversed.”²⁰ Although the statistics are alarming, they fail to reflect adequately the factual contours of American prosecutorial misconduct, largely due to underreporting and the judicial system’s zealous acceptance of a “harmless error” standard when reviewing criminal convictions.²¹

1. Prosecutorial Power

a. Ethics Rules Specific to Prosecutors

“The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.”²² Perhaps in response to this vast discretion, the Model Rules of Professional Conduct set forth five ethical obligations only applicable to prosecutors.²³ Prosecutors are empowered with the awesome responsibility of deciding whether to order an arrest, turn over evidence to the defense, negotiate a plea bargain, and recommend sentencing to the judge. Further, the prosecutor also must discern of which crimes to charge the accused.²⁴ Perhaps in response to

²⁰ *Id.* at 211-12.

²¹ *Id.* at 212.

²² Robert Jackson, Attorney Gen. of the U.S., Address to the Second Annual Conference of United States Attorneys: The Federal Prosecutor (April 1, 1940), <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speechesby-robert-h-jackson/the-federal-prosecutor/> [<https://perma.cc/94FR-62G5>].

²³ See Joy, *supra* note 4, at 413. See also ABA CANONS OF PROF'L ETHICS Canon 5 (1908) (Interestingly, the ABA's initial ethics rules attempted to impose a limitation on prosecutorial power by stating that a prosecutor's "primary duty . . . is not to convict, but to see that justice is done."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (AM. BAR ASS'N 1969) (The 1969 Model Code also published nonmandatory ethical considerations, which reinforced the idea of prosecutors exercising restraint in their duty "to seek justice, not merely to convict.").

²⁴ CENTER FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 1 (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf> [<https://perma.cc/D7MT-8U29>].

overcharging, more than ninety percent of convictions in criminal cases result from plea bargains arranged by prosecutors.²⁵

b. Prosecutorial Immunity

Prosecutors are immune from liability for conduct arising “within the scope of [prosecutors’] duties in initiating and pursuing a criminal prosecution.”²⁶ This immunity applies even when prosecutors intentionally present false testimony or suppress evidence favorable to the accused.²⁷ In other words, a prosecutor cannot be subjected to a civil lawsuit even if he or she fabricates evidence, withholds information, or lies under oath.²⁸ As a result, state bar associations remain hesitant to impose sanctions for prosecutorial misconduct.²⁹ Other factors contributing to the lack of prosecutorial punishments include failure to detect and report the misconduct. For instance, prosecutors often fail to disclose exculpatory evidence, so it is never brought to the defense’s attention. Even in the event that a defense attorney does learn of intentionally withheld evidence, they are frequently reluctant to file a complaint due to fear of

²⁵ *Id.* Interestingly, however, nothing in the ABA Model Rules of Professional Conduct dictates how prosecutors are to behave when negotiating plea bargains. The lack of guidance on ethical obligations of prosecutors for arranging plea bargaining agreements is concerning given the prevalence of cases settled by plea agreements.

²⁶ *Imbler v. Pachtman*, 424 U.S. 409, 410, 431 (1976) (citing 42 U.S.C. § 1983).

²⁷ 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, 816 (2006).

²⁸ CENTER FOR PROSECUTOR INTEGRITY, QUALIFIED IMMUNITY: STRIKING THE BALANCE FOR PROSECUTOR ACCOUNTABILITY 3 (2014), <http://www.prosecutorintegrity.org/wp-content/uploads/2014/09/Qualified-Immunity.pdf> [<https://perma.cc/39LN-6PPC>]. Perhaps absolute immunity should be abolished. However, qualified immunity could be imposed which would offer prosecutors protection only when their behavior is unintentional. Or, at a minimum, state supreme courts should take away an offending prosecutor’s license to practice for a temporary period of time or forever, depending on the severity of the misconduct. However, fully developing this idea is beyond the scope of this Comment.

²⁹ *Id.* at 7 (“A 2005 study of convictions reversed on account of prosecutorial misconduct revealed that only 2.2% resulted in bar disciplinary action. A recent analysis compiled the findings from nine separate studies involving 3,625 incidents of prosecutorial misconduct, which identified only 63 cases in which public sanctions were imposed”). See also Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 60 (2005); CENTER FOR PROSECUTOR INTEGRITY, *supra* note 24, at app. B.

hindering professional relations with a prosecutor that they will undoubtedly work with in future cases.³⁰ Judges also experience hesitancy to report prosecutorial misconduct in the courtroom because they do not want voters in future elections to view them as “soft on crime.”³¹ Finally, laypeople find the process of filing an ethics complaint to be too inconvenient.³²

c. Culture of Infallibility

Today’s society reflects a “culture of prosecutorial infallibility.”³³ Prosecutors are incentivized to earnestly prosecute suspected criminals in order to earn “the gratitude of victims, favorable media coverage, career promotions, appointment to judgeships, and the allure of high political office.”³⁴ They take bigger risks when gaps in evidence do not indicate their suspect’s guilt because they are safeguarded by unqualified civil immunity and shielded from discipline. This mindset of untouchability has only cultivated rampant corruption.³⁵

Government figures often make no effort to conceal the frequency and extent of twisted prosecutorial motives. One

³⁰ CENTER FOR PROSECUTOR INTEGRITY, *supra* note 28, at 7.

³¹ *Id.* See also Quiana D. Harris, *A Plea to Federal Judges: Combatting Prosecutorial Misconduct in the Cliven Bundy Era*, 62 HOW. L.J. 605, 637 (2019) (noting that state judges are supposed to report wayward prosecutors to the state bar, but this rarely ever occurs; “Some believe that fear of backlash from a state judge’s potential voters cause them to be less likely to take the forefront of addressing prosecutorial misconduct. The reluctance of state judges to address prosecutorial misconduct head-on leaves discipline from state bars virtually non-existent.” (footnote omitted)).

³² CENTER FOR PROSECUTOR INTEGRITY, *supra* note 28, at 7.

³³ See CENTER FOR PROSECUTOR INTEGRITY, *supra* note 24, at 1. See also CENTER FOR PROSECUTOR INTEGRITY, *supra* note 28, at 3 (“Established in a milestone Supreme Court decision [*Imbler v. Pachtman*, 424 U.S. 409 (1976)], absolute immunity has represented a pillar in the edifice of prosecutorial invincibility for nearly 40 years.”).

³⁴ CENTER FOR PROSECUTOR INTEGRITY, *supra* note 24, at 3. See also Brand, *supra* note 3 (“*Brady* violations not only send potentially innocent people to prison, but they reinforce a win-at-all costs mentality that undermines the pursuit of justice.”).

³⁵ See CENTER FOR PROSECUTOR INTEGRITY, *supra* note 24, at 4 (citing BENNETT GERSHMAN, *Preface to PROSECUTORIAL MISCONDUCT*, preface to second edition (2d ed. 2008)) (“Former New York City Assistant District Attorney Bennett Gersham [sic] worries the problem may be worsening: ‘The last 15 years are most notable for a vast accretion of power by prosecutors, increased deference by courts to prosecutorial prerogatives, and a general failure of courts and disciplinary bodies to impose meaningful sanctions on prosecutors for misconduct.’”).

prosecutor asked potential new employees in job interviews whether their “previous experiences in the law had provided [them] with a chance to ‘taste blood,’” claiming that he would only hire attorneys “who had already tasted blood and liked it.”³⁶ An Assistant District Attorney in Louisiana kept a small electric chair on his desk wired to a battery to intimidate anyone who doubted him, admonishing that he experienced “no thrill” unless a case presented the chance to impose the death penalty.³⁷

2. Types of Prosecutorial Misconduct

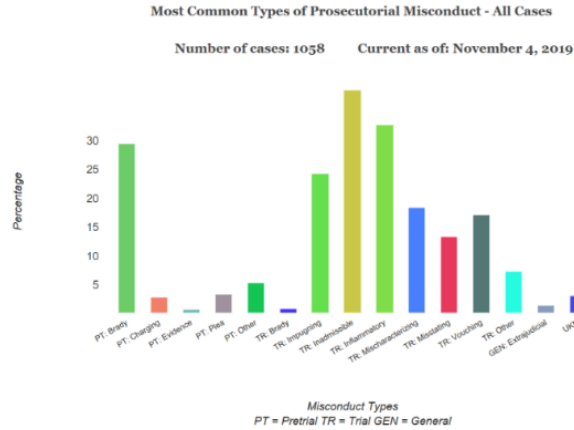
Examples of types of prosecutorial misconduct include: charging a suspect with more crimes than warranted, withholding exculpatory evidence, allowing witnesses to provide false testimony, pressuring defense witnesses to not testify, relying on phony forensic experts, overstating the strength of the evidence during plea negotiations, presenting the jury with misleading information, misstating facts in the cross-examination of a witness, suppressing evidence favorable to the accused, and failing to report prosecutorial misconduct.³⁸ The frequency of each strain is indicated in the following bar graph:³⁹

³⁶ Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 36 (2009).

³⁷ CENTER FOR PROSECUTOR INTEGRITY, *supra* note 24, at 3.

³⁸ See, e.g., *Key Facts*, CENTER FOR PROSECUTOR INTEGRITY, <http://www.prosecutorintegrity.org/key-facts/> [<https://perma.cc/V6RE-B3P4>]; Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, INNOCENCE PROJECT (Apr. 23, 2020), <https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult/> [<https://perma.cc/NYC3-TCCD>].

³⁹ *Most Common Types of Prosecutorial Misconduct—All Cases*, CENTER FOR PROSECUTOR INTEGRITY, <http://www.prosecutorintegrity.org/registry/graph/all/> [<https://perma.cc/HPZ3-ECLG>] (last visited Nov. 4, 2019).



3. Examples of Prosecutorial Misconduct

In *Brady v. Maryland*, an inmate convicted of murder and sentenced to death learned that the State had withheld a statement from his accomplice in the crime admitting to the actual homicide.⁴⁰ The Supreme Court held that suppression of evidence favorable to the accused upon request violates the Due Process Clause of the Fourteenth Amendment where the evidence was material⁴¹ to guilt or punishment, regardless of the State’s good or bad faith.⁴² Since *Brady* applies to evidence known exclusively to

⁴⁰ *Brady v. Maryland*, 373 U.S. 83, 84-85 (1963).

⁴¹ The Supreme Court defined “material” in *United States v. Bagley*, 473 U.S. 667, 682 (1985) (Evidence is material when there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”). In *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), the Supreme Court clarified that the question of materiality “is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial.”

⁴² *Brady*, 373 U.S. at 87. Note that the Supreme Court in *Kyles* expanded the prosecutor’s duty to disclose material evidence favorable to the accused irrespective of whether the defense requested such evidence, holding that suppression by the Government absent a request still constitutes a constitutional error. *Kyles*, 514 U.S. 419 at 437-38 (1995). See also MODEL RULES OF PROF’L CONDUCT r. 3.8(d) (AM. BAR ASS’N 1983) which confirms the prosecutor’s duty to timely disclose exculpatory information to the defense “that tends to negate the guilt of the accused or mitigate[] the offense.”

the prosecutor, its disclosure hinges upon his or her good faith.⁴³ This arrangement is deeply concerning and devoid of meaningful oversight.⁴⁴ Crucial evidence that might exonerate an innocent person⁴⁵ slips away undetected, and *Brady* violations go unenforced.

Due to the lack of regulations governing custodianship of evidence, there is no way to track *Brady* violation incidents.⁴⁶ However, the conundrum has not fallen solely upon deaf ears. Court opinions specifically note that *Brady* violations are one of the most prominent types of prosecutorial misconduct. One scholar even expressed that *Brady* violations “may be the paradigmatic example of prosecutorial misconduct.”⁴⁷ A 1987 study by Hugo Adam Bedau and Michael L. Radelet found that 35 of the 350 wrongful convictions were due to prosecutorial suppression of evidence.⁴⁸ Another study by James S. Liebman, Jeffrey Fagan, and Valerie West in 2000 revealed that sixteen to nineteen percent of cases reversed for error resulted from prosecutorial suppression of evidence.⁴⁹

*Batson v. Kentucky*⁵⁰ is another landmark Supreme Court case involving prosecutorial misconduct. In *Batson*, the prosecutor used his peremptory challenges to strike all four minority potential jurors and curate an all-white jury.⁵¹ The trial judge

⁴³ Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 687 (2006).

⁴⁴ *Brady* violations often result from a flawed assessment of what constitutes material evidence. However, allowing a prosecutor to unilaterally determine whether a piece of evidence is material “would be to appoint the fox as henhouse guard.” *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006).

⁴⁵ *Brand*, *supra* note 3 (Examples of *Brady* material include: “[e]vidence suggesting someone other than the accused committed the crime,” “[e]vidence of a witness’s prior inconsistent statements,” “[e]vidence of a witness’s motive to lie,” “[i]nformation that casts doubt on the credibility of the police,” and “[i]nformation that casts doubt on a crime lab technician.”).

⁴⁶ Gershman, *supra* note 43, at 688.

⁴⁷ *Id.* See also *id.* at 691-92 (“*Brady*, more than any other rule of constitutional criminal procedure, has been the most fertile and widespread source of misconduct by prosecutors . . .”).

⁴⁸ Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 (1987).

⁴⁹ JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 5 (2000).

⁵⁰ 476 U.S. 79 (1986).

⁵¹ *Id.* at 83.

held that a party can use peremptory challenges to strike anyone for any reason, but on appeal, Batson demonstrated that the prosecution engaged in a systematic pattern of discriminatory challenges and thus violated the Equal Protection Clause.⁵² The Supreme Court reversed and remanded the case to the trial court, holding that if the trial court determined that the facts established purposeful discrimination and that the prosecutor did not provide a neutral explanation for his actions, Batson’s conviction had to be reversed.⁵³

*Banks v. Dretke*⁵⁴ is an example of when prosecutorial misconduct almost cost an innocent woman her life. In *Banks*, the prosecutor failed to disclose exculpatory evidence and used false testimony to convict Banks of capital murder and sentence her to death.⁵⁵ The Supreme Court reversed and remanded the case,⁵⁶ but as one scholar pointed out, “[i]t is at least unsettling and indeed frightening to know that some prosecutors believe people are expendable, if necessary, to achieve an end, even if the result is that a person faces execution for a crime he did not commit or where application of the death penalty is simply unwarranted.”⁵⁷

*Connick v. Thompson*⁵⁸ involved a similar fact pattern. After fourteen years on death row, Thompson’s execution date was only weeks away when an investigator working for his defense uncovered an exculpatory blood-evidence report in an obscure file hidden in the New Orleans Police Crime Laboratory.⁵⁹ Prosecutors failed to inform Thompson’s public defender that the perpetrator of the robbery had left his blood on the pants leg of one of the victims.⁶⁰ A test performed on a swatch of fabric taken from the pants conclusively established that the perpetrator’s blood was type B; Thompson’s blood, which prosecutors never tested, was type O.⁶¹

⁵² *Id.* at 83-84.

⁵³ *Id.* at 100.

⁵⁴ 540 U.S. 668 (2004).

⁵⁵ *Id.* at 674-76.

⁵⁶ *Id.* at 705-06.

⁵⁷ Moore, *supra* note 27, at 807.

⁵⁸ 563 U.S. 51 (2011).

⁵⁹ *See id.* at 56.

⁶⁰ *Id.* at 55-56.

⁶¹ *Id.*

Lamar Johnson is another innocent man who was wrongly convicted. The city of St. Louis's chief prosecutor admitted that Johnson did not commit murder, yet he spent more than half of his life behind bars and will remain in prison for the rest of his life without the possibility of parole.⁶² According to a report from St. Louis Circuit Attorney, Kimberly Gardner, and the Conviction Integrity Unit, "Johnson did not shoot [the victim] and had nothing to do with [the] murder, and he should not be in prison for the crime. Imprisonment of an innocent person constitutes a manifest injustice."⁶³ The report uncovered various instances of misconduct by police and prosecutors, including perjury, false testimony, and the payment of over \$4,000 to the lone eyewitness who later recanted.⁶⁴ Additionally, two men later came forward and signed sworn affidavits confessing that they killed the victim and that Johnson was not involved.⁶⁵ One of those men was only sentenced to seven years for the murder and the other was given a life sentence for a murder committed after the victim's.⁶⁶

Toforest Johnson's conviction is another troubling case that reveals the brokenness of the criminal justice system and draws attention to the ongoing problem of prosecutorial misconduct. Johnson is still on Alabama's death row, yet even the man who prosecuted him admits he doubts Johnson's guilt.⁶⁷ The state's star witness, Chambers, admitted to lying over 300 times during the course of the investigation.⁶⁸ Furthermore, witness testimony and phone records place Chambers nowhere near the scene of the crime.⁶⁹ Her story was fabricated in the hopes of winning the \$10,000 reward from the Alabama governor for coming forward

⁶² Ray Sanchez & Dave Cera, *He's Served 24 Years for a Murder Prosecutors Say He Didn't Commit, but He's Been Denied a New Trial*, CNN (Aug. 29, 2019, 12:04 PM), <https://www.cnn.com/2019/08/29/us/missouri-wrongly-convicted-lamar-johnson/index.html> [<https://perma.cc/RSS8-PWD3>].

⁶³ *Id.* (quotation marks omitted).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Radley Balko, *An Illusion of Justice: The Baffling Conviction and Death Sentence of Toforest Johnson Reveal a Broken System*, WASH. POST (Sept. 5, 2019), <https://www.washingtonpost.com/opinions/2019/09/05/an-alabama-man-has-been-death-row-years-he-is-almost-certainly-innocent/?arc404=true> [<https://perma.cc/8MZR-33W5>].

⁶⁸ *Id.*

⁶⁹ *Id.*

with information about who killed a Birmingham police officer.⁷⁰ Chambers’ story changed nearly ten times, and each version contradicted the evidence and alibis in various ways.⁷¹ Despite the vast deficiencies in testimonial veracity and the State’s admission that Chambers had lied before, the prosecutor still told the jury that Chambers was a credible witness.⁷² Investigators never found any physical evidence linking Johnson to the crime,⁷³ yet he was convicted and sentenced to death.

Chambers also implicated another man, Ardragus Ford, with her false testimony.⁷⁴ The district attorney told Ford’s lawyer that he did not think Ford was the killer, yet he still put Ford on trial and sought the death penalty.⁷⁵ At Ford’s trial, the state presented a witness, Bowen, who had not previously been disclosed to the defense.⁷⁶ The state told Ford’s attorney that Bowen had only come to their attention within a few hours before trial and they had no signed or recorded statements from her.⁷⁷ When questioned by the defense later, however, Bowen stated that she had submitted to a recorded interview with the police.⁷⁸ Initially in this interview, Bowen claimed that Ford never mentioned the murder.⁷⁹ However, once the prosecutor threatened her with losing her children if she did not come forward, Bowen’s story magically changed; Bowen now claimed that Ford actually did tell her that he was involved in the murder.⁸⁰ Despite the inconsistency, the judge refused to prevent Bowen from testifying.⁸¹

To sum up the appalling reality of this case, “[t]he state of Alabama attempted to get a death sentence for a man based on a

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (The lead investigator for the sheriff’s dept told the grand jury that “while she might have been dishonest in the past, ‘our investigation reveals there is no doubt that Yolanda Chambers is telling us the truth.’”).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

theory of a murder that directly contradicted a different theory of the same murder that the same state—indeed, the same *prosecutor*—had already used to put a different man on death row.”⁸² The fact that Johnson remains on death row today, when the evidence against him is slim to none, sheds light on the harsh reality that the criminal justice system is inherently broken when prosecutors commit misconduct.

Frederic Block, a federal district judge for the Eastern District of New York, highlighted the financial burden of prosecutorial misconduct; New York taxpayers have forked over millions of dollars in settlement fees regarding wrongful convictions.⁸³ Similarly, 45 wrongful convictions in Texas cost taxpayers approximately \$8.6 million,⁸⁴ and 85 wrongful convictions in Illinois cost taxpayers \$214 million.⁸⁵

4. State Bar Associations and the Illusion of Reform

a. Prosecutorial Ethics: A Statewide Analysis of Rule 3.8(d)

Model Rule of Professional Conduct 3.8(d) (“Rule 3.8(d)”) requires prosecutors in a criminal case to “make timely disclosure⁸⁶ to the defense of all evidence or information known to

⁸² *Id.* (“At the very least, seeking the death penalty for two men by claiming the evidence supports exclusive theories of the crime would seem to violate a prosecutor’s professional ethics. ‘While the practice may be considered constitutional, it is extremely difficult to square with the understanding that a prosecutor’s primary obligation is to do justice, not merely win cases,’ says Carissa Hessick, director of the Prosecutors and Politics Project at the University of North Carolina School of Law. ‘Any prosecutor who pursues this path should face significant scrutiny and should have to publicly explain and defend the decision.’”). *Id.*

⁸³ Frederic Block, *Let’s Put an End to Prosecutorial Immunity*, THE MARSHALL PROJECT (Mar. 13, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity> [<https://perma.cc/V4HB-8NCL>].

⁸⁴ Jennifer Emily & Steve McConigle, *Dallas County District Attorney Wants Unethical Prosecutors Punished*, DALL. MORNING NEWS (May 4, 2008), <https://www.november.org/stayinfo/breaking08/TX-Unethical.html> [<https://perma.cc/GW6F-6587>].

⁸⁵ John Conroy & Rob Warden, *Illinois Taxpayers Forced to Pick Up Big “Injustice Tab”*, BETTER GOV’T ASS’N (June 18, 2011, 9:00 AM), <https://www.bettergov.org/news/illinois-taxpayers-forced-to-pick-up-big-injustice-tab/> [<https://perma.cc/9GYG-DAVT>].

⁸⁶ It is unclear what is meant by “timely disclosure” of the exculpatory evidence. The Second Circuit has held that prosecutors are required to disclose exculpatory evidence “no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made.” *United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001). The Seventh Circuit has provided

the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”⁸⁷ Thirty-six states have adopted this rule verbatim.⁸⁸ Twelve states have adopted this rule with only minor variations in the language used.⁸⁹

The Rules patently state that a “prosecutor’s duty to disclose exculpatory evidence⁹⁰ to the defense cuts to the very core of his

prosecutors with similar guidance: “As long as ultimate disclosure is made before it is too late for the defendant[] to make use of any benefits of the evidence, Due Process is satisfied.” *United States v. Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979). Both of these holdings are vague and again give prosecutors wide discretion in determining a disclosure timeline. The ambiguity in defining what constitutes material evidence and how soon a prosecutor must disclose such material evidence leads to inconsistent results among prosecutors in making decisions they believe satisfy their *Brady* discovery requirements. This lack of guidance produces negative implications for criminal defendants who are frequently presented with exculpatory evidence as early as the night before trial, but often times much later or not at all. The haunting reality is that the decision to disclose material exculpatory evidence is within the prosecutor’s personal judgment, meaning that no one will ever learn of this evidence unless one comes across it by happenstance.

⁸⁷ MODEL RULES OF PROF’L CONDUCT r. 3.8(d) (AM. BAR ASS’N 2007). This is consistent with the duty imposed on prosecutors by the Supreme Court following the landmark decision in *Brady v. Maryland*. While this Comment only focuses on Rule 3.8(d), Rule 3.8 as a whole actually imposes seven obligations specific to prosecutors. See MODEL RULES OF PROF’L CONDUCT r. 3 (AM. BAR. ASS’N 2007).

⁸⁸ Hans P. Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, PROSECUTOR, Jan.-Mar. 2008, at 21.

⁸⁹ *Id.*

⁹⁰ *Brady* gives prosecutors discretion to decide what evidence is deemed exculpatory, and how soon to disclose this evidence to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963). The lack of uniformity in labeling evidence as “exculpatory” stems from the vague “materiality” standard. “[A] prosecutor’s duty to disclose evidence favorable to the defense is only triggered when the evidence is material.” Joy, *supra* note 4, at 421 n.116. In *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Supreme Court held that evidence is material when there is a “reasonable probability” that the outcome of the trial would have been different if such evidence was turned over to the defense. This definition of materiality invokes different responses from prosecutors. For example, one prosecutor might withhold evidence from the defense on a theory that the evidence is not material because there is enough evidence of guilt to convict the defendant without the exculpatory evidence, while another prosecutor in the same scenario would have turned over the same evidence as material, garnering the belief that the outcome of the case may turn out differently in the absence of such exculpatory evidence.

duty as both an advocate and as a minister of justice.”⁹¹ Thus, it is crucial to maintain an effective system that penalizes prosecutors who fail to disclose such material information. The title of Rule 3.8 of the Model Rules of Professional Conduct is self-instructive: “Special Responsibilities of a Prosecutor.”⁹² No other type of lawyer is subject to particularized rules of conduct.⁹³ This phenomenon further evidences the importance and significance of the type of work prosecutors engage in and indicates that extra precautions must be taken to channel their wide range of power.⁹⁴

Brady imposed an obligation on prosecutors to present evidence they deem material to guilt upon the defendant’s request.⁹⁵ On the other hand, Rule 3.8(d) requires prosecutors to voluntarily provide the defense with evidence favorable to the accused and “to do so in a timely manner.”⁹⁶ The ABA has opined that Rule 3.8(d) urges prosecutors to “err[] on the side of caution.”⁹⁷

Unfortunately, the vague terminology in Rule 3.8(d) negates its effectiveness in promoting higher ethical standards among prosecutors.⁹⁸ For example, it is unclear what standard is used for

⁹¹ Sinha, *supra* note 88, at 20.

⁹² MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2007).

⁹³ Joy, *supra* note 4, at 412 (The 1969 ABA Model Rules of Professional Conduct Ethical Considerations divulged that the prosecutor’s special duty originates from the prosecutor’s role in “representing the sovereign” (footnote omitted)).

⁹⁴ Sinha, *supra* note 88, at 20. *See also*, Keenan et. al, *supra* note 4, at 222 (noting Rule 3.8 also restricts prosecutors from pursuing charges absent probable cause). However, Rule 3.8 falls short of implementing effective procedural safeguards to combat prosecutors’ unfettered discretion when it comes to charging decisions. *See* Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 152 (2016) (noting the irony that Rule 3.8 actually fails to address many aspects of a prosecutor’s work and “is essentially limited to restating the constitutional minimum” of “prohibiting prosecutors from pursuing charges that are not supported by probable cause”). The implication imposed by the concept of implementing a special rule for prosecutors presents a stark dichotomy with the actual substance of the special rule. Although there is a clear need for ethics rules specific to prosecutors, such rules currently in place are far short of foolproof.

⁹⁵ Keenan et. al, *supra* note 4, at 224.

⁹⁶ *Id.* “In this way, Rule 3.8(d) is more rigorous than *Brady*’s material standard by requiring disclosure of exculpatory or mitigating evidence regardless of whether the favorable evidence is dispositive of the ultimate issue of guilt.” *Id.* at 224-25.

⁹⁷ *Id.* at 225.

⁹⁸ *Id.*

evaluating whether evidence is favorable to the accused or what is intended by the knowledge and timeliness criteria.⁹⁹

b. Reporting Professional Misconduct and Examples of Misconduct: A Statewide Analysis of Rules 8.3(a) and 8.4(d)

A survey of all fifty state bar associations and Washington D.C. indicates that fifty bar associations¹⁰⁰ have adopted Rule 8.3, which mandates the duty to report professional misconduct,¹⁰¹ and all fifty-one bar associations have adopted Rule 8.4, which governs misconduct.¹⁰² With the exception of a few minor variations, in each state, Rule 8.3(a) asserts that “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”¹⁰³ In other words, state bars place an emphasis on the duty to self-report as well as report the unethical behavior of others in the field. While the requirement sounds effective in theory, the likelihood that attorneys will take such a mandate to heart seems highly unlikely.

In addition, the language “the appropriate professional authority” is vague, making it difficult for lawyers to know whom

⁹⁹ *Id.* In a formal advisory opinion, the ABA explained that evidence “known to the prosecutor” is evidence of which “the prosecutor has actual, rather than constructive, knowledge.” *Id.* Based on this interpretation, “Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence . . . and actually imposes an ethical standard below the constitutional minimum.” *Id.* In *Kyles*, the Supreme Court held that prosecutors have a duty, under *Brady*, to acquire information regarding any favorable evidence known to other government personnel, including police officers; however, abiding by the ABA’s logic would enable a prosecutor “to pursue a conviction without having familiarized himself with the most basic aspects of the case, such as the arresting officer’s police report and witness statements.” *Id.* Pursuant to the ABA’s analysis of Rule 3.8(d), it is unclear whether a prosecutor is “ethically bound” to further investigate inconsistencies in the evidence, such as discrepancies between a witness’s statement and the police report. *Id.* The ABA’s advisory opinion defines “timely” as “as soon as reasonably practical.” *Id.* at 226. This vague definition permits prosecutors who desire to obtain an advantage during plea negotiations “to interpret ‘timely’ as meaning any time prior to trial.” *Id.* at 227.

¹⁰⁰ California has not adopted a version of Rule 8.3.

¹⁰¹ MODEL RULES OF PROF’L CONDUCT r. 8.3 (AM. BAR ASS’N 2007).

¹⁰² MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2007).

¹⁰³ MODEL RULES OF PROF’L CONDUCT r. 8.3 (AM. BAR ASS’N 2007).

to contact. Each state bar maintains varying disciplinary structures, so the identity of the appropriate professional authority might be unclear. For example, the State Bar of Georgia's General Counsel is responsible for investigating and prosecuting claims when a lawyer has violated the ethics rules,¹⁰⁴ whereas in California, the same role belongs to the Office of the Chief Trial Counsel.¹⁰⁵ Rule 8.3 also lacks guidance on what it means to inform the appropriate professional authority. Is there a complaint form that the reporting lawyer must fill out? Must a complainant mail a letter to the person in charge of investigating and prosecuting complaints? If so, is the appropriate professional authority's contact information readily available to attorneys? Or are attorneys supposed to report unethical behavior to the professional authority in person? This rule fails to effectively communicate expectations regarding the duty to report unethical behavior.

Further, when does behavior meet the threshold of raising a "substantial" question of one's honesty? Moreover, what does it mean to "know" that someone has committed misconduct? In other words, what does a lawyer do if he suspects unethical behavior but cannot be sure? Does a lawyer need concrete evidence of the misconduct or can he report behavior based on mere suspicion? If suspicion of misconduct alone is not enough to file a complaint, lawyers may be discouraged from reporting because they are not absolutely certain and do not want to get in trouble if they bring a false allegation. However, allowing lawyers to file complaints based on mere suspicion could also lead to abuse because lawyers may make a false claim of suspicion, hoping to incapacitate an opponent before trial. Therefore, a lawyer probably should have more than a hunch that another lawyer engaged in unethical behavior to prevent frivolous claims; one may need some form of concrete proof. Since filing standards are murky, potential informants may be discouraged from reporting misconduct, thus

¹⁰⁴ *Ethics and Discipline*, STATE BAR OF GEORGIA, <https://www.gabar.org/barrules/ethicsandprofessionalism/index.cfm> [<https://perma.cc/9TDL-P8P7>] (last visited May 11, 2021).

¹⁰⁵ *Conduct and Discipline*, THE STATE BAR OF CALIFORNIA, <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline> [<https://perma.cc/HX24-U5UC>] (last visited May 11, 2021).

allowing lawyers to evade accountability for their unethical actions. This effect is further compounded by the fact that it is often unclear whether there is anonymity in reporting. Finally, there is no way to compel reporting, and no external body holds judges and practitioners accountable for turning a blind eye to unethical behavior.

Forty-nine states and Washington D.C. have enacted variants of Rule 8.4 that list examples of professional misconduct. Surprisingly, the rule does not make any specific mention of *Brady* or *Batson* violations, or other in-court misconduct.¹⁰⁶ The enumerated misconduct relates only to violations of the state bars' individual Rules of Professional Conduct and conduct outside of the courtroom, such as incurring criminal charges unrelated to work.¹⁰⁷ Rule 8.4(d) is the only mechanism that comes close to regulating court behavior and it is vague at best. In thirty-eight states, Rule 8.4(d) states that “it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.”¹⁰⁸ However, there is no consensus as to the practical meaning of “prejudicial to the administration of justice.” Does the commandment encompass *Brady* violations, since withholding exculpatory evidence prejudices a defendant's case? There must be clear guidelines for the exact types of conduct that can subject one to punishment and clearly defined consequences for their committal.

North Dakota, Colorado, Florida, Rhode Island, and Nebraska each have enacted slight variations of Rule 8.4(d) that explicitly mention types of bias.¹⁰⁹ For example, North Dakota's rule directs that “[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel, or others”¹¹⁰

¹⁰⁶ See MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2007).

¹⁰⁷ See *id.*

¹⁰⁸ MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2007).

¹⁰⁹ N.D. RULES OF PROF'L CONDUCT 8.4(f); COLO. RULES OF PROF'L CONDUCT 8.4(g); FLA. RULES OF PROF'L CONDUCT 8.4(d); R.I. RULES OF PROF'L CONDUCT 8.4(d); NEB. RULES OF PROF'L CONDUCT 8.4(d).

¹¹⁰ N.D. RULES OF PROF'L CONDUCT 8.4(f).

This prohibition more closely parallels the relevant jurisprudence governing issues of prosecutorial misconduct.¹¹¹

Georgia, Kentucky, Alaska, Hawaii, New Hampshire, Texas, Virginia, Wisconsin, and Washington D.C. do not mention prejudice at all in their descriptions of professional misconduct under Rule 8.4.¹¹² However, Washington D.C.'s formulation of Rule 8.4(d) denotes that "[i]t is professional misconduct for a lawyer to [e]ngage in conduct that seriously interferes with the administration of justice."¹¹³ Again, however, this iteration is inherently vague.

c. State Bar Association Disciplinary Measures

A survey of the states' individual disciplinary systems suggests promising trends towards fairness in the criminal justice system. However, the mechanisms in place provide only a false sense of security. While the structures appear facially sound, in reality, the state bars rarely enforce their policies. The problem starts with the inconvenience of filing bar complaints: only four states allow a party to file a complaint online; most states offer downloadable forms online, but the form must be printed and mailed; and twelve states mandate that complaints be submitted over the telephone or by mail.¹¹⁴ Kentucky and New Hampshire go so far as to require that the complaint be notarized.¹¹⁵

Another issue is the negative stance bar associations take on filing complaints. For example, Mississippi and Georgia strongly discourage filing complaints. The Mississippi Bar Association's

¹¹¹ For example, *Batson* violations are based on race, and this rule explicitly states that it is professional misconduct to act biased based on race. *Id.*

¹¹² GA. RULES OF PROF'L CONDUCT 8.4; KY. RULES OF PROF'L CONDUCT 8.4; ALASKA RULES OF PROF'L CONDUCT 8.4; HAW. RULES OF PROF'L CONDUCT 8.4; N.H. RULES OF PROF'L CONDUCT 8.4; TEX. RULES OF PROF'L CONDUCT 8.4; VA. RULES OF PROF'L CONDUCT 8.4; WIS. RULES OF PROF'L CONDUCT 8.4; D.C. RULES OF PROF'L CONDUCT 8.4.

¹¹³ D.C. RULES OF PROF'L CONDUCT 8.4(d).

¹¹⁴ Keenan et. al, *supra* note 4, at 235-36 (footnotes omitted). Besides the initial inconvenience, another obstacle to holding prosecutors accountable is that almost half the states fail to offer complainants the opportunity to appeal the dismissal of their complaint. Keenan et. al, *supra* note 4, at 239-240. This is especially problematic if a group of biased attorneys is reviewing a complaint. That is why, as discussed below, having at least one layperson on an Office of Professional Responsibility panel is essential to help decrease the incidence of bias. See *infra* Part III.B.2.

¹¹⁵ *Id.* at 236.

website cautions parties considering filing a complaint that “lawyers are human,” and that “[t]he lawyer [complained against] inevitably suffers from the accusation, regardless of whether any misconduct is ultimately found.”¹¹⁶ This language, paired with a reminder that complaints cannot be withdrawn, invokes guilt and acts as a deterrent that causes parties with legitimate claims to second-guess themselves. Along a similar vein, Georgia requires potential filers to partake in a mediation program prior to deciding whether to file a complaint.¹¹⁷ This process also discourages parties from filing complaints. Further, the mediation is designed to resolve private issues between attorneys and their clients, not to address instances of prosecutorial misconduct.¹¹⁸ Georgia law even explicitly states that “[t]here is no disciplinary penalty for a violation of [Rule 8.3(a)],”¹¹⁹ which only serves to further disincentivize the submission of genuine complaints.

Moreover, a lack of data on the number of complaints filed against prosecutors makes it difficult to track the frequency of misconduct.¹²⁰ Illinois is the only state that “publishes data on the number of complaints of prosecutorial misconduct received and investigated on an annual basis.”¹²¹ In 2010, 99 of the 4,016 charges against attorneys docketed by the Illinois Attorney Registration and Disciplinary Commission involved charges of prosecutorial misconduct; of those 99 cases, only 1 resulted in a formal hearing.¹²²

State statutes of limitations on filing bar complaints is another barrier to accountability.¹²³ The temporal limitations such

¹¹⁶ *Id.* (citing *Complaint Procedure*, MISS. BAR, <https://www.msbar.org/complaint.php> (last visited Oct. 25, 2011)).

¹¹⁷ *Id.* (footnote omitted).

¹¹⁸ *Id.*

¹¹⁹ GA. RULES OF PROF'L CONDUCT 8.3.

¹²⁰ It is important to note, however, that even if data was collected on the number of complaints filed against prosecutors, that number would not be representative of the number of instances of prosecutorial misconduct. As noted above, filing a bar complaint can be cumbersome so not all parties will go through the trouble of actually filing a report. Additionally, parties may disregard the misconduct altogether in situations of harmless error.

¹²¹ Keenan et. al, *supra* note 4, at 239.

¹²² *Id.*

¹²³ *Id.* at 237.

statutes impose are troubling because instances of prosecutorial misconduct typically do not surface until many years beyond their occurrence. As of 2011, at least twenty-one states place a statute of limitations on complaints filed against attorneys, ranging from two years after the occurrence of the misconduct to up to ten years following the discovery of the misconduct.¹²⁴ The ABA's Model Rules discourage states from imposing statutes of limitation on attorney disciplinary proceedings.¹²⁵ States that have implemented statutes of limitations, however, typically toll them in situations where the misconduct escaped undetected as a result of fraud or concealment.¹²⁶ Despite tolling allowances, such statutes still create a major drawback to achieving prosecutorial accountability.

For example, in 2005 the State Bar of North Carolina filed a complaint against two district attorneys for violating various ethics rules, including failure to report an immunity deal presented to a witness in exchange for his testimony at trial.¹²⁷ Though the North Carolina State Bar mandates that all complaints be filed within six years of the transgression, the defense attorneys neglected to file their complaint against the two district attorneys until after the period expired because they feared that it would adversely affect their client's trial.¹²⁸ The State Bar Disciplinary Hearing Commission deemed the complaint time-barred, thus precluding disciplinary action against the district attorneys for their actions.¹²⁹ While statutes of limitations are arguably necessary to prevent frivolous claims against attorneys who have long-since retired following the alleged misconduct, such statutes pose an additional burden on the aggrieved party. As in the North Carolina case, a defendant may face the difficult task of deciding whether to risk potential ramifications at trial due to the filing of a bar complaint against

¹²⁴ *Id.* (footnotes omitted).

¹²⁵ *Id.* (citing MODEL RULES OF LAWYER DISCIPLINARY ENFORCEMENT r. 32 cmt. (AM. BAR ASS'N 2007)).

¹²⁶ *Id.* (footnote omitted).

¹²⁷ *Id.* at 237-8 (footnotes omitted).

¹²⁸ *Id.* at 238 (footnotes omitted).

¹²⁹ *Id.* (citing Memorandum and Order on Defendant's Motion to Dismiss, at 12 11.4, N.C. State Bar v. Brewer, No. 05 DHC 37 (Disciplinary Hearing Comm'n of the N.C. State Bar Apr. 4, 2006)).

the lead prosecutor, or to allow the prosecutor’s unethical behavior to go unreported in order to secure favorable client outcomes.

Finally, while the state bars’ disciplinary systems function in theory, major time delay issues prevent prosecutors from ever facing the consequences of their reprehensible behavior, thus diminishing the punishment’s deterrent effect. For instance, in California, it takes a minimum of two to three weeks just to review a bar complaint.¹³⁰ Then, if the bar determines that there is a strong likelihood of misconduct, an investigation of unethical conduct may take six months or more. According to data collected by the ABA, the amount of time between filing a bar complaint and imposing a punishment may take more than 1,000 days in some states.¹³¹ This time delay only further discourages parties with legitimate claims from filing complaints.

d. State Bar Association Enforcement of Penalties

In *Imbler v. Pachtman*, the Supreme Court noted that “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”¹³² However, such an assertion is unfounded. In reality, state bars rarely enforce punishments for prosecutorial misconduct.

In *Connick v. Thompson*, the Supreme Court noted that prosecutors are discouraged from engaging in misconduct due to the fact that they face the threat of “professional discipline, including sanctions, suspension, and disbarment.”¹³³ In practice, it seems that such threats remain empty; data indicates that the Supreme Court incorrectly assumed that bar associations opt to

¹³⁰ *After You File a Complaint*, STATE BAR OF CALIF., <http://www.calbar.ca.gov/Public/Complaints-Claims/How-to-File-a-Complaint/After-You-File> [<https://perma.cc/RWK2-VY9Z>] (last visited Mar. 5, 2021). This time delay problem is not unique to California. For example, a defense attorney in New Orleans “filed eight complaints with the Office of Disciplinary Council in 2011. It took three and a half years for him to receive notice that the office even received them.” Brand, *supra* note 3 (citation omitted).

¹³¹ Keenan, et. al., *supra* note 4 at 237.

¹³² *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

¹³³ *Connick v. Thompson*, 563 U.S. 51, 66 (2011) (citations omitted).

discipline prosecutors.¹³⁴ The lamentable reality is that prosecutors are rarely ever disciplined. The Bronx District Attorney's Office is a clear example of lacking ethical oversight. Despite the office's large size and employment of approximately "400 prosecutors and hundreds of support staff," it possesses no code of conduct, formal disciplinary rules indicating when sanctions will be imposed, procedures for investigating or reprimanding prosecutors, or records of prosecutorial disciplinary records.¹³⁵ Perhaps most telling is the fact that, as of 2011, the office has never imposed sanctions on prosecutors for violating the mandate of *Brady*.¹³⁶ In fact, as one scholar, Joel B. Rudin, points out, District Attorneys' offices typically defend internal misconduct, even when faced with overwhelming evidence against the errant prosecutor.¹³⁷

Unfortunately, the lack of discipline is not unique to New York. Nine studies have been conducted analyzing disciplinary actions, or lack thereof, at the state and national levels as a result of prosecutorial misconduct between 1963-2013.¹³⁸ The studies revealed a collective 3,625 instances of misconduct.¹³⁹ Of those cases, only two percent resulted in the infliction of public sanctions.¹⁴⁰ Additionally, the sanctions imposed regularly

¹³⁴ Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 540-544 & 572 (2011).

¹³⁵ *Id.* at 544.

¹³⁶ *Id.* at 557-58.

¹³⁷ *See id.* at 539-40.

¹³⁸ CENTER FOR PROSECUTOR INTEGRITY, *supra* note 24, at 8. *See also*, Brand, *supra* note 3 ("Other studies confirm that state bars rarely discipline *Brady* violators. In 2010, for example, the Northern California Innocence Project found that the state bar 'publicly disciplined only one percent of the prosecutors in the 600 in cases in which the courts found prosecutorial misconduct.'" (citation omitted)); Harris, *supra* note 31, at 638-39. Harris also details the results of the Northern California Innocence Project's 2010 study in which disciplinary action was taken in only six of the 4,000 federal and state criminal cases in California where instances of prosecutorial misconduct were reported, amounting to public discipline by the State Bar of only one percent of the prosecutors who engaged in such misconduct. *See id.* "The study's results revealed that those empowered to address the problem—California state and federal courts, prosecutors, and the California State Bar—repeatedly fail to take meaningful action." *Id.*

¹³⁹ CENTER FOR PROSECUTOR INTEGRITY, *supra* note 24, at 8.

¹⁴⁰ *Id.*

constituted a mere “slap-of-the-wrist.”¹⁴¹ In its study of fifty criminal cases, the Center for Prosecutor Integrity discovered that the most common sanction only required the prosecutor to pay the costs of the disciplinary hearings.¹⁴² A prosecutor was suspended or disbarred in only fourteen of these cases.¹⁴³ Of great concern is the judicial system’s attitude towards ethical violations by prosecutors. In fact, one commentator observed that judges “seemingly bend over backwards to excuse the conduct.”¹⁴⁴

In 2009, the New York Bar Association Task Force on Wrongful Convictions (“Task Force”) conducted a study and found that thirty-one of the fifty-three cases that were overturned in New York were due to instances of *Brady* violations, false testimony, and refusal to investigate additional suspects.¹⁴⁵ The Task Force also concluded that “[r]esearch ha[d] not revealed public disciplinary steps against prosecutors.”¹⁴⁶ Furthermore, the study indicated that there was “little or no risk to the specific [prosecutor] involved resulting from a failure to follow the [*Brady*] rule.”¹⁴⁷

The Commission on the Fair Administration of Justice in California conducted a study with similar results.¹⁴⁸ The agency reviewed 2,131 California cases in which prosecutorial misconduct claims were raised.¹⁴⁹ California courts “found prosecutorial misconduct in 444 of these cases,” 54 of which were consequently

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* (“Even in the most reprehensible cases, judges typically do not refer the case for disciplinary action and ethics boards fail to apply sanctions. Courts rely upon fault-absolving notions like ‘harmless error’. . . .” (citing Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013, 5:30 AM), <http://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody> [https://perma.cc/U8Z3-MUKT])).

¹⁴⁵ N.Y. STATE BAR ASS’N, FINAL REPORT OF THE N.Y. STATE BAR ASS’N’S TASK FORCE ON WRONGFUL CONVICTIONS 6-7, 19 (2009), <http://www.nysba.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendaItems/FinalWrongfulConvictionsReport.pdf> [https://perma.cc/9KC9-X6AG].

¹⁴⁶ *Id.* at 29.

¹⁴⁷ *Id.* See also Rudin, *supra* note 134, at 542.

¹⁴⁸ Rudin, *supra* note 134, at 542.

¹⁴⁹ *Id.* (citing CAL. COMM. ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 71 (Gerald Uelman ed., 2008), <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf> [https://perma.cc/NJ4G-DT35]).

reversed.¹⁵⁰ However, none of these 54 cases were reported to the state bar association.¹⁵¹ The Commission determined that its “reliance upon the State Bar as the primary disciplinary authority [was] seriously hampered by underreporting.”¹⁵² Perhaps of most concern, none of the 444 cases of misconduct garnered internal discipline.¹⁵³

In 1999, the Chicago Tribune also studied internal discipline of prosecutorial misconduct that produced disheartening results.¹⁵⁴ The study revealed that since *Brady* was decided in 1963, 381 homicide cases nationwide were reversed for the admission of false evidence or withholding exculpatory evidence.¹⁵⁵ Only one prosecutor was fired, but he was reinstated with back-pay upon appeal.¹⁵⁶ Another prosecutor was suspended by his office for thirty days, and another had his law license suspended for fifty-nine days.¹⁵⁷ However, none of the prosecutors involved in misconduct “were disbarred or received any public sanction.”¹⁵⁸ Not only are attorneys neglecting the Rule 8.3(a) duty to report instances of misconduct to their state bar, but prosecutor offices are failing to discipline their employees.

In 1987, Richard A. Rosen evaluated all reported cases of lawyer discipline to determine how many of those cases resulted in disciplinary action against prosecutors for *Brady* violations.¹⁵⁹ Shockingly, only nine cases contemplated discipline, and of those nine, only six resulted in an enforced punishment.¹⁶⁰ Jeffrey Weeks conducted the same survey ten years later and found the same amount of *Brady* violations, yet prosecutors were only

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 542.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 540 (citing Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 718-20 (1987)).

¹⁶⁰ *Id.* at 541 (citing Rosen, *supra* note 159, at 720-31).

disciplined in four of those cases.¹⁶¹ Fred C. Zacharias explored the number of times that prosecutors were disciplined compared to the number of reported cases of professional misconduct.¹⁶² He concluded that prosecutors were only disciplined for misconduct, such as *Brady* violations, twenty-seven times.¹⁶³ Additionally, Zacharias compared the rate of prosecutorial discipline to that of all other attorneys and found the rate of discipline for prosecutors significantly lower compared to private attorneys.¹⁶⁴ These results reinforce the notion that unethical behavior remains a low priority in prosecutors’ offices. Since disciplinary action is a rarity, the Supreme Court operates under a faulty assumption that prosecutors respond to threats of professional sanctions.

After analyzing published decisions of state bar disciplinary committees, the current trend in attorney discipline regrettably remains the same: there is a persistent pattern of lacking discipline. This lingering trend demands active reform efforts to combat prosecutorial abuse in the pursuit of justice. Nationwide, forty-three percent of wrongful convictions involve prosecutorial misconduct (or other individuals involved in the investigation) and less than two percent of those cases result in public sanctions for the offending official.¹⁶⁵ Such a reality is appalling given the high standards to which prosecutors are held and seriously undermines the public’s confidence in the criminal justice system. These statistics are also cause for concern given the great emphasis Americans place on “justice for all” and the alarming number of wrongful convictions based on little to no evidence against innocent individuals. The contention illuminates a marked crisis in the context of criminal adjudication.

Hundreds of convictions have been reversed due to *Brady* violations.¹⁶⁶ It is shocking to compare the number of egregious

¹⁶¹ *Id.* (citing Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 881 (1997)).

¹⁶² Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 743 (2001).

¹⁶³ *Id.* at 751-54 tbls. VI & VII.

¹⁶⁴ *Id.* at 755.

¹⁶⁵ *Key Facts*, CENTER FOR PROSECUTOR INTEGRITY, <http://www.prosecutorintegrity.org/key-facts/> [<https://perma.cc/SG5P-8MHT>] (last visited Oct. 22, 2019).

¹⁶⁶ Gershman, *supra* note 43, at 686.

violations committed by prosecutors to the number of times these prosecutors are actually disciplined. As one scholar noted, “[o]ne would naturally expect that a prosecutor who abetted the conviction of an innocent person by suppressing exculpatory evidence would be a prime candidate for severe disciplinary action.”¹⁶⁷ Sadly, this is not the case. A disturbing example of deficient prosecutorial discipline occurred in *People v. Ramos*, where an innocent man spent seven years in jail for a crime he did not commit.¹⁶⁸ His conviction and incarceration resulted from a prosecutorial directive to withhold exculpatory evidence from the defense.¹⁶⁹ While the case was eventually reversed for numerous *Brady* violations, the prosecutor was never reprimanded.¹⁷⁰ Acquiescing to reckless behavior that preys upon innocent individuals is a major problem that contradicts the deep-rooted American cry of liberty and justice for all. A lack of punishment eschews accountability and cultivates a calamitous system of abuse.

B. *The Connecticut Bill*

Connecticut was the first state to enact a bill requiring prosecutors to collect data from various procedures, such as arrests, prison time, plea bargains or diversionary programs, the number of cases that went to trial, and demographics.¹⁷¹ The state Division of Criminal Justice oversees prosecutors¹⁷² and must provide annual data to the Office of Policy and Management (OPM) starting no later than February 2021.¹⁷³ Then, the OPM must issue annual reports to the Criminal Justice

¹⁶⁷ *Id.* at 724.

¹⁶⁸ *People v. Ramos*, 614 N.Y.S.2d 977, 980 (N.Y. App. Div. 1994).

¹⁶⁹ *Id.*

¹⁷⁰ Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price; Disciplinary Action Is Rare After Misconduct or Mistakes*, N.Y. TIMES (Mar. 21, 2004), <https://www.nytimes.com/2004/03/21/nyregion/when-prosecutors-err-others-pay-price-disciplinary-action-rare-after-misconduct.html> [https://perma.cc/75M2-RDCD]. See also JIM DWYER ET AL., ACTUAL INNOCENCE 225 (New Am. Library 2003) (explaining that even though cases may be reversed due to prosecutorial misconduct, “nothing happens to the people who broke their oaths and the law in pursuit of conviction”).

¹⁷¹ S.B. 880, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019).

¹⁷² *The Division of Criminal Justice*, CONNECTICUT.GOV (last visited May 11, 2021) <https://portal.ct.gov/DCJ/About-Us/About-Us/About-Us> [https://perma.cc/G6YB-EVHE].

¹⁷³ S.B. 880, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019).

Commission¹⁷⁴ and make the presentation publicly available on the internet.¹⁷⁵ Connecticut is also in the process of implementing an electronic case management system to expedite and streamline data collection.¹⁷⁶

This bill also established a Criminal Justice Commission, “comprised of the Chief State’s Attorney and six members nominated by the Governor and appointed by the General Assembly,” two of whom are judges from the Superior Court, that will meet to “appoint, reappoint, remove, or otherwise discipline the Chief State’s Attorney, a deputy chief state’s attorney or a state’s attorney.”¹⁷⁷ These meetings must also include an opportunity for public testimony.¹⁷⁸ The commission will almost certainly increase the likelihood that prosecutors are held accountable for misconduct, as the committee’s stated role is candidly disciplinary in nature. Encouraging public testimony also keeps the public engaged in the disciplinary process and allows them to know what prosecutors are doing. Constant public involvement also encourages prosecutors to behave ethically for fear of spawning a bad reputation, which is especially important in states where the public elects the prosecutors.

The goal of this bill is to increase fairness and transparency in the criminal justice system.¹⁷⁹ Apart from data collection requirements, the bill also expands Connecticut’s Early Screening and Intervention Program, “develop[s] resource coordinators and greater prison interactions with the [Connecticut] Department of Corrections,” provides additional funding for prosecutorial

¹⁷⁴ S.B. 880, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019). <https://www.cga.ct.gov/2019/ACT/pa/pdf/2019PA-00059-R00SB-00880-PA.pdf> [<https://perma.cc/DQ5H-FF3G>].

¹⁷⁵ S.B. 880, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019).

¹⁷⁶ Elie Mystal, *Prosecutorial Data Collection Is Coming to Connecticut*, ABOVE THE LAW (June 10, 2019, 1:13 PM), <https://abovethelaw.com/2019/06/prosecutorial-data-collection-is-coming-to-connecticut/> [<https://perma.cc/BG67-LPVN>]. See also Associated Press, *Connecticut Will be First State to Collect Prosecutor Data to Study Racial Bias*, NBC NEWS (June 6, 2019, 8:06 AM), <https://www.nbcnews.com/news/us-news/connecticut-will-be-first-state-collect-prosecutor-data-study-racial-n1014416> [<https://perma.cc/LV72-EAM9>].

¹⁷⁷ S.B. 880, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019).

¹⁷⁸ *Id.*

¹⁷⁹ Advisory Memorandum from the Conn. State Advisory Comm. to the U.S. Comm’n on Civil Rights 5 (May 1, 2019), <https://www.usccr.gov/press/2019/05-01-CT-SAC-Prosecutor-Memo-for-Legislation.pdf> [<https://perma.cc/W8WZ-VQUP>].

training, and increases opportunities for the public to be heard in the prosecutorial appointment process.¹⁸⁰

While the Connecticut bill marks a clear advancement in the quest for prosecutorial accountability, it does not completely cure the problem. The data will probably be largely unorganized, and thus, of little value. For example, general data on the number of convictions will not specify how many were wrongful. Since prosecutorial misconduct frequently goes unreported, particularly in cases of harmless error, the number of convictions remains disproportionate to the number of ethical prosecutions. Moreover, prosecutors may actually engage in misconduct more frequently if their actions are documented. The tracked data may appear as though the public is “keeping score,” and create pressure to convict a certain number of people per year and thus rush to charge someone with an offense when the evidence against that person is minimal at best.

II. ARGUMENT

A. Implement New Legislation Modeled Pursuant to the Connecticut Bill

1. Mandate Prosecutorial Data Collection

Mandated data collection by prosecutors is an essential first step in finding a mechanism to hold prosecutors accountable.¹⁸¹

¹⁸⁰ *Id.*

¹⁸¹ Interestingly, scholars had already recognized the importance of collecting data ten years ago. See Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1617 (2010) (“Promising strategies for shrinking the accountability deficit in the United States need not wait for prosecutors to decide for themselves to collect data and explain that data to the public. The law could affirmatively promote transparency. More transparent reporting of office operations becomes plausible for prosecutors’ offices through improved case data management. If state law required the regular publication of reports from prosecutors, with certain standard metrics of office performance in the report, interest groups, such as neighborhood associations, victim advocacy organizations and civil liberties organizations would watch those reports closely. They would sound the alarm if a prosecutor were misusing resources or departing too dramatically from current voter priorities in the enforcement of criminal law. . . . The availability of data and users of the data among different constituencies will provide the mechanism for accountable prosecutors.”).

Absent information on prosecutorial actions, state bars and the public have no way to track whether prosecutors are abusing their unbridled power.

State attorney generals should collect data on defendants, including the “total number of defendants prosecuted; total number of defendants prosecuted for felonies and for misdemeanors; age; race or ethnicity; sex; physical or mental disability; zip code of primary residence; veteran status; and indigency finding by Judicial Branch, if applicable.”¹⁸² They should also amass data on plea deals, “including at least the first and last plea deal offers by charging offense.”¹⁸³ Additionally, data on defendants under the age of eighteen should be documented, including the “total number of cases referred to a juvenile probation officer, total number of cases dealt with informally and dealt with formally, total number of cases dealt with formally that are mandatory transfers and the number that are discretionary transfers requested by prosecutors, and the total number of cases that are transferred back to juvenile court after a discretionary transfer request.”¹⁸⁴ The collection of data tracking the number of arrests, arraignments, continuances, use of diversionary programs, non-judicial sanctions, court fees or fines, dispositions by charge, and “[b]ail or bond and pretrial release determinations, including prosecutors’ recommendations and time held” is also crucial.¹⁸⁵ Connecticut now mandates the collection of these data types, and the other states should follow suit.¹⁸⁶

2. Give Attorneys General More Power

a. Clearly Indicate Permissible Behavior and Communicate Ramifications

All states should afford their state attorneys general the discretionary power to create their own internal policies governing

¹⁸² Advisory Memorandum, *supra* note 179.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 6.

¹⁸⁵ *Id.*

¹⁸⁶ S.B. 880, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019).

regulation of prosecutors' work.¹⁸⁷ Each attorney general should set clear, unequivocal guidelines for how prosecutors should conduct their *Brady* operations. For example, attorneys general should mandate that prosecutors keep the victims' families informed about the state of the investigation or rule out using certain types of scientifically deficient evidence to prove a crime, such as bite mark evidence.¹⁸⁸ A precise and straightforward set of rules promotes consistency in the prosecutor's behavior and offers them less flexibility to stray from the norm.

Further, requiring state attorneys general to establish their own policies regarding prosecutors' discovery obligations and other professional conduct, in line with state statutory mandates, would promote consistency in the way prosecutors fulfill their *Brady* obligations and create a culture of ethical compliance. A study of police integrity by the U.S. Department of Justice's National Institute of Justice revealed that a "culture of integrity, as defined by clearly understood and implemented policies and rules, may be more important in shaping the ethics of police officers than hiring the 'right' people."¹⁸⁹ Studies of lawyer ethics have produced similar results, culminating in the conclusion that the ethical culture of a law firm is crucial to the subsequent ethical conduct of attorneys.¹⁹⁰ Establishing norms in district

¹⁸⁷ Creating standardized guidelines for all prosecutors' offices in the state will promote consistency in the way various operations are carried out, such as what is required of prosecutors during discovery. Data collection will help promote this consistency. See Wright & Miller, *supra* note 181, at 1617 ("[D]ata will slowly drive out local variation among prosecutor offices and individual variation within offices.").

¹⁸⁸ For example, in 2013, Texas enacted a law regarding new discovery requirements for prosecutors. See Michael Morton Act, 2013 Tex. Gen. Laws 106. Attorneys general should create internal policies that align with state law consisting of their own expectations regarding ethical procedures throughout the course of a criminal investigation and trial. Attorneys general should also seek to influence state legislatures in their opinions regarding areas of concern with prosecutorial conduct, such as how Texas adopted an additional requirement to their discovery rules.

¹⁸⁹ NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, ENHANCING POLICE INTEGRITY, at ii (2005), <http://www.ncjrs.gov/pdffiles1/nij/209269.pdf> [https://perma.cc/K4C7-5KP6]. See also Joy, *supra* note 4, at 424.

¹⁹⁰ Joy, *supra* note 4, at 424 (citing JEROME E. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 167 (1966) ("The longer a lawyer has been a member of the office, and the more socially cohesive the office, the more likely it is that his behavior will be in line with the attitudes of his colleagues."); FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 173 (1981) ("[A]fter general upbringing, the source given the greatest credit for learning professional responsibility

attorneys’ offices would make deviations from ethical expectations more readily apparent and, thus, allow attorneys general to enforce such policies.¹⁹¹

Additionally, state attorneys general should devise a distinct set of punishment standards for prosecutorial misconduct. The attorneys general should model these rules after the Federal Sentencing Guidelines. For example, for each type of *Brady* violation, there should be a standardized punishment that increases with the severity of the violation. Such a disciplinary model would have a noticing effect by ensuring that prosecutors are aware of the reverberations should they elect to engage in misconduct. A standard set of guidelines also promotes consistency and lends the Office of Professional Responsibility (OPR), elaborated on below, an appropriate degree of direction in assigning punishments.

b. Give Attorneys General the Power to Request Information from Prosecutors at Any Time

Further, this new legislation should allow the state attorneys general to request information from prosecutors at any time, similar to how the general public can request information from any federal government agency at any time.¹⁹² This would allow the attorneys general to always stay informed about what

is the ‘observation of or advice from other attorneys in your own law office.’”). See also Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 926 (2015) (“In his book *Prosecution Complex*, Professor Daniel S. Medwed concludes that an ethical culture is ‘key’ to increasing the likelihood that prosecutors’ offices will carry out justice.” (citing DANIEL S. MEDWED, *PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT* 170 (2011))).

¹⁹¹ See Joy, *supra* note 4, at 427 & n.141 (“[P]sychological literature demonstrates that when one is not held accountable for decisions several biases come into play that negatively affect the quality of those decisions. . . . Properly structured accountability mechanisms significantly improve decision-making by counteracting psychological biases that occur in the absence of oversight. . . . Thus, the overall lack of accountability is a condition contributing to prosecutorial misconduct.” (citations omitted)). Therefore, it is essential that attorneys general, together with state supreme courts, begin actively enforcing punishments on prosecutors who fail to uphold the ethical duties of the profession.

¹⁹² See Freedom of Information Act (FOIA), 5 U.S.C.A. § 552(a)(4)(A)(iii) (West, Westlaw through Pub. L. No. 116-158).

individual prosecutors are doing as well as deter misconduct since prosecutors are subject to random requests for information.

3. Require Public Prosecutorial Elections

“Connecticut is one of only three states that appoints its prosecutors rather than [allowing the public to] elect[] [them].”¹⁹³ Electing prosecutors deters prosecutorial misconduct because prosecutors risk not winning re-election if they attract negative attention. Prosecutors are encouraged to behave ethically so that they will gain public favor. Therefore, all fifty states should adopt the election model.

While facially favorable, the general lack of data on prosecutors hinders elections from promulgating prosecutorial accountability. Besides major cases in the press, the public is not made aware of the decisions prosecutors make and how they conduct themselves in the courtroom. Mandating the collection of data from prosecutors mitigates this problem by enabling the public to make informed voting decisions. Without this data, the public casts votes based only on superficial candidate traits, such as personality or politics. In contrast, gathering accessible information allows the public to see the type of people and types of crimes certain prosecutors are prosecuting. By requiring an OPR, a prosecutor-specific disciplinary agency introduced below, to post lawyer disciplinary proceedings on their website, the public can also determine which prosecutors are ethical. Armed with this new information, people can then choose who to vote for based on shared values and community safety.

4. Improve Prosecutorial Training and Allocate More Resources to the Attorney General

Prosecutors need additional training in order to discern their exact role in the criminal justice system. Such training may include greater prison interactions with the state department of corrections; learning about “junk science” and forensic fraud; and more instruction on vague terms in ethical rules, such as what is meant by “timely disclosure” in Rule 3.8(d). This education and

¹⁹³ Advisory Memorandum, *supra* note 179.

training is crucial to accomplishing compliance with the professional standards in place. This training should occur after the prosecutor is hired and continue periodically to keep prosecutors up to date on new judicial decisions, ethical opinions, technology, and any amendments the attorney general makes to *Brady* or other internal policies.

The state attorneys general should also maintain an OPR to help with data collection, case investigations, and sentencing. However, this would likely require significant budget expenditures depending on the size of the state, so states will need to revamp their budgets. For example, the training budget for Connecticut’s Office of the Chief Public Defender is nearly five times the budget of the Chief State’s Attorney’s office.¹⁹⁴ In order to implement an OPR, Connecticut may want to reallocate some of its resources between the public defender’s office and the state’s attorney’s office.

B. Reform at the Attorney General Level

1. Make the State Attorney General the Head of Compliance

States should take a top-down approach, with the attorney general as the head of compliance. Putting the attorney general in charge creates a more centralized system of control. The attorney general’s office shall handle all prosecutorial complaints, document data, and make that data accessible to the public. The attorney general also needs to establish a clear and conspicuous policy for the state prosecutors to follow.¹⁹⁵ For example, the phrase “make timely disclosure” in ABA Model Rule 3.8(d) is vague.¹⁹⁶ This rule mandates that prosecutors turn over all exculpatory evidence to the defense, but how soon is “timely”? The state attorneys general need to construct policies to clarify this vagueness. Additionally, state attorneys general need to design their own *Brady* policies.

¹⁹⁴ Advisory Memorandum, *supra* note 179, at 4.

¹⁹⁵ The attorney general in each state should create a handbook of their discovery policy; define vague terms, such as “timely;” and establish clear ethical policies and expectations that each district attorney’s office must follow.

¹⁹⁶ See MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2018).

2. Create an Office of Professional Responsibility Under the Attorney General

Each state attorney general should create an OPR under his or her direction to conduct investigations into prosecutorial misconduct complaints. This office would also be responsible for recommending punishments should it find an attorney at fault. The state supreme courts would then decide whether to accept the punishment recommendation and, if they do, enforce the punishment.

Currently, most state bar associations have an Office of Disciplinary Counsel that handle all complaints. However, an OPR is a unique context just for prosecutors.¹⁹⁷ A special commission for prosecutors is justified in that prosecutors play such an important role socially and have an incomprehensible amount of power and discretion. Prosecutors must be held to a higher standard because they have the potential to cause really serious damage. For example, if a civil lawyer misplaces money in a trust fund, there are minor consequences. On the other hand, if a prosecutor violates *Brady* and withholds exculpatory evidence, an innocent person could be convicted and sentenced to death. In other words, the stakes are much higher for prosecutorial misconduct.

The OPR should consist of a three-member panel,¹⁹⁸ comprised of two attorneys¹⁹⁹ and one layperson,²⁰⁰ appointed by

¹⁹⁷ A special review process, separate from the state bar associations' grievance procedures, is justified because prosecutors are held to a higher standard, as is made clear by their special professional and ethical obligations under ABA Model Rules of Professional Conduct 3.8 (and states' adoptions thereof). See MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2018). Private attorneys are not subjected to the same heightened responsibilities; they conduct their professional duties under a different standard. Compare MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2018), with MODEL RULES OF PROF'L CONDUCT rr. 5.1-5.2 (AM. BAR ASS'N 2018). A similar approach has been proposed by Professor Harry Mitchell Caldwell at Pepperdine University School of Law. See Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Conduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U. ILL. L. REV. 1455, 1480-84 (2017) (proposing an independent Prosecutorial Review Panel which would identify and enforce discipline based on findings of misconduct by appellate courts). California's Judicial Panel operates in a similar fashion for holding judges accountable for their misconduct and has proven its effectiveness. *Id.* at 1456-57.

¹⁹⁸ The number of persons on an OPR panel may vary by state depending on the specific needs and population of that state. For example, California and New York have

the attorney general and approved by the state legislature. All three OPR panel members must go through special training²⁰¹ on the standards relating to criminal matters in their state. They must also receive training on the state attorney general’s *Brady* policy. The OPR should also be comprised of a separate committee²⁰² responsible for engaging in in-depth investigations of meritorious complaints. This committee will also be required to attend extensive training on state criminal matters and *Brady* policies, and its members will be a mixture of attorneys and laypersons selected by the state bar association.

The OPR panel established under the state attorney general should function in a similar respect to the U.S Department of Justice’s OPR. The OPR panel should receive and evaluate all complaints of prosecutorial misconduct to decide whether the claim warrants additional investigation. If necessary, the OPR committee will engage in further review of the allegations set

a larger number of attorneys compared to Maine, so three OPR members may not be enough to efficiently process the quantity of prosecutorial misconduct complaints. *See* AM. BAR ASS’N, NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER POPULATION BY STATE (2019). However, the ratio of laypersons to attorneys should never fall below one-third to avoid the appearance of bias.

¹⁹⁹ No more than one prosecutor should be on an OPR panel. Both attorneys selected must have substantial experience in criminal law and extensive knowledge of the criminal justice system.

²⁰⁰ Keenan et al., *supra* note 4, at 238 (“State disciplinary authorities, which are comprised almost entirely of lawyers, . . . exercise nearly unbridled discretion in deciding whether to pursue individual complaints.”). As such, legitimate claims of prosecutorial misconduct may get dismissed prematurely. The presence of laypersons would help combat this problem. Including a layperson on an OPR panel garners the same justification given for selecting an unbiased jury for trial: the goal of promoting fairness in the criminal justice system. As such, “[l]aypersons should have an active and substantial role in the grievance process” to avoid the appearance of bias. *Id.* at 242-43. *See also* Caldwell, *supra* note 197, at 1458 (discussing the Prosecutorial Review Panel proposed in the author’s prior article, which consisted of a three-member committee including one layperson), for further evidence of the importance of laypersons in contributing to unbiased outcomes in the criminal justice system.

²⁰¹ Prosecutors should also be required to attend mandatory CLE training at least once a year to stay current on discovery procedures and other professional obligations. The OPR members will also always be available as a resource to answer any discovery-related questions.

²⁰² The size of this committee will vary by state depending on population. For example, there are a significantly higher number of attorneys licensed in the state of California as compared to Delaware. *See* AM. BAR ASS’N, *supra* note 198. As such, California’s OPR will likely receive a higher number of complaints and, thus, need more manpower to conduct investigations into said complaints.

forth in the complaint. Thereafter, the lawyer accused of misconduct in the complaint should be given an opportunity to respond. Based upon the attorney's response and the findings of the investigation, the OPR will determine whether the lawyer is guilty of misconduct²⁰³ and, if so, recommend a punishment, such as a private or public reprimand or suspension. The OPR's recommendation will then be submitted to the state supreme court for final review. If the state supreme court accepts the OPR's finding of guilt and appropriate punishment, the proceeding should become public by listing the lawyer(s) involvement in the misconduct, a synopsis of the case, and the punishment imposed on the OPR's website. The threat of public exposure should serve to deter instances of prosecutorial misconduct.

²⁰³ The OPR established under the state attorney general should follow the same guidelines as the DOJ's OPR when making a determination of professional misconduct. See Office of Prof'l Responsibility, *Attorney Professional Misconduct Matters*, U.S. DEPT OF JUSTICE, <https://www.justice.gov/opr/professional-misconduct> [<https://perma.cc/2LY9-CAJS>] (last updated Nov. 22, 2019) ("The decision to conduct an investigation does not give rise to a presumption of professional misconduct. OPR makes professional misconduct findings only after conducting a full investigation. . . . A professional misconduct finding is appropriate when a preponderance of the evidence establishes that the attorney intentionally violated, or recklessly disregarded, a clear and unambiguous legal obligation or professional standard. . . . An attorney's violation is intentional when the attorney engages in conduct that is either purposeful or knowing. Conduct is purposeful when the attorney takes or fails to take an action in order to obtain a result that is unambiguously prohibited by the applicable obligation or standard. By contrast, conduct is knowing when the attorney takes or fails to take an action with knowledge of the natural or probable consequences of the conduct, and those consequences are unambiguously prohibited by the applicable obligation or standard. . . . Alternatively, OPR may conclude that a violation resulted from the attorney's reckless disregard of the applicable obligation or standard. This determination is based on three factors. First, OPR considers whether the attorney knew, or should have known, of the obligation or standard based on the attorney's experience and the unambiguous nature of the obligation or standard. Second, OPR considers whether the attorney knew, or should have known, that the attorney's conduct was substantially likely to violate or cause a violation of an obligation or standard based on the attorney's experience and the unambiguous applicability of the obligation or standard. Third, OPR considers whether the attorney nonetheless engaged in the conduct, which was objectively unreasonable under all the circumstances. Ultimately, after considering the nature and circumstances of the attorney's conduct and the facts known to the attorney, OPR will find that an attorney's disregard of an obligation or standard is reckless if the conduct amounted to a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.").

Each district attorney would be responsible for collecting data from all the prosecutors in his or her district and reporting the results to the OPR. The OPR would issue annual reports to the state attorney general regarding the data collected. This office would take some of the burden off of the attorney general because keeping track of all state prosecutors is too big of a job for one person.

Similar to the Connecticut bill, the OPR should also publish attorney disciplinary proceedings on its website.²⁰⁴ However, it should only do so after a final ruling has been made declaring the prosecutor guilty and the state supreme court determines that the prosecutor should be disciplined with public, rather than private, censure. This public exposure is likely to deter misconduct, particularly in states where the public elects prosecutors. The OPR should also provide the state supreme court with a roster of lawyers who are subject to the disciplinary jurisdiction of the court, as well as the disciplinary record of each of those lawyers. This is the approach taken by the Delaware Supreme Court, which maintains lawyers' disciplinary records.²⁰⁵ This information should be accessible to every judge in the state. Keeping judges informed about the prior misconduct of attorneys practicing before them is important because it alerts the judges to keep an eye out for any potential future misconduct. Making sure the judges know a lawyer's disciplinary history is also beneficial as a misconduct-deterrence tactic because it is embarrassing to have a judge know about previous misconduct.

Since much of the success of this program depends on misconduct being reported, which does not always occur, the OPR should search legal databases on a weekly basis for cases in which

²⁰⁴ See, e.g., Office of Prof'l Responsibility, *OPR's Disclosure Practices*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/opr/oprs-disclosure-practices> [<https://perma.cc/5WEC-NZEP>] (last updated Apr. 30, 2020) (“OPR publicly discloses substantial information concerning its work. Subject to applicable privacy restrictions, OPR releases on its website summaries of concluded investigations, discloses annual compilations of statistical information concerning the complaints it receives and the number of inquiries and investigations it accepts and resolves, and provides information to various individuals and entities outside the Department.”).

²⁰⁵ See Office of Disciplinary Counsel, *Digest of Lawyer Discipline*, DEL. COURTS, <https://courts.delaware.gov/odc/digest/> [<https://perma.cc/L4HM-FMGB>] (last visited Sept. 20, 2020).

judges have criticized prosecutors' conduct.²⁰⁶ Judges will often state their findings of misconduct in their court opinions, although those instances are not always reported, such as in cases of harmless error. Requiring the OPR members to conduct weekly searches of judicial opinions from their state will help combat the lack of reporting problem, and fewer instances of misconduct will go undetected. The OPR will be given authority to conduct investigations into instances of misconduct found in court decisions. As an additional precaution to make sure instances of misconduct do not go unreported, judges should also be encouraged to alert the OPR when they make a finding of prosecutorial misconduct.

III. POTENTIAL CRITICISMS OF THIS PROPOSAL

One potential criticism of this proposal is that its success is dependent upon complaints actually being filed and misconduct actually being reported. Having a separate entity to review only prosecutorial complaints will encourage the filing of complaints because it helps to combat the time-delay issue. The OPR will be a disciplinary body exclusive to prosecutors and, thus, the amount of complaints will be condensed as compared to the state bar association, which currently handles complaints regarding every attorney licensed in that state. Knowing that his or her complaint will be reviewed in an expedited fashion will incentivize an aggrieved party to file such complaint because there is a greater potential that action will be taken. In sum, requiring the attorney general's office to process complaints over state bar associations would speed up the process of reviewing complaints because there will likely be fewer complaints. Additionally, the attorney general's office would speed up the imposition of punishments since the process of reviewing complaints would be faster. This will have a higher likelihood of producing a deterrence effect due to the implementation of penalties being near in time to the occurrence of the offense. As an added bonus, the greater

²⁰⁶ This is similar to how the DOJ's OPR "regularly conducts its own searches to identify judicial findings of misconduct against Department attorneys" except, in this case, the searches by the OPR will be used to identify instances of misconduct against all state prosecutors. See Office of Prof'l Responsibility, *supra* note 204.

efficiency with which the OPR will be able to evaluate claims of misconduct will also help counteract the statute of limitations restraint on filing bar complaints. The structure of the OPR will enhance confidence in the disciplinary system and, thus, encourage the injured party to file a complaint in close succession to the misconduct in the belief that it will produce a positive outcome.

Another potential hurdle to the success of this proposal is a lack of money in the state budget needed to provide additional salaries for the members of the OPR panel and committee and to fund any additional prosecutorial training resources. Discrepancies in state budgets are inevitable as different states have varying populations and resources available. However, states can figure out creative ways to reallocate funds. For example, the training budget for Connecticut’s Office of the Chief Public Defender is nearly five times the budget of the Chief State’s Attorney’s office.²⁰⁷ The compelling demand for better-trained prosecutors would justify shifting some of those funds and channeling them into the attorney general’s office.

Finally, harmless error invokes a major setback for holding prosecutors accountable for misconduct. The OPR’s weekly searches of case law will help combat this issue.²⁰⁸ Even though the case may not have been reversed for the misconduct, judges frequently reprimand prosecutors in their opinions, and weekly searches of court opinions would reveal these instances.

CONCLUSION

In sum, prosecutors are very powerful individuals, yet the public, and even most state attorneys general, are ignorant of their daily engagements. Abuse and corruption permeate throughout the criminal justice system as a result of the onslaught of prosecutorial misconduct, and its effects are palpable. The

²⁰⁷ Advisory Memorandum, *supra* note 179, at 4.

²⁰⁸ Perhaps defense counsel and judges should also have a duty to report instances of prosecutorial misconduct to the OPR regardless of whether it would change the outcome of a case, but that is beyond the scope of this Comment. Interestingly, Kentucky has already made strides in this direction as state law mandates that judicial officers report unprofessional conduct. *See* KY. REV. STAT. ANN. § 26A.080 (West 2020).

current safeguards in place are deficient, and society demands a functional system free from abuse that will prevent government officials from turning a blind eye on the harsh reality of prosecutorial misconduct. With little to no ramifications for their behavior, prosecutors are able to slide their bad acts under the rug. In this respect, the criminal justice system craves reform.

It is difficult to grapple with the stark discrepancies between the literal text of the prosecutorial ethics rules and the continual failure to implement these rules. This phenomenon is vexing, to say the least, and implores ethical policymakers to endorse firm policies that prevent prosecutors from eluding punishment for their misdeeds. The failure to act blurs the concept of justice until it becomes foreign and unascertainable.

To combat the problem of prosecutorial accountability at the state level, public policy vehemently beseeches state attorneys general, state bar associations, state judges, and state legislatures to work together to establish good policy and admonish wrongdoers. In particular, states need new legislation mandating the collection of data from prosecutors and establishing reforms at the attorney general level. As aforementioned, a uniform system of transparency and discovery obligations, as well as an all-encompassing special review panel, will enhance the public's perception of a prosecutor's unbiased and honest work, limit the myriad of misconduct incidences, and ensure that the constitutional value of "justice for all" endures forever.