Improving Prosecutorial Accountability

A Policy Review

By John F. Terzano, Esq.,
Joyce A. McGee, Esq.,
& Alanna D. Holt

THE JUSTICE PROJECT

"The prosecutor has more power over life, liberty, and reputation than any other person in America."

—United States Attorney General and Supreme Court Justice Robert H. Jackson

ABOUT THE JUSTICE PROJECT

The Justice Project (TJP) is a non-profit, non-partisan organization dedicated to improving the fairness and accuracy of the criminal justice system. TJP's Campaign for Criminal Justice Reform seeks to reaffirm America's core commitment to fairness and accuracy. By designing and implementing national and state-based reform efforts, the Campaign for Criminal Justice Reform addresses significant flaws in the American criminal justice system.

THE JUSTICE PROJECT STAFF

John F. Terzano, President
Joyce A. McGee, Executive Director
Robert L. Schiffer, Executive Vice President
Kirk Noble Bloodsworth, Program Officer
Edwin Colfax, Director of State Campaigns
Rosa Maldonado, Controller
Leah Lavin, Development Coordinator
Alanna Holt, Policy Coordinator
Lauren Brice, Policy Associate
Amber Rudolphi, Intern

ACKNOWLEDGEMENTS

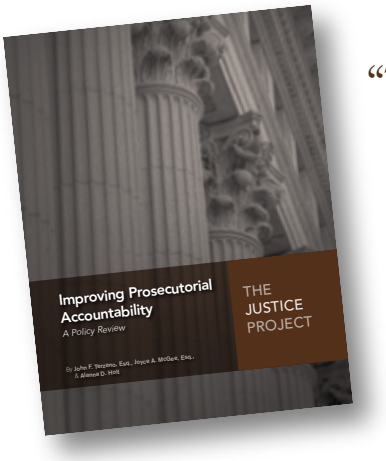
The Justice Project would like to express special thanks to the following people for their contributions in the development of this policy review:

Professor Bennett Gershman, *Pace Law School*
Christopher Hill, *State Strategies Coordinator, ACLU Capital Punishment Project*
Timothy P. O'Toole, *Miller & Chevalier, Chtd., Washington D.C.*
Former TJP Staff and Interns: Delia Herrin, Eric James, and Daniel Aaron Weir.
Graphic design by Barking Dog Design.

For information on ordering additional copies of this report, contact our office at (202) 638-5855 or *info@thejusticeproject.org*.

1025 Vermont Avenue, NW, Third Floor
Washington, DC 20005
(202) 638-5855 • Fax (202) 638-6056
www.thejusticeproject.org

Texas Office
510 S. Congress Avenue, Suite 304
Austin, TX 78704
(512) 391-2320 • Fax (512) 391-2330
www.thejusticeproject.org/state/texas



"The prosecutor has more power over life, liberty, and reputation than any other person in America."

—United States Attorney General and Supreme Court Justice Robert H. Jackson

TABLE OF CONTENTS

NATIONAL AGENDA FOR REFORM

The Justice Project (TJP) has developed a national program of initiatives designed to address the policies and procedures that lead to errors and contribute to wrongful convictions. TJP advocates for 1) improvements in eyewitness identification procedures; 2) electronic recording of custodial interrogations; 3) higher standards for admitting in-custody informant testimony at trial; 4) expanded discovery in criminal cases; 5) improvements in forensic testing procedures; 6) greater access to post-conviction DNA testing; 7) proper standards for the appointment and performance of counsel in capital cases; and 8) improving prosecutorial accountability.

As part of its efforts to increase fairness and accuracy in the criminal justice system, TJP is developing comprehensive policy reviews on each of the eight reform initiatives outlined above. The policy reviews are designed to provide necessary information to policymakers, legal and law enforcement practitioners, advocates, and other stakeholders about the best practices within these reform areas, the reasoning behind these necessary changes in procedure, their practical effect, and the costs and benefits of implementation. For more information, please visit www.thejusticeproject.org.

EXECUTIVE SUMMARY

Prosecutors are arguably the most powerful figures in the American criminal justice system. Prosecutors are heavily involved in the investigation of crimes; they are solely responsible for what charges, plea bargains, and sentences a criminal defendant will face; and they have complete control over what evidence will be disclosed to the defense during discovery.[1] The decisions of prosecutors have far-reaching consequences on defendants, victims, their respective families, and the general public. These broad powers reflect the prosecution's unique role in the criminal justice system as defined by the Supreme Court: "not that it shall win a case, but that justice shall be done."[2] The role of the prosecutor is not just one of an advocate, but rather an "administrator of justice" whose ultimate goal is to protect the innocent, convict the guilty, and guard the rights of the accused.[3] Prosecutors—unlike defense attorneys—do not advocate for a single individual; they advocate for a just outcome.

Given the special duties of prosecutors and the broad power they exercise in the criminal justice system, it is critically important that prosecutors conduct themselves responsibly and ethically.

PROSECUTORIAL ACCOUNTABILITY RECOMMENDATIONS

1) States should require that prosecutors' offices adopt and enforce clearly defined policies and procedures.
2) States should require open-file discovery in criminal cases.
3) States should require that prosecutors document all agreements with witnesses and jailhouse informants, especially concerning conferment of benefits of any kind.
4) States should require trial and appellate judges to report all cases of prosecutorial misconduct—including cases where the misconduct is ruled to be harmless error.
5) States should establish a prosecutorial review board with the power to investigate allegations of misconduct and impose sanctions.
6) States should require that prosecutors participate in training and continuing education programs.

Prosecutorial Misconduct

Failure to comply with legal, ethical, and constitutional obligations constitutes prosecutorial misconduct.[4] In 2003, a study conducted by the Center for Public Integrity found that prosecutorial misconduct was a factor in dismissed charges, reversed convictions, or reduced sentences in at least 2,012 cases since 1970.[5] The study found that prosecutorial misconduct led to the wrongful conviction of thirty-two individuals.[6] In these cases, prosecutors suppressed exculpatory evidence, knowingly presented false testimony, coerced witnesses, fabricated evidence, and/or made false statements to the jury.

The most common form of prosecutorial misconduct is a failure to provide the defense team with evidence that is favorable to the defendant.[7] For example, in April of 2009, Attorney General Eric Holder dismissed the indictment against former Alaska Senator Ted Stevens because prosecutors in the case repeatedly withheld important evidence from the defense. Another common form of misconduct is the use of unreliable in-custody informant testimony. Other forms include courtroom misconduct, mishandling of physical evidence, threatening or badgering witnesses, using false or misleading evidence, and improper behavior during grand jury proceedings.[8]

While deliberate misconduct tends to be the exception, unintentional misconduct and inadvertent error occur with troubling regularity. The current safeguards designed to prevent misuse of prosecutorial power—such as appellate review of claims of misconduct, judicial reporting of acts of misconduct, state bar disciplinary action, statewide codes of professional conduct, as well as internal systems of accountability within prosecutors' offices—fall short in preventing prosecutorial misconduct and abuses of power. In all aspects of the criminal justice system, there is a dangerous and pervasive lack of prosecutorial accountability.

The prevalence of prosecutorial misconduct within the criminal justice system undermines the

accuracy of criminal trials and plays a direct hand in wrongful convictions. Prosecutors' offices, the courts, state bar disciplinary authorities, and the state itself must create mechanisms whereby prosecutors are held more accountable for their actions in the criminal justice system. Otherwise, abuse of prosecutorial power and acts of misconduct will continue.

In this policy review, The Justice Project recommends states take the following actions to improve prosecutorial accountability:

1) States should require that prosecutors' offices adopt and enforce clearly defined policies and procedures.

One of the more troubling systemic problems that leads to prosecutorial misconduct is a lack of transparency. Very few prosecutors' offices have explicit office manuals or written policies and procedures that guide the use of prosecutorial discretion.[9] Prosecutorial misconduct can in large part be prevented by implementing sound policies on how to avoid abuses of power, and how to make ethical decisions. Considering all the factors a prosecutor must take into account when charging an individual with a crime, it is imperative that prosecutors' offices provide guidelines and tools to help prosecutors make decisions fairly, ethically, equitably, and effectively. Prosecutors' offices must create an environment that values the fair and efficient administration of justice.

2) States should require open-file discovery in criminal cases.

State statutes governing discovery obligations in criminal cases often fall short in protecting against misconduct and abuses of prosecutorial power. Unlike in civil cases where each side must turn over all evidence, in criminal cases prosecutors must only disclose evidence that is exculpatory and tends to negate guilt. Prosecutors have sole discretion in determining whether evidence is exculpatory and thus, whether to disclose it. Studies reveal that prosecutors regularly withhold, often times intentionally, crucial exculpatory evidence.[10] Better discovery laws, such as open-file discovery, would prevent such abuses, whether intentional or not, by requiring prosecutors to disclose any and all evidence to the defense. Prosecutors in jurisdictions with open-file discovery rules find the practice more efficient, with fewer reversals and retrials, and more cases resolved earlier in the process.

3) States should require that prosecutors document all agreements with witnesses and jailhouse informants, especially concerning conferment of benefits of any kind.

Prosecutorial decision making, by its very nature, occurs with little or no transparency. The majority of prosecutorial decisions take place outside the view of the public, the courts, and defense attorneys.[11] One such example is the use of in-custody informant testimony. Prosecutors often rely on in-custody informants to build their case against a defendant. Prosecutors oftentimes offer plea deals or reduced sentences to informant witnesses, giving them a powerful incentive to lie on the stand. Testimony by informant witnesses is widely regarded as the least reliable testimony encountered in the criminal justice system. However, juries, judges, and defense teams are not provided with crucial information such as the agreement reached with the witness, the witness' background, or how many times the witness has testified previously. As such, juries can be misled by these inherently unreliable witnesses. States could take steps to prevent false testimony by informant witnesses through increased transparency—requiring mandatory, automatic pretrial disclosures of information related to in-custody informant or cooperating witness testimony.

4) States should require trial and appellate judges to report all cases of prosecutorial misconduct—including cases where the misconduct is ruled to be harmless error.

The courts are typically the first outside entity to be made aware of a possible act of prosecutorial misconduct. Prosecutorial misconduct is typically brought before a judge when a convicted individual files an appeal on those grounds. For a case to be overturned on such an appeal, the courts must find the acts of the prosecutor to be *harmful*. In other words, the court must determine that the outcome of the trial would have been different but for the actions of the prosecutor.[12] Having a case reversed

on appeal can be perceived as a form of punishment for prosecutors because they must re-try the case or lose the conviction all together, but it does little to effectively curtail misconduct. In the vast majority of appellate cases, the conviction is upheld despite the misconduct. As such, this process categorically excludes the majority of cases where misconduct has occurred, but the case did not get reversed on appeal. As a result, prosecutors are not held accountable for their acts of misconduct in cases where the appellate court finds misconduct but does not reverse the case.

Compounding the problem of appellate review is a pervasive and widespread pattern of judges failing to report acts of prosecutorial misconduct. In 2007, a study conducted on behalf of the California Commission on the Fair Administration of Justice found that judges generally do not report cases of prosecutorial misconduct to the State Bar, despite a statutory requirement to do so.[13] This failure to report allows even the most egregious acts of misconduct to slip through the cracks, and prevents prosecutors who repeatedly abuse their power, known as "repeat offenders" from being identified and sanctioned. One key reform aimed at improving the court's role in prosecutorial accountability is stronger judicial reporting requirements.

> Prosecutorial misconduct can in large part be prevented by implementing sound policies on how to avoid abuses of power and how to make ethical decisions.

5) States should establish a prosecutorial review board with the power to investigate allegations of misconduct and impose sanctions.

Regardless of whether judges report cases of misconduct, which would typically be reported to the state bar disciplinary authorities, the majority of these disciplinary authorities have largely failed to investigate, discipline, or sanction prosecutors who abuse their power and/or engage in misconduct. In 1999, a national study conducted by the *Chicago Tribune* found that between 1963 and 1999, the courts dismissed homicide convictions in 381 cases because prosecutors suppressed exculpatory evidence or presented false testimony.[14] In those 381 cases, not one prosecutor was publically sanctioned by a state disciplinary authority or criminally prosecuted for withholding evidence or presenting false evidence.[15] States could greatly reduce the amount of prosecutorial misconduct that occurs by effectively sanctioning prosecutors who violate their professional duties. Because state bar disciplinary authorities have failed to hold prosecutors accountable in the way they hold private practitioners accountable,[16] states should establish separate prosecutorial review boards responsible for investigating allegations of misconduct and sanctioning prosecutors when necessary. States should recognize the unique responsibilities and powers of prosecutors through the establishment of separate disciplinary structures.

6) States should require that prosecutors participate in training and continuing education programs.

Often times prosecutors' offices do not provide crucial training programs on the proper use of prosecutorial discretion, and states offer limited continuing legal edcation programs on the causes and costs of wrongful convictions. Another way to ensure prosecutorial accountability is to improve the training and education of prosecutors. Educating prosecutors on how their decisions can lead to wrongful convictions and impede the fairness and accuracy of criminal trials can prevent abuses of power, and ensure that prosecutors perform their duties with a high degree of professionalism.

The Justice Project has developed this policy review to facilitate communication among prosecutors, defense attorneys, judges, state bar associations, and others about the general lack of prosecutorial accountability in the criminal justice system. By identifying the systemic causes that lead to prosecutorial misconduct and abuses of power, we hope to encourage active efforts to reform the system and prevent such injustices. By adopting and implementing the reforms recommended in this policy review, states can ensure the level of prosecutorial accountability necessary for the fair and accurate administration of justice.

RECOMMENDATIONS & SOLUTIONS

1) States should require that prosecutors' offices adopt and enforce clearly defined policies and procedures.

Prosecutors have broad discretion in criminal cases. They decide how to investigate a case, what charges to bring, what plea bargains to offer, what penalties to seek, and what evidence to turn over to the defense through pretrial discovery. At these critical stages of a prosecution, the decisions made by a prosecutor invariably have an enormous impact on defendants, victims, and their respective families. The power to bring charges against an individual is perhaps the most influential responsibility of a prosecutor. As one commentator notes: "When a prosecutor makes the decision to charge an individual, she pulls that person into the criminal justice system, firmly entrenches him there, and maintains control over crucial decisions that will determine his fate."[17]

The power to bring charges against an individual is perhaps the most influential responsibility of a prosecutor.

Prosecutorial discretion is a critical part of the criminal justice system. Not every crime can be prosecuted, and each criminal offense and defendant is entirely different. Prosecutors dismiss cases, bring charges, and request sentences based on the individual circumstances of each case and each defendant. Their decisions should appropriately address the severity of the crime and the history of the offender.[18] However, prosecutors are only constrained by vaguely worded ethical guidelines.[19] Few jurisdictions have adopted or enforced standards on how prosecutors should appropriately utilize their broad discretionary powers.[20] Absent any standards on when it is constitutional and appropriate to bring charges, what charges to bring, when and how to offer a plea bargain, determine a sentence, or when to dismiss a case, prosecutorial discretion becomes a very dangerous power that is entirely open to abuse.

Prosecutors make significant decisions in every criminal case before the trial even begins. The majority of these decisions are made with no guidance, oversight, or accountability.[21] As a result, prosecutors can easily abuse their discretion during investigations by utilizing evidence they know to be illegally obtained, bringing charges without sufficient evidence, bringing unfounded charges to help their position in plea bargaining, or by withholding important evidence from the defense.[22]

One of the most troubling consequences of prosecutorial abuse of power is arbitrariness, in which similarly situated defendants are treated in vastly different ways by prosecutors. Broad prosecutorial discretion allows a prosecutor to dismiss charges against one defendant, while taking another defendant to trial, even if the circumstances in both cases are exactly the same.[23]

Prosecutorial discretion can also lead to racial disparity in the administration of justice. For instance, prosecutors seek the death penalty more often in cases where the defendant is black and the victim is white.[24] Racial disparity in the administration of justice occurs systemically and over long periods of time. There is little to no ability to provide relief after this kind of abuse occurs—it cannot be sanctioned on a case-by-case basis. The only way to prevent arbitrariness and racial disparity in the administration of justice is for prosecutors' offices themselves to take steps to ensure they are making decisions fairly and equitably.

Due to the essential need for guidance in the exercise of discretion, prosecutor's offices should produce and maintain a manual that details an office's general policies and procedures. An office's policies should include, at a minimum, a list of specific factors prosecutors must consider when exercising their discretion at each stage of a prosecution—from investigation, to trial, to sentencing—as well as comprehensive guidelines for discovery compliance.

The American Bar Association (ABA) and the National District Attorneys Association (NDAA) recommend that prosecutors' offices develop and implement official policies and procedures that guide the exercise of prosecutorial discretion.[25] The goal of these policies would be achieving "fair, efficient, and effective enforcement of criminal law."[26] In developing standards, jurisdictions should first look to the ABA Prosecution Function Standards, for areas of prosecutorial discretion "about which there is widespread agreement."[27] The NDAA also recommends

that in developing a manual, offices should consult with area prosecutor's associations as well as other offices that have already developed written or model standards. Only a small number of prosecutors' offices actually have manuals.[28]

The Department of Justice has published a publically available manual for U.S. Attorneys' offices that jurisdictions could utilize as a model for state prosecutors' offices.[29] The manual outlines policies "on a wide range of criminal issues;"[30] including what factors U.S. Attorneys should take into consideration when pursuing federal prosecution. Some of the standards include law enforcement priorities, the seriousness of the offense, the deterrent effect of prosecution, the person's culpability, criminal history, willingness to cooperate, and the probable sentence. Additionally, the U.S. Attorney's manual specifically addresses what factors a prosecutor should *not* take into consideration when bringing charges, including the person's race, religion, or national origin, the attorney's personal feelings regarding the suspect or the victim, politics and political influences, or the possible consequences on the attorney's personal or professional life.

The first step towards enacting an effective system of prosecutorial accountability must come from prosecutors' offices themselves.

Adopting and implementing such a manual "can provide useful instruction, and vigilant internal enforcement can influence the conduct of subordinates—especially those committed to a career in the particular department or office."[31] All contents of the office manual should be made readily available to the public,[32] except for any content deemed confidential.[33] Public access to the manual makes clear to the public that the prosecutor's office's interest is in the fair and effective enforcement of the law, as well as the specific policies by which the chief prosecutor seeks to achieve this goal.

Effective implementation of office policies and procedures cannot be achieved without proper supervision within prosecutors' offices, and prompt action by supervisors when prosecutors violate official policies. Internal enforcement of these guidelines can ensure their proper use and help maintain a constant awareness within offices of how to avoid abuses of power. Additionally, implementation and enforcement of office policies and procedures can protect offices against charges of arbitrariness, thus strengthening public trust in the prosecution function.

The first step towards enacting an effective system of prosecutorial accountability must come from prosecutors' offices themselves. By implementing internal policies and procedures, prosecutors' offices can create and maintain a culture of integrity and accountability. This first step could be effective in preventing prosecutorial abuses of power and acts of misconduct that can lead to wrongful convictions.

2) States should require open-file discovery in criminal cases.

Discovery is the formal process in which the prosecution discloses relevant evidence to the defense prior to a criminal trial. Discovery procedures "help inform both sides of the strengths and weaknesses of their case, reduce the risk of trial by ambush, focus the trial process on facts genuinely in dispute, and minimize the inequities among similarly situated defendants."[34] The proper functioning of the criminal justice system—accurate verdicts, fair sentences, and the protection of fundamental constitutional rights—depends on full compliance with disclosure obligations.

In 1963, the United States Supreme Court issued a landmark decision regarding discovery obligations in *Brady v. Maryland*, finding failure to disclose relevant exculpatory information, or information that would tend to negate guilt, to be a violation of the defendant's due process rights.[35] Under *Brady*, the prosecution must provide the defense with any evidence in its possession that is material to the defendant's guilt or punishment. This includes evidence of innocence as well as evidence that undermines the credibility or truthfulness of a witness, known as impeachment evidence.

The constitutional duties outlined in *Brady* embody the prosecutor's responsibility to seek justice and uphold the rights of the accused. Prosecutors bear the burden of ensuring that the defense has all relevant facts before proceeding with a plea bargain or a criminal trial. The effectiveness of the *Brady* rule "depends on the integrity, good faith, and professionalism of the prosecutor."[36]

Current federal and state procedural safeguards that seek to guarantee compliance with *Brady* are very weak. The Supreme Court has been largely silent on what specifically constitutes *Brady* evidence, when it must be disclosed, and what the remedies or sanctions should be for failure to comply with *Brady*.[37] Additionally, the court's standard for overturning a conviction based on a *Brady* violation is extremely lenient. For a conviction to be overturned, the defense must show that the evidence was exculpatory *and* material to the case at hand, meaning the presence of such evidence would have altered the outcome of the trial. One scholar on this issue describes the devastating consequences of the Court's lenient stance on *Brady*: "the lenient standard of materiality encourages prosecutorial gamesmanship by allowing prosecutors to play and frequently beat the odds that their suppression of evidence, even if discovered, will be found immaterial by a court."[38]

THE CULTURE OF PROSECUTORS' OFFICES

The culture of prosecutors' offices can indirectly encourage misconduct. The American criminal justice system is an adversarial one that can foster gamesmanship or a "win at all costs" mentality. The focus on conviction rates can undermine a prosecutor's goal of seeking a just outcome. Some district attorneys' offices reward high conviction rates with promotions, in part because conviction rates are one of the few available quantifiable measures of "success." This "batting average" mentality was taken too far in the Cook County District Attorney's Office in Illinois, which used to put lawyers' names on a bulletin board and place red stickers next to their names for losses and green stickers for wins. This visual reminder of "wins" and "losses" undermined the prosecutors' duty to seek a fair outcome.

The Dallas County District Attorney's Office in Texas is another example of an office that took the "win at all costs" mentality too far, becoming notorious for its high conviction rates and prosecutorial abuse of power. Both of these offices, which saw an alarming number of wrongful convictions, have since taken steps to change that culture and avoid the kinds of attitudes that foster prosecutorial misconduct. While not every prosecutor's office operates under this "win at all costs" mentality, every prosecutor should understand the dangers of focusing on winning at the expense of a fair trial process. Overzealousness in the pursuit of convictions can and has led to wrongful convictions.

In most states, prosecutors are only required to disclose *Brady* evidence upon request. Most states lack statewide discovery statutes that detail what kind of evidence must be disclosed, when it must be disclosed, and what the sanctions are for noncompliance. The resulting system of criminal discovery is one that differs greatly between jurisdictions, and operates with little to no oversight and no threat of discipline for noncompliance.

Suppression of exculpatory evidence is the most common form of prosecutorial misconduct.[39] A national study by the *Chicago Tribune* cited suppression of evidence as one of the leading prosecutorial violations that has led to the reversal of hundreds of homicide convictions since 1963.[40] Another study by Columbia Law School revealed that one of the top two serious reversible errors in capital cases is prosecutorial suppression of evidence.[41]

Prosecutorial suppression of evidence is not always motivated by malfeasance. Prosecutors do not always know what evidence is exculpatory—oftentimes a statement by a witness or a piece of forensic evidence is only later discovered to be exculpatory after investigation by a defense attorney. Additionally, giving prosecutor's broad discretion in the discovery process imposes intuitively contradicting obligations—prosecutors are required to protect the rights of the same defendants they are trying to convict by providing them with evidence favorable to the defendant's case. In an adversarial system of justice that fosters gamesmanship, prosecutors are more likely to bolster their case than uphold the rights of a defendant they believe to be guilty.[42]

In order to prevent the alarming number of *Brady* violations in the criminal justice system, states should adopt open-file discovery statutes. The Justice Project's publication, *Expanded Discovery in Criminal Cases: A Policy Review*, details comprehensive recommendations for adopting effective open-file discovery. Open-file discovery grants the defense access to all unprivileged information that is known or should be known to the prosecution, law enforcement agencies acting on behalf of

the prosecution, or other agencies working for the prosecution, such as forensics testing laboratories.

In 1994, the American Bar Association (ABA) issued new standards of criminal discovery. The ABA standards clearly define the types of evidence the prosecution must share with the defense. They include written and oral statements made by the defendant, codefendants, witness lists, police reports, tangible objects, expert opinions, and information (such as eyewitness identifications) collected by third-party investigatory agencies such as law enforcement or forensics laboratories. The standards also call for the disclosure of materials related to sentencing (meaning aggravating evidence that calls for a more severe sentence, or mitigating evidence that calls for a lesser sentence).[43]

> In an adversarial system of justice that fosters gamesmanship, prosecutors are more likely to bolster their case than uphold the rights of a defendant they believe to be guilty.

States should adopt rules that closely mirror the ABA standards. Discovery should be mandatory and automatic, not based on an appeal or motion. This denies the prosecution any chance to withhold evidence simply because there was no request. Additionally, an open-file discovery statute must outline clear timelines of when the state must disclose their files—prosecutors frequently evade discovery obligations by providing witness information the day of the trial or exculpatory evidence after a defendant has made a plea bargain.[44]

States must ensure that discovery laws do not allow prosecutors to avoid disclosing evidence that might not be in the prosecutor's personal file concerning the case, such as forensic testing results, notes from law enforcement regarding the investigation or witness interviews, or other evidence held by agencies that assist in the investigation and prosecution of a crime. Prosecutors are still obligated to provide information from other agencies, even if such information is not in their possession. In order to ensure the prosecution is able to obtain all the evidence concerning a case, open-file discovery statutes should include a provision requiring all law enforcement agencies to make their files available to prosecutors upon request.[45]

Discovery rules should require proper documentation that both parties have exchanged the necessary materials, as well as when, and in what manner, and that they have exercised due diligence in obtaining materials from police agencies and other agents acting for or on behalf of the prosecution. Discovery certificates filed with the court create a record that the parties have fulfilled discovery responsibilities.

To ensure compliance with open-file discovery, states should modify their codes of professional conduct to reflect these additional discovery obligations. Most states have adopted a variation of the ABA's Model Rules of Professional Conduct Rule 3.8, which outlines the "Special Duties of a Prosecutor." Among other obligations, Rule 3.8 requires prosecutors to comply with *Brady* by making "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the defense."[46] However, when a state adopts open-file discovery, the prosecutor has a duty to disclose *all* unprivileged information on a given case to the defense, not just exculpatory evidence. Therefore, states adopting open-file discovery should modify rules of Professional Conduct to require disclosure to the defense not just of evidence that tends to negate guilt, but of all evidence and information required to be disclosed by law. States should also modify rules of Professional Conduct to require prosecutors to disclose evidence "after a reasonably diligent inquiry" by the prosecutor for all evidence relating to the case.[47] This clause asserts the positive duty of prosecutors to seek out and obtain the complete files from all law enforcement and prosecutorial agencies and turn those files over to the defense.

Implementing a strong open-file discovery statute with provisions that ensure full compliance and full disclosure to the defense would greatly increase the accuracy of criminal proceedings. Defendants who are fully informed about the facts in the case are better able to make the decision whether to agree to a plea bargain or pursue trial, and prosecutors are far less likely to have cases overturned due to *Brady* violations. This reform would likely save states time and resources by reducing the number of convictions overturned on appeal, as well as the number of wrongful convictions that result from prosecutorial suppression of evidence.

3) States should require that prosecutors document all agreements with witnesses and jailhouse informants, especially concerning conferment of benefits of any kind.

Prosecutors often provide compensation to "cooperating" witnesses who can offer testimony favorable to their case. Benefits given to in-custody informants who provide incriminating testimony against a suspect, frequently one with whom they share a jail cell, often take the form of a favorable plea to a lesser charge or a reduction in sentence. Other types of cooperating witnesses, such as accomplice witnesses and out of-custody informants, can be compensated by the state either through immunity from prosecution or reduced charges.

This system creates a powerful incentive for such witnesses to fabricate testimony. For this reason, testimony by cooperating witnesses is widely regarded as the least reliable testimony encountered in the criminal justice system. Unfortunately, prosecutors frequently rely on the testimony of cooperating witnesses, especially when their case lacks strong eyewitness or physical evidence.[48]

Due to the inherently unreliable nature of informant testimony, prosecutors are required under *Brady* to disclose to the defense any evidence that diminishes the credibility of a cooperating government witness, or any leniency agreements between the prosecution and such witnesses.[49] However, prosecutors often evade this obligation by making a "tacit deal with a witness without actually verbalizing the agreement."[50] These measures prevent juries from accurately understanding the dangers of an informant witness. Absent any proof the witness has received compensation, or any record of the interviews or preparation the witness went through before taking the stand, such witnesses can appear credible and reliable to juries.

Current safeguards have failed to prevent false testimony by cooperating witnesses. According to a study

DUKE LACROSSE CASE: PROSECUTOR DISBARRED FOR MISCONDUCT

In June of 2007, North Carolina Durham County District Attorney Michael Nifong was disbarred for acts of misconduct related to the prosecution of three Duke Lacrosse players for an alleged rape that occurred in the spring of 2006. Nearly six months after the alleged crime occurred and DNA testing was conducted, and after repeated requests by the defense attorneys to obtain all evidence related to the case, defense attorneys discovered Nifong had withheld several important lab reports containing exculpatory information. North Carolina's open-file discovery statute played a crucial role in the discovery of the reports, as defense attorneys used the statute to compel Nifong to disclose additional evidence about the case. The reports indicated that DNA evidence found on the victim did not match any of the three defendants in the case. North Carolina's Attorney General eventually dropped all charges against the lacrosse players and determined the men to be innocent. Nifong's discovery violations, in conjunction with a series of inflammatory and improper public statements about the case, led to his eventual disbarment and removal from his position as Durham County District Attorney.

This case represents a unique example of a state bar taking swift action to hold a prosecutor accountable for misconduct. While the kind of disciplinary response in this case is rare, the prosecutorial misconduct is not. Suppression of exculpatory evidence is the most widespread and common form of prosecutorial misconduct. There are dozens of cases in which misconduct identical to Nifong's have resulted in wrongful convictions and imprisonment, yet no disciplinary action was ever imposed. What became known as the "Duke Lacrosse" case had a high-profile in the media, inviting well-known lawyers to come to the defense of the lacrosse players. The media attention in the case was enough to spur the bar association to hold Nifong accountable for his actions.

This case demonstrates the kind of disciplinary action that is appropriate when a prosecutor abuses his power. Although this kind of response by a state bar is extremely rare, the case reveals the importance of open-file discovery laws, which prompted the disclosure of important evidence that might never have been discovered otherwise.

conducted by the Center on Wrongful Convictions at the Northwestern School of Law, falsified testimony by government informant witnesses receiving benefits in exchange for their testimony is the leading cause of wrongful convictions in capital cases.[51]

The Justice Project's publication, *In-custody Informant Testimony: A Policy Review* contains comprehensive recommendations for improving the standards of admissibility of in-custody informant testimony. In order to prevent false testimony by informant witnesses, states should adopt rules requiring mandatory, automatic pretrial disclosures of information related to in-custody informant or cooperating witness testimony. States should require the prosecution to disclose the following information: statements made by the accused to the in-custody informant; incentives that the witness received, will receive, or may receive in exchange for testimony (*e.g.*, promises for sentence reductions, offers to lesser pleas, improved incarceration conditions for in-custody witnesses, or anything else of value); whether the witness has agreed to testify at prior criminal trials and, if so, how many times he or she has done so (or agreed to do so) and whether the witness has received any previous benefits for testimony; the complete criminal history of the witness; whether at any time prior to trial the witness has recanted his or her testimony or made statements inconsistent with the testimony to be presented at trial; and anything else bearing on the witness' credibility.[52]

Implementation of this recommendation can best be achieved through the use of centralized databanks in each jurisdiction that keep track of informant witnesses and the relevant information associated with them—when they testified, incentives offered, their criminal history, and the credibility of their prior testimony. Such a databank would increase transparency within prosecutors' offices, and allow all prosecutors access to crucial information regarding informant witnesses. Without such a system, prosecutors might not be aware of the damaging background information of a given informant before utilizing their testimony in trial.

This recommendation helps ensure the accumulation of detailed records of all interactions between the government and the informant witness prior to trial. Such disclosures should occur prior to any criminal trial or proceeding in which the prosecution intends to call the informant to testify. Disclosure of this information ensures that defendants can conduct meaningful cross-examination and that juries can properly weigh the testimony offered by an informant witness.

4) States should require trial and appellate judges to report all cases of prosecutorial misconduct, including cases where the misconduct is ruled to be harmless error.

Perhaps the greatest barrier preventing prosecutors from being reported and/or disciplined for misconduct are the courts. Trial and appellate judges are not required to report the vast majority of prosecutorial misconduct and in those jurisdictions where there is a requirement to report, judges are failing to do so.[53]

When a prosecutor commits misconduct during a trial, such as withholding exculpatory evidence or allowing a witness to lie on the stand, defendants have a right to appeal to have their convictions overturned. Judicial review of claims of misconduct occurs during these appeals.

The primary purpose of a judicial review is to ensure that a defendant was afforded procedural justice—that his case was not unfairly prejudiced or affected by the misconduct, mistakes, or incompetence of the prosecutor. For a case to be overturned upon appellate review, the court must determine that the prosecutor's misconduct was harmful and that the outcome of the trial would have been different but for the actions of the prosecutor.[54]

A second, but equally important, purpose for judicial review is to identify cases of misconduct to be reported to state and local disciplinary authorities. Serious acts of incompetence and misconduct should be properly reported, investigated, and disciplined. Judicial review of claims of misconduct is the most likely avenue through which misconduct will be reported.[55] However, states with a mandatory reporting requirement, such as California, limit the requirement to cases where the judgment is modified or reversed.[56] This excludes all harmless error cases, meaning judges are not required to report the vast majority of misconduct.[57]

This reporting scheme is problematic because a harmless error determination often depends on the strength of the overall evidence against the defendant, not the egregiousness of the prosecutor's misconduct. As such, virtually identical prosecutorial misconduct

can result in a conviction being upheld in one case, and overturned in another.[58] Whether a judge must refer a prosecutor to the bar for discipline should depend on the egregiousness of the misconduct, not on whether the case resulted in reversal.

In addition to a lack of accountability for acts of misconduct that do not prompt appellate reversal, judicial underreporting also permits a troubling trend of allowing "repeat offenders" to slip through the cracks. "Repeat offenders" are prosecutors whose misconduct has prejudiced the outcome of more than one trial or even led to the wrongful conviction of more than one individual. A study conducted on behalf of the California Commission on the Fair Administration of Justice found 443 findings of prosecutorial misconduct in the state of California over a ten year period. The study uncovered thirty repeat offenders, including two prosecutors who committed misconduct in three different trials.[59] This phenomenon goes unnoticed when judges do not report acts of misconduct.

Appellate judges should be required to report findings of misconduct regardless of whether the misconduct is deemed harmless error. Prosecutorial accountability and the threat of being reported and/or disciplined must exist in all criminal cases, regardless of the facts against the accused.

In all appellate cases in which claims of prosecutorial misconduct are raised and a judge determines misconduct took place, that judge should be required to report such misconduct to 1) the prosecutor's supervisor; 2) the state or local bar association; and 3) any other investigative or disciplinary authority. These outside authorities will then determine if the misconduct merits any further action—investigation, a disciplinary hearing, and/or disciplinary action. Such a reporting scheme would allow a disciplinary body to compile a list of prosecutors who have committed misconduct. By initiating a mandatory reporting requirement, repeat offenders can also be identified and properly investigated and disciplined.

Ensuring compliance with reporting requirements can be strengthened by modifying judicial canons to make clear when judges are ethically obligated to report findings of misconduct. The California Commission on the Fair Administration of Justice found that judicial underreporting in the state may have been due to confusion over who has a duty to report misconduct, and when.[60] The Commission recommended modifying judicial canons to specify what kinds of misconduct judges are required to report, and when.[61] In doing so, holding prosecutors accountable becomes a part of a judge's ethical obligations.

PROSECUTORIAL MISCONDUCT: THREE OPTIONS FOR APPELLATE REVIEW

Claims of prosecutorial misconduct are often brought up on appeal when convicted individuals claim their trial was compromised as a result of the misconduct. Appellate courts can respond to these claims in three ways:

- **No Misconduct:** The court rules that the prosecutor's actions were not misconduct, or not address the claim at all.
- **Misconduct, Harmless Error:** The court rules that an act of misconduct did take place, but that it was "harmless error." In these cases, the court finds that the misconduct would not have affected the outcome of the trial. Because harmless error findings do not result in reversal of the original conviction, the courts rarely address misconduct in these cases in any meaningful way, either through an admonition in the written opinion or an official report to a disciplinary authority.
- **Misconduct, Harmful Error:** The court rules that an act of misconduct was "harmful error" and fundamentally interrupted the fairness of the proceeding, preventing the jury from reaching an accurate verdict. Harmful error determinations result in a modification or reversal of the original conviction.

Harmful error determinations are generally based on the strength of the evidence against the defendant, not the seriousness of the prosecutor's misconduct. As a result, identical misconduct can often lead to a harmful error finding in one case, and a harmless error finding in another. Over seventy-five percent of prosecutorial misconduct findings result in a harmless error determination.* If states only require appellate courts to report cases of harmful error, the vast majority of prosecutorial misconduct will slip through the cracks and go unnoticed.

**Based on data provided by the Center for Public Integrity*

Modifying judicial reporting requirements would entail a drastic break from traditional norms of prosecutorial and judicial ethics and accountability. Many judges are former prosecutors themselves, and they work closely with prosecutors day-to-day, forming close professional relationships that make them extremely disinclined to report acts of misconduct.[62] Oftentimes, this desire to "protect their own," a belief that misconduct was unintentional, or that it won't occur again, prevents judges from reporting even the most egregious acts of misconduct to bar disciplinary boards.[63] In fact, judges often go out of their way to withhold the names of offending prosecutors in published opinions.[64]

Given the sheer volume of misconduct that takes place within the criminal justice system, and the role that such misconduct plays in the wrongful convictions of innocent individuals, judicial indifference and reluctance to hold prosecutors accountable can no longer be tolerated. States must require judges to report all cases of misconduct to the proper investigative and disciplinary authorities.

5) States should establish a prosecutor review board with the power to investigate allegations of misconduct and impose sanctions.

Currently, when judges report prosecutorial misconduct or abuses of power, they typically report such acts to the state bar disciplinary authority, which is

MISCONDUCT BY FEDERAL PROSECUTORS: THE TED STEVENS CASE

On April 1st, 2009, U.S. Attorney General Eric Holder, citing prosecutorial misconduct as the primary reason, dismissed an indictment against former Senator Ted Stevens of Alaska. Holder and the Justice Department determined that the fairness of the trial against Senator Stevens had been too damaged by government misconduct to proceed further. This decision by the most powerful and influential prosecutor in the country—the Attorney General—represents a critical first step in addressing a nationwide problem of prosecutors abusing their power in order to secure convictions.

The Stevens' case was marred by prosecutorial misconduct from the outset. Judge Emmett Sullivan repeatedly criticized prosecutors for failing to follow orders to provide evidence to the defense. In addition, prosecutorial misconduct at trial led Judge Sullivan to hold three of the prosecutors in contempt, and at one point instruct the jury to disregard some evidence presented by the prosecution. After replacing the original trial team, new prosecutors discovered even more evidence that should have been turned over to the defense, prompting Holder to dismiss the indictment against Stevens. Holder then ordered an internal review of the offending prosecutors.

Judge Sullivan has also appointed a prosecutor to investigate whether or not the prosecutors should face criminal contempt charges for their actions in the Stevens' case. Citing a "troubling tendency" he has observed among prosecutors to withhold evidence and abuse their prosecutorial powers, Judge Sullivan stated, "[i]n twenty-five years on the bench I have never seen anything approaching the mishandling and misconduct that I have seen in this case." Judge Sullivan has suggested that the Department of Justice provide better training for its prosecutors including mandatory ethics training.

The Stevens' case demonstrates that a culture has developed in which prosecutorial abuse of power occurs—even in the most powerful and well-funded office in the nation. This policy review reveals that this culture, and the type of misconduct in the Stevens' case, is prominent in jurisdictions all over the country.

Sullivan's and Holder's responses to prosecutorial misconduct are not common occurrences--prosecutors are rarely investigated or sanctioned for abusing their power. States should follow the example of the Attorney General in the Stevens case by effectively responding to acts of prosecutorial misconduct that impede the fair administration of justice. This policy review details how jurisdictions can change the culture of leniency towards prosecutors, and prevent the kind of misconduct that took place in the Stevens' case from happening in the future.

responsible for investigating and disciplining *all* attorneys, both criminal and civil, in a given jurisdiction. For a variety of reasons discussed in detail below, the state bar disciplinary authorities are not well-suited to adequately hold prosecutors accountable, investigate all acts of misconduct, and discipline prosecutors. Thus, it is recommended that a separate entity be established with the sole responsibility of improving the quality of representation on the part of prosecutors.

The unique role of prosecutors in the system makes the state bar an unsuitable entity to address prosecutorial misconduct.[65] State bar disciplinary committees are specifically designed to address misconduct by private practitioners of law with commitments to individual clients, not publicly elected officials whose duties and obligations are to the general public. A search of any state bar disciplinary or grievance counsel website, for example, gives instructions on how individual citizens can file formal complaints against their attorneys—but none mention any process by which a complaint can be made against a prosecutor.

All actors within the criminal justice system have a continuing obligation to report acts of misconduct by prosecutors, defense attorneys, or judges.

The complaint intake mechanism of state bar disciplinary authorities is not well-suited for receiving or identifying allegations of misconduct against prosecutors.[66] Individual citizens are able to make formal complaints against private practitioners that are then investigated by the state bar, and appropriate action is taken if necessary. However, prosecutors do not represent individual clients who are able to make complaints, and the actors that are in a position to report a prosecutor—judges, defense attorneys, and fellow prosecutors—are failing to do so.

All actors within the criminal justice system have a continuing obligation to report acts of misconduct by prosecutors, defense attorneys, or judges. However, reports of this nature, especially in regards to misconduct by prosecutors, are extremely rare. Appellate court judges by and large fail to report findings of misconduct to the proper authorities, and oftentimes actively withhold the names of offending prosecutors from their written decisions.[67] Defense attorneys and prosecutors also underreport prosecutorial misconduct. A defense attorney's controlling interest is in securing the best possible outcome for her client; accordingly, she will likely seek discipline of the prosecutor only insofar as it serves her client's best interest.[68] A prosecutor, on the other hand, may not report a fellow prosecutor because to do so might damage professional relationships, friendships, or her career.

Private practitioners in civil practice are disciplined on a much greater scale than prosecutors.[69] Civil practitioners are even sanctioned more frequently for acts of misconduct more commonly attributed to prosecutors, such as discovery violations.[70] This disparity is in large part due to underreporting, but there is strong evidence that even when misconduct is reported or brought to the attention of the state bar, enforcement is soft and discipline lax. The Center for Public Integrity's study could only identify forty-four cases of attorney discipline by the bar out of the 2,012 cases reversed due to misconduct since 1970. Of the forty-four cases, seven resulted in a dismissal of the complaint or no punishment, twenty in a reprimand or censure, twelve in a suspended license, two in disbarment, twenty-four in a fine, and three in a remand for further proceedings.[71]

There are a number of possible reasons for this leniency towards prosecutors on behalf of the state bar. Bar disciplinary authorities derive their power from the judiciary, and might be reluctant to impose disciplinary sanctions on elected officials who operate under the executive branch, for fear of imposing on another branch of government.[72] Additionally, attorneys that serve on bar disciplinary committees are typically private practitioners in civil practice that might not be well-versed in criminal law and the broad responsibilities of prosecutors in criminal cases.[73] However, leniency and lack of action by the state bar presents an enormous risk to public safety, given the role prosecutorial misconduct plays in delaying justice and the wrongful convictions of innocent individuals.

A more appropriate means of investigating and disciplining prosecutors is through the establishment of independent prosecutor review boards[74] with the power to investigate allegations of prosecutorial misconduct and impose sanctions.[75] The responsibilities of prosecutors differ greatly from civil practitioners, requiring oversight and accountability distinct from the oversight of civil practitioners. In the same way states regulate

judges through judicial conduct organizations, states should regulate the conduct of prosecutors through independent review boards. These review boards could be modeled on judicial conduct organizations already established in each jurisdiction.[76]

The review board should be comprised of individuals within the criminal justice system who present a broad range of interests and an understanding of the unique responsibilities of prosecutors, including judges, prosecutors, and criminal defense attorneys.

The review board should establish a complaint-intake mechanism aimed at identifying claims of prosecutorial misconduct specifically. Defense attorneys, prosecutors, judges, and individual citizens should be able to make formal complaints to the prosecutor review board, and judges should be required to report *all* findings of misconduct, regardless of whether it is deemed harmful or harmless error. States should encourage all actors in the system to uphold their ethical obligations and report acts of prosecutorial misconduct to the review board. However, even in the absence of formal complaints or reports, the review board can be alerted to claims of misconduct each time a written opinion by an appellate court contains a finding of misconduct. Each appellate finding of misconduct should trigger a preliminary investigation by the review board.[77]

The board should have the subpoena power necessary to investigate individual prosecutors and prosecutors' offices.

The review board should then determine which allegations warrant a formal investigation. To this end, the review board should have the subpoena power necessary to investigate individual prosecutors and prosecutors' offices. While the review board would not launch an adversarial, trial-like proceeding against a prosecutor, prosecutors should have the ability to appeal any decisions made by the review board to the Supreme Court.[78] Sanctions should include, but not be limited to, admonition, compulsory education or training, fine, or suspension for any prosecutor it finds to have violated any provisions of the states'

HOW PSYCHOLOGICAL BIASES CAN CONTRIBUTE TO MISCONDUCT

Cognitive science research suggests that unavoidable psychological biases often negatively affect decision-making. For prosecutors, these biases can lead to serious judgment errors during an investigation and trial of a suspect. For example, when seeking to confirm the accuracy of a theory or hypothesis, a phenomenon known as "confirmation bias" often leads people to disproportionately look for and favor information that confirms their own theory. Another psychological phenomenon known as "belief perseverance" results in adherence to a certain theory or hypothesis, even when confronted with overwhelming evidence that that theory is incorrect.

When prosecutors form a theory of guilt for a defendant, confirmation bias and belief perseverance can threaten their ability to adjust their thinking, even when confronted with evidence strongly challenging the accuracy of their theory. Psychological biases can lead prosecutors to favor evidence which confirms their theory, while ignoring or discrediting contradictory information. This phenomenon often leads to a "tunnel vision" mentality, where prosecutors and law enforcement focus all of their attention and efforts on building a case against a single suspect, often overlooking weaknesses in their case or leads pointing to other suspects. Tunnel vision is particularly dangerous when the prosecution's theory is wrong, and the defendant is in fact innocent. Confirmation bias and belief perseverance are perhaps most visible in the alarming number of cases in which an individual is exonerated by DNA evidence, and the prosecutors continue with their theory that the person must have somehow been involved in the crime, despite overwhelming evidence of innocence.

Prosecutors can best be made aware of the dangers of tunnel vision, and how to avoid it, through proper training and education programs within prosecutors' offices. Awareness of the sources of error can help prosecutors be vigilant in avoiding those errors and the tunnel vision mentality that often leads to wrongful convictions.

professional codes. If the review board determines a prosecutor's misconduct was serious enough to warrant disbarment, it should recommend this sanction to the state bar. Prosecutor review boards can only be an effective deterrent of misconduct if they are granted the appropriate power to investigate and sanction prosecutors that violate their professional obligations.

The prosecutor review board should be unlike bar disciplinary boards in that it would conduct periodic, random, and unannounced reviews of closed cases.[79] Its audits would help deter misconduct as well as gauge its prevalence and suggest how it might best be addressed. Additionally, the review board should serve as an information-providing entity by making its operations transparent, and its findings publicly available. This information can help restore accountability to the popular election of prosecutors by providing the public with the information needed to make informed judgments about whether prosecutors are upholding their duties.

The duty to maintain "highly developed professional skills" is uniquely important for prosecutors, who hold the lives of defendants and the safety of the public in their hands.

Implementation of this recommendation would impose an additional funding commitment for states. While states need not compensate members of the board for their service, there would be actual expenses the state must cover in order for the board to meet and perform its duties. Additionally, the use of expert witnesses or investigators might be necessary as part of an investigation by the review board, which would entail additional expenses. However, the benefits of prosecutorial accountability would far outweigh the costs in the long run. States shoulder a huge financial burden every time prosecutorial misconduct leads to a re-trial, reversal, or wrongful conviction. Establishing an independent entity responsible for maintaining high levels of professionalism among prosecutors would prevent the acts of misconduct that often delay justice or lead to wrongful convictions.

6) States should require that prosecutors participate in training and continuing education programs.

A key reform aimed at preventing prosecutorial misconduct and abuses of power is improved training and education. All prosecutors' offices should establish training and education programs and require new prosecutors to successfully complete such training prior to playing an active role in cases. Acting prosecutors should also participate in continuing education programs. Continuing education is important because, over time, the lessons learned in initial trainings are forgotten as habit, politics, and institutional pressures exert their influence. Training and education programs should focus on ethics and the unique ethical obligations prosecutors have as officers of justice.

Beyond ethics, training should also focus on a prosecutor's role in minimizing the errors that lead to wrongful conviction. In addition to understanding how their actions can lead to wrongful convictions—*i.e.* tunnel vision, suppression of evidence, trial misconduct, or knowingly using false testimony—prosecutors must understand what steps they can take to improve the quality and reliability of evidence, and avoid the use of weak or unreliable evidence that often leads to wrongful convictions. This includes education on how to recognize, prevent, or avoid using faulty eyewitness identifications, unreliable forensic evidence and testimony, and false confessions.

The American Bar Association recommends that, "training programs should be established within the prosecutor's office for new personnel and for continuing education of the staff. Continuing education programs for prosecutors should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs."[80] This recommendation is rooted in the recognition that the "function of public prosecution requires highly developed professional skills."[81]

Just as legal practitioners in private practice participate in continuing legal education to maintain a high level of skill in their craft, prosecutors should take actions to maintain a high level of skill and professionalism in performing their duties. The duty to maintain "highly developed professional skills" is uniquely important for prosecutors, who hold the lives of defendants and the safety of the public in their hands.

LEGAL LANDSCAPE

Traditionally, legal remedies for prosecutorial misconduct in the United States have been weak and ineffectual. By and large, the U.S. Supreme Court ("the Court") has failed to effectively articulate standards to guide prosecutorial discretion.[82] Absent any standards on what is considered an abuse of prosecutorial power, it is extremely difficult for a defendant whose trial was compromised by prosecutorial misconduct to obtain relief.

Overall, the courts have taken a remarkably laissez-faire attitude towards prosecutorial misconduct, leaving it to the states to regulate prosecutor behavior.

The Court has provided some guidance as outlined in *Brady v. Maryland*. In *Brady*, the Court ruled that the prosecution has a constitutional obligation, under the due process clause, to disclose exculpatory evidence to the defense.[83] The Court ruled that the right to a new trial exists if the suppression is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[84]

Even if the Court were to articulate more comprehensive standards about what is considered an abuse of prosecutorial power, the development of the harmless error rule makes enforcement of any standards nearly impossible. In *United States v. Bagley*, the Court ruled that appellate courts can ignore *Brady* violations unless "there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different."[85] Using the materiality of the evidence, as opposed to the egregiousness of the prosecutor's misconduct, as the standard for granting appellate relief extends beyond *Brady* violations. In *Rose v. Clark*, the Court ruled that, "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed."[86] It termed misconduct that had no perceptible change in the trial's outcome a "harmless error." While there are some serious constitutional violations that will always warrant appellate reversal,[87] appellate courts are required to apply the harmless error rule to the majority of constitutional errors.

The harmless error rule "has been a jurisprudential fiasco"[88] that often denies criminal defendants a fair trial. It places the goal of winning a case above all else, including upholding the Constitution. The rule fosters prosecutorial gamesmanship by allowing prosecutors who have a strong case to deny criminal defendants a fair trial. As long as the judgment will not be reversed, and the prosecutor not reported for misconduct, prosecutors have no incentive to refrain from unethical or unconstitutional behavior in order to secure a conviction.

There is no doubt that the harmless error rule has contributed to prosecutorial tendencies to bend the rules. Justice Stevens recognized this danger in his concurring opinion in *Rose v. Clark:*

> *An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case.*[89]

Beyond the harmless error rule, the Court has granted federal prosecutors civil immunity from lawsuits.[90] Most states have followed suit, and have laws protecting prosecutors from civil lawsuits.[91] The Court's reasoning behind granting prosecutors immunity was that bar associations and prosecutors' superiors would effectively respond to misconduct. Overall, the courts have taken a remarkably laissez-faire attitude towards prosecutorial misconduct, leaving it to the states to regulate prosecutor behavior. The states have also failed to effectively regulate the behavior of prosecutors.

The consequences of the Court's lenient stance on prosecutorial misconduct cannot be overstated. One need only point to the frequency of prosecutorial misconduct within the system and the role it plays in wrongful convictions. The lenient approach to prosecutorial misconduct by the courts, along with the Supreme Court's failure to articulate clear standards on the prosecutor's obligations in the criminal justice system heightens the need for states to enact the procedural reforms outlined above.

BENEFITS AND COSTS

BENEFITS OF REFORM

The existence of pervasive prosecutorial misconduct in the criminal justice system places the fairness and reliability of every criminal trial at risk. The reforms highlighted in this policy review would prevent and address both the intentional and unintentional prosecutorial errors that threaten a fair trial process. First, these reforms would deter prosecutorial misconduct. Office manuals would give prosecutors better guidance on making decisions at critical stages of a prosecution and also serve as a guide for making ethical decisions throughout the prosecution. Mandatory reporting requirements for judges would help to hold prosecutors more accountable for their abuses of power and acts of misconduct at the trial level to secure a conviction. Open-file discovery requirements would eliminate the ample opportunities for prosecutors to withhold material evidence from a defendant. Additionally, the reforms laid out in this policy review can increase the quality of oversight and accountability of prosecutors so that when misconduct does occur, it is handled appropriately. The prosecutorial review boards could provide a venue for holding prosecutors more accountable and creating an environment that ensures integrity, credibility, and accuracy.

The reforms laid out in this policy review can increase the quality of oversight and accountability of prosecutors so that when misconduct does occur, it is handled appropriately.

There would also be substantial financial benefits to states implementing these reforms. Increasing the accuracy and reliability of criminal trials would reduce the number of wrongful convictions. Additionally, every time a prosecutor compromises the fairness of a trial, that case is then launched into a lengthy appeals process based on claims of prosecutorial misconduct. In addition to the costs of these appeals, states waste more resources when a conviction is overturned and sent back for a new trial. These reforms help ensure a more accurate trial process that can help states "get it right the first time" and save the costs of exhaustive appeals and retrials.

COSTS OF REFORM

Instituting open-file discovery, requiring pre-trial disclosures of informant agreements, and mandating judicial reporting of misconduct are all procedural reforms, which would result in very minimal cost to the state. Establishing manuals for prosecutors' offices would require the additional work of drafting the manuals and disseminating them to offices, but again the costs to create, distribute, and implement manuals are minimal, particularly in comparison to the added benefits in performance and accountability that enforcing those manuals would bring.

Improving training with an eye towards avoiding wrongful convictions would also entail minimal cost in comparison to the costs of wrongful convictions. Prosecutors are uniquely situated to ensure only reliable and credible evidence makes it into the courtroom, thus avoiding critical errors in criminal trials. Investing in the proper training of prosecutors, and equipping them with the knowledge they need to avoid using unreliable evidence, will save states the exorbitant costs associated with wrongful convictions.

The creation of a prosecutorial review board is a reform that could be costly. While states can recruit members to perform this role without compensation, it is likely to be more effective if compensation is provided. In addition, states would have to fund the board's investigations, administrative costs, and other procedural costs. However, the benefits of prosecutorial accountability would far outweigh the costs in the long run. States shoulder a huge financial burden every time prosecutorial misconduct leads to a wrongful conviction. For example, in 1999 a prosecutor under former District Attorney Harry Connick in New Orleans admitted to withholding evidence that led to the wrongful conviction of John Thompson and his subsequent fourteen year imprisonment at Angola State Penitentiary in Louisiana. A court of appeals later awarded Johnson a 15 million dollar civil settlement.[92] Cases like Johnson's show that if states don't invest in ensuring an accurate criminal trial process, taxpayers will be forced to pay the costs in the future.

PROFILES OF INJUSTICE

Since 1970, over two thousand convictions in the United States have been modified or reversed due to prosecutorial misconduct.[93] In over thirty of these reversals, prosecutorial misconduct led directly to the wrongful convictions of innocent people.[94] These profiles of injustice highlight the very real possibility that an unintentional error or deliberate abuse of power by a prosecutor can cost an innocent person his freedom.

Ernest Willis

Ernest Willis spent seventeen years on death row in Texas largely as a result of prosecutorial misconduct. In 2004, the Supreme Court found that both his conviction and sentence were obtained in violation of his constitutional rights. More specifically, the state inappropriately administered antipsychotic drugs to Willis and suppressed evidence favorable to the defense.[95] Willis was eventually pardoned and exonerated and received $430,000 compensation.[96]

On June, 11, 1986 a fire destroyed a home in Iraan, Texas. Ernest Willis was sleeping in the house at the time of the fire. He and his brother made it safely out of the house, but two friends, Elizabeth Belue and Gail Allison, were unable to escape and perished in the fire. Four months after the fire, Ernest Willis was arrested and charged with arson resulting in murder.[97] There was no clear evidence of arson in Willis' case and police failed to discover fingerprints or flammable liquids in the house or on Willis' clothes. Prosecutors built a case against Willis using weak, circumstantial forensic evidence.[98] In 1987, a jury found Willis guilty of capital murder and sentenced him to death.

Willis was wrongfully convicted largely as a result of prosecutorial misconduct and an unfair trial. While awaiting trial, Willis was administered an unnecessary and excessive (over twice the recommended dosage) amount of antipsychotic medications by the State authorities.[99] It is unclear why he was administered these drugs as he had no history of psychosis or mental illness. Side effects of the drugs were flat facial expression, drowsiness, and confusion. This severely affected Willis' behavior during hearings. An appellate judge scolded the prosecution for "seiz[ing] upon Willis' demeanor… asking the jury to draw inferences of guilt and future dangerousness from Willis's lack of apparent feeling or emotion."[100]

Prosecutors capitalized upon Willis' appearance and used inflammatory language to damage his character in front of the jury. For example, they referred to him as a "pit bull," an "animal," and a "rat," and remarked upon his "dead pan, insensitive, expressionless face."[101] In 2004, the Court recognized this, writing that, "It is clear from the state trial court's findings of fact that Willis was actually prejudiced, both because of the effect of the medication on Willis's demeanor and because the prosecution used Willis's demeanor as evidence of guilt and future dangerousness."[102]

The prosecution also failed to disclose a psychiatric evaluation performed before the trial, which found Willis not to be a future danger. In Texas, a defendant must be considered a future danger to society in order to be eligible for the death penalty. The prosecutor's suppression of this key expert opinion made it possible for a jury to inflict a sentence of death, despite evidence that should have excluded Willis from receiving such a punishment.

Willis was eventually pardoned in 2004 when a regional judge ordered prosecutors to either release Willis or re-try his case.[103] A subsequent investigation cast even more doubt on Willis' guilt, when two arson experts reported that the cause of the fire could not be determined. One investigator called some of the scientific testimony at Willis' trial "absurd" and said the initial suspicions of arson rested on a flawed and unscientific understanding of the physics of fire.[104]

For Ernest Willis, the costs of prosecutorial misconduct were nearly fatal. In addition to spending seventeen years wrongfully imprisoned, Willis was nearly executed for a crime he did not commit. His case reveals the extent to which prosecutorial errors can prevent accuracy in the criminal justice system. The state of Texas likely could prevent such injustices by creating strong safeguards against prosecutorial abuses of power, such as mandatory reporting requirements and prosecutor review boards. A lack of prosecutorial accountability cost the state of Texas $430,000 in compensation for his wrongful conviction, not to mention the additional costs of his lengthy appeals. It cost Ernest Willis nearly two decades of his life.

Milton Lantigua

Despite his repeated protests of innocence and a lack of substantial evidence, Milton Lantigua was convicted for the 1990 murder of a man named Felix Ayala. Because the prosecution allowed a highly unreliable witness to perjure herself on the stand, Lantigua served five years in prison wrongfully convicted before an appeals court reversed his conviction. In 2005 the City of New York agreed to compensate Lantigua one million dollars to settle a civil rights lawsuit.[105]

A month after Felix Ayala's murder, a young woman told police she had witnessed the crime from her bedroom window across the street. The police drove the woman around the neighborhood, and from the car, she identified Milton Lantigua as the assailant. Lantigua was subsequently charged and imprisoned. The woman, Frances Rosario, became the chief witness against him at trial. Apart from the testimony given by Rosario, there was no evidence to connect Lantigua to the victim's death.[106] Rosario's testimony was described by the court as "confusing, inarticulate, vague, frequently inaudible, and extremely hesitant."[107]

The crucial information regarding the reliability of the witness could have been revealed had New York adopted open-file discovery policies.

The first trial resulted in a hung jury. After the trial, prosecutors offered Lantigua a "deal": plead guilty to a lesser charge of weapons possession and be sentenced only to time served. Lantigua refused the offer, maintaining his innocence of any crime. In the retrial, despite Rosario's unreliable testimony, Lantigua was convicted of second degree murder and sentenced to twenty years to life in prison.

Years later while Lantigua sat in prison, his new defense attorney Joel Cohen obtained evidence that seriously questioned the credibility of Rosario's testimony. Cohen discovered an affidavit in which Rosario recanted her testimony that Lantigua had been involved in the shooting. Furthermore, Cohen discovered that Rosario had told the prosecution she had been with a man at the time of the shooting, yet the prosecution allowed her to testify falsely at trial that she was alone when she witnessed the crime.

In 1996 the Appellate Division of the New York Supreme Court threw out Lantigua's conviction, citing the conduct of the prosecutors as "especially egregious."[108] The court ruled that the failure of the prosecution to reveal inconsistencies by a crucial eyewitness fundamentally affected the fairness of the trial and the accuracy of the conviction. Additionally, the court cited misconduct by trial prosecutor Sophia Yozawitz during her closing argument, finding that "the prosecutor's summation cannot be remotely regarded as fair comment on [Rosario's] testimony."[109]

During a subsequent civil lawsuit, Lantigua's attorney suggested that the misconduct committed by prosecutors was due to a lack of oversight and training within the prosecutor's office.[110] Regardless of whether the errors leading to Lantigua's wrongful conviction were intentional, they were errors that could have been prevented had the State of New York required certain procedural safeguards to prevent abuses of prosecutorial power. The crucial information regarding the reliability of the witness could have been revealed had New York adopted open-file discovery policies, and the prosecutor's closing argument may not have deliberately misrepresented the facts had she been properly trained to appropriately use her discretion.

A lack of prosecutorial accountability in Lantigua's case had huge financial ramifications. After his exoneration, the State of New York paid Lantigua a $300,000 settlement in compensation for his wrongful conviction, and in February 2005 New York City agreed to pay Lantigua one million dollars to settle his civil rights lawsuit against the city.[111] However, the financial burden imposed on the state does not compare to the ordeal of spending five years in prison as an innocent man. After the settlement Lantigua told *The New York Times*, "No amount of money in the world makes up for everything I went through. I hope that with the end of this case, these things don't keep happening to other people, that no one goes through what I went through." The State of New York did not take any steps to prevent prosecutorial misconduct in the aftermath of Lantigua's case—no prosecutor was disciplined by a superior or by state disciplinary authorities for misconduct that cost an innocent man five years of his life.

Roy Brown

Roy Brown spent fifteen years in prison for a murder he did not commit. Several preventable prosecutorial errors led directly to Brown's wrongful conviction. Prosecutors in the case did not adequately investigate other possible leads—including one pointing to the real killer. In addition, the prosecution failed to disclose to the defense a crucial expert opinion that cast doubt on the state's entire case. [112]

In the spring of 1991, Roy Brown found himself the primary suspect for the murder of Sabina Kulakowski, a crime he did not commit. Brown would spend fifteen years in prison despite his innocence. If New York had enacted safeguards to prevent prosecutorial misconduct, exculpatory information likely would have been introduced at trial and Brown would never have been wrongfully convicted.

Brown's trial for the murder came in January of 1996. The key piece of evidence against Brown was the testimony of a local dentist who claimed that the bite marks found on the victim were consistent with Brown's teeth and the testimony of an in-custody informant who claimed that Brown confessed to him. Brown was convicted of second-degree murder and sentenced to twenty-five years in prison. Over the next eleven years, he filed eight appeals, but was never granted a new trial.[113]

Brown turned his cell into a miniature law office, pouring over legal documents and filing appeals on his own. In 2003, Brown filed a Freedom of Information request with the Cayuga County Sheriff's Office asking for a list of individuals who had given statements to the police and prosecutors. The office sent Brown a list with seventeen names he had never seen before. He later discovered that all seventeen of these people had given statements to police. A close reading of these statements led Brown to formulate a theory of the crime: the real killer of the victim was Barry Bench, the brother of her ex-boyfriend. The evidence seemed clear to Brown, but his lawyers had never been provided with these affidavits.[114]

Convinced of his theory that Barry Bench was the true perpetrator of the crime, Brown wrote a letter to Bench from prison. In the letter, he accused Bench of committing the crimes and promised that the truth would eventually be revealed. Five days after Brown sent the letter, Bench committed suicide. Attorneys finally convinced a judge to allow DNA testing on the saliva from the bite marks found at the crime scene. The tests showed that Brown's DNA was not on the shirt. Further testing revealed that it was indeed Bench's DNA on the shirt found at the crime scene. Brown was released from prison in January of 2007 and exonerated two months later.[115]

The prosecutors in Brown's case also failed to disclose the opinion of an expert that disagreed with the bite-mark analysis presented during the trial. The expert, Dr. Paul Levine, met with the prosecutor prior to trial and expressed his belief that at least one mark could not have come from Brown. Because prosecutors never revealed this information to the defense, Levine's opinion never made it into the courtroom.

Brown's case demonstrates the extent to which *Brady* violations can derail a fair trial process and emphasizes the importance of prosecutorial compliance with discovery requirements. With stronger safeguards to protect against prosecutorial misconduct, such as open-file discovery policies, it is likely that Brown would not have lost fifteen years of his life.

Tim Masters

Tim Masters spent nearly a decade in prison for a murder he did not commit. Despite no physical evidence connecting Masters to the crime, tunnel vision drove police and prosecutors to focus on Masters as a suspect for nearly ten years after the crime was committed. Masters later discovered that the prosecution withheld key pieces of evidence pointing to his innocence. He was exonerated by DNA testing in 2008.

Timothy Masters was fifteen years old in February, 1987, when thirty-seven year old Peggy Hettrick was murdered in Fort Collins, Colorado. On the day Hettrick's body was found near Masters' home, police found Masters at school and took him to the police department for questioning. Police searched Masters' home and discovered drawings he created depicting scenes of violence against women. Based on these drawings, police zeroed in on Masters as a suspect. No physical evidence was ever found linking Masters to the crime.

For the next ten years, throughout Masters' life as a teenager and into his early adulthood, police persisted in trying to build a case against him. Finally, in 1998,

police retained Dr. Reid Meloy, a forensic psychologist, to review the evidence in the case and the drawings created by Masters and prepare a report implicating Masters in the murder. Based almost entirely on the conclusions of Dr. Meloy, police arrested Tim Masters for the murder of Peggy Hettrick in 1999, over ten years after the crime had taken place. He was convicted as an adult and sentenced to life in prison.[116]

Master lost his appeals in 1999 and again in 2002, but never stopped maintaining his innocence. In January of 2008, special prosecutors were assigned to Masters' case and conducted a series of hearings that revealed serious errors by police and prosecutors. A number of substantial, important pieces of evidence were discovered that were never disclosed to Masters' attorneys in 1999 as well as evidence gathered through surveillance of Masters and his father in 1988. Subsequent DNA testing on evidence recovered from the victim excluded Masters as the perpetrator and instead implicated one of Hettrick's previous boyfriends. Based on the newly discovered evidence and the DNA testing, special prosecutors concluded he had been denied a fair trial, and recommended his immediate release. Masters was freed on January 22, 2008, after spending nearly a decade in prison, and over half his life trying to prove his innocence.[117]

The two lead prosecutors in Masters' case, who went on to become judges, were investigated by Colorado's Office of Attorney Regulation (OAR) for their failure to disclose material evidence in Masters' case. OAR's investigation concluded that the prosecutors "directly impaired the proper operation of the criminal justice system," and both prosecutors were publically censured by the Colorado Supreme Court for their actions.[118] In an interview, one of the prosecutors admitted that the discovery violations were largely due to their failure to diligently collect all relevant evidence from police and investigators, stating, "I didn't take the responsibility of ensuring that we had everything that we should have. I trusted that that was being done, and if I could go back in time and make different decisions, I certainly would."[119]

The discovery violations leading to Masters' flawed trial could have been prevented with open-file discovery statutes and clear ethical guidelines requiring prosecutors to actively gather all relevant evidence in a criminal case. The costs of a lack of accountability in Masters' case are staggering—ten years of incarceration for an innocent man, and hundreds of thousands of dollars in legal fees for the public officials who are being sued in Masters' subsequent civil case.[120]

SNAPSHOTS OF SUCCESS

Currently, no state has a system of prosecutorial accountability that effectively prevents and deters prosecutorial misconduct. However, a number of states and individual jurisdictions have recognized the problem of prosecutorial abuse of power and have taken steps to improve prosecutorial accountability.

CALIFORNIA

California has taken a number of unprecedented steps towards addressing prosecutorial misconduct. In 2003, the *San Jose Mercury News* launched an ambitious investigative series examining the nature and extent of professional misconduct. The investigative series uncovered nearly one-hundred findings of prosecutorial misconduct in the 6th District Court of Appeals.[121] One of the prosecutors identified as a "repeat offender" in the *San Jose Mercury News* series, Benjamin Field, was subsequently brought before the State Bar of California for acts of misconduct in multiple cases spanning nearly a decade. In a highly contested and controversial opinion issued in February 2009, the State Bar recommended Field be suspended for four years from practice. [122]

While Field's misconduct and repeated failures to disclose exculpatory evidence were not unique occurrences, the decision of the State Bar to bring Field before a disciplinary court and sanction him appropriately was certainly a unique and almost unprecedented action. The State Bar's response to prosecutorial misconduct in Field's case reflects a trend in California in which "bar prosecutors have generally stepped up their disciplinary probes of state prosecutors."[123] Despite vigorous opposition

by fellow prosecutors to disciplinary action in Field's case, the State Bar's proceedings, as well as any other proceedings brought against prosecutors who deliberately abuse their discretion, are welcomed developments and absolutely crucial in ensuring prosecutorial accountability.

In 2008, the California Commission on the Fair Administration of Justice conducted a series of hearings specifically examining the issue of prosecutorial misconduct and accountability. The Commission identified systemic weaknesses within the criminal justice system that contribute to a lack of prosecutorial accountability, including judicial underreporting, as well problems with the "harmless error" rule. The Commission recommended modifying judicial reporting requirements and judicial canons to strengthen prosecutorial accountability in the state.

Additionally, the San Francisco District Attorney's Office has made a policy decision to operate under the charging standards established by the California District Attorney's Association in 1974 and updated annually in its Uniform Crime Charging Manual.[124]

The developments in California reflect an awareness by key actors within the criminal justice system that widespread prosecutorial misconduct and a lack of prosecutorial accountability are problems that must be addressed.

TEXAS

In 2006, former defense attorney Craig Watkins was elected to be Dallas County's next District Attorney. Prior to Watkins' election, Dallas County had become known for its damaging "convict at all costs" mentality under the supervision of District Attorney Henry Wade. After a record twelve wrongful convictions in Dallas County were exposed by DNA testing, Watkins was elected to be District Attorney based on a reform platform. Upon election, Watkins took steps to change the culture of the district attorney's office, stating "[w]e aren't here to rack up convictions. We're here to seek justice." [125] Watkins established the "Conviction Integrity Unit" to look for other possible cases of wrongful conviction in the office, as well as "what policies and procedures to put in place to keep [wrongful convictions] from happening in the future." The Unit was also charged with "the responsibility of training the younger lawyers…on the ethical side of a prosecutor's job." [126]

The changes made by Watkins to the Dallas District Attorney's office are a critical step in changing the culture of prosecutors' offices around the nation. The wrongful convictions that occurred in Dallas County reveal the extent to which an overzealous prosecutor's office can hinder the fair and accurate administration of justice. It is imperative that more offices implement the kinds of reforms enacted by Craig Watkins. Prosecutorial accountability cannot be achieved without the efforts of prosecutors' offices themselves. Craig Watkins represents a model district attorney that has truly taken seriously his responsibility as an "administer of justice."

MINNESOTA

Minnesota is one of the few jurisdictions that require prosecutors' offices to adopt written procedures to guide the use of prosecutorial discretion. Minnesota requires every prosecutors' office in the state to have "written guidelines governing the county attorney's charging and plea negotiation policies and practices" which must include "the circumstances under which plea negotiation agreements are permissible…the factors that are considered in making charging decisions and formulating plea agreements."[127] These written standards provide needed guidance for prosecutors as they exercise their discretionary power.

NORTH CAROLINA

Prosecutorial misconduct that led to the wrongful conviction, and death sentence of Alan Gell for the murder of Allen Jenkins, prompted the state of North Carolina to enact a number of safeguards designed to prevent prosecutorial misconduct. Gell spent nine years in prison, over half of which on death row, for a murder that was committed on a day when Gell was in jail, and could not have been present. The testimony of two young girls who confessed to being involved in the crime was the only evidence the state relied upon to secure Gell's conviction and death sentence in 1998.[128] Despite repeated requests by the courts and Gell's defense attorneys for the prosecution to disclose all exculpatory evidence in the case, prosecutors withheld over a dozen witness statements claiming to have seen the victim *after* the alleged date of the murder, as well as a recording of one of the girls who testified against Gell that called her credibility into question. At the time, North Carolina had an open-

file discovery statute only for capital post-conviction proceedings, and it was during these proceedings that Gell discovered the enormous amount of exculpatory evidence that had been withheld. He was re-tried and acquitted of all charges in 2004. [129]

Prosecutors in Gell's case, David Hoke and Deborah Graves, were investigated by the State Bar of North Carolina, and received public reprimands for their actions. Public outcry over Gell's case prompted the legislature and the State Bar in North Carolina to take steps to prevent the kind of egregious misconduct that led to his wrongful conviction.[130] The legislature enacted an open-file discovery law statute, requiring prosecutors to "[m]ake available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant."[131] In addition to open-file discovery requirements, the State Bar amended North Carolina's Model Rules of Professional Conduct Rule 3.8(d), governing the duties of prosecutors to disclose exculpatory evidence, to include the introductory phrase "[a]fter a reasonably diligent inquiry." This phrase imposes an additional obligation on prosecutors to actively seek potentially exculpatory evidence in the investigation and prosecution of criminal cases. Additionally, the State Bar changed Model Rule 3.8(d) from requiring the disclosure of exculpatory evidence to requiring "timely disclosure to the defense of all evidence or information required to be disclosed by applicable law, rules of procedure, or court opinions," to reflect North Carolina's open-file discovery laws.[132]

The developments in North Carolina reflect unprecedented efforts to prevent the prosecutorial suppression of evidence that too often leads to wrongful convictions. The Justice Project recommends all states adopt open-file discovery as in North Carolina and strengthen the ethical requirements of prosecutors to actively seek all important evidence in a criminal case, and ensure transparency and reliability through full disclosure of all law enforcement and prosecutorial files.

Additionally, jurisdictions such as **Florida, Colorado, New Jersey, Arizona, Massachusetts,** among others**,** have expanded their discovery laws in criminal cases, with some adopting full open-file discovery. States enacting expanded discovery statutes not only reduce the risk of prosecutorial misconduct, but ensure a more accurate and efficient criminal trial process with fewer reversals of convictions and re-trials.

VOICES OF SUPPORT

"[A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

George Sutherland
United States Supreme Court Justice
Berger v. U.S.

"We fail in our duty to the public and the bar when we do not penalize publicly those prosecutors who engage in egregious conduct."

Ruth I. Abrams
Former Justice on the Massachusetts Supreme Judicial Court[133]

"Certainly the expense to the public in having to retry cases over and over again—the increase in personnel on the state's attorney's office and the public defender's office—the financial impact should strongly weigh in persuading prosecutors to simply follow the law."

Chief Justice Charles Freeman
Illinois Supreme Court[134]

"Your job as assistant U.S. attorneys is not to convict people. Your job is not to win cases. Your job is to do justice…Anybody who asks you to do something other than that is to be ignored."

Eric Holder
United States Attorney General[135]

MODEL POLICY

The following model policy outlines the reforms recommended in this policy review. It establishes a prosecutor review board responsible for investigating complaints against prosecutors and imposing sanctions; as well as ensuring prosecutors' offices develop written manuals and implement training programs. The prosecutorial review board could serve as an effective oversight mechanism to ensure that prosecutors' offices develop manuals and implement training programs, but jurisdictions can still enact those reforms without a review board in place. This model policy also articulates comprehensive open-file discovery obligations, disclosure requirements regarding cooperating witnesses, and mandatory reporting requirements for judges.

AN ACT TO IMPROVE THE PRACTICE OF CRIMINAL PROSECUTION[136]

Section I. Purpose
The purpose of this Act is to ensure the proper use of prosecutorial discretion and provide for appropriate sanctions for prosecutors who abuse their discretionary powers. This Act should be interpreted consistent with these objectives.

Section II. Scope
This Act applies to all prosecutors practicing in [state].

Section III. Definitions
As used in this Act, these words and phrases can be defined in the following way:

A. "In-custody informant" means a person whose testimony is based upon statements made by the defendant while both the defendant and the informant are held by the state.
B. "Accomplice informant" means a person who will or may testify or provide information for the prosecution who is alleged to have participated in the criminal offense(s) that are the subject of the trial and investigation.
C. "Informant" refers to both in-custody informants and accomplice informants, as defined in subsection A and B of this section.
D. "Consideration" means any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness.

Section IV. Prosecutorial Review Board, creation

A. A Prosecutorial Review Board (hereafter called "The Board") is created.
B. The Board shall consist of X members, appointed by the Governor.
C. The Board shall consist of at least X people who have experience as a prosecutor, at least X attorneys who have experience defending criminal defendants, and at least X people who are not attorneys.
D. The Board shall meet at least once a month. X members shall constitute a quorum. The Board may pass rules governing its internal structure and practices, as appropriate.

Section V. Prosecutorial Review Board, responsibilities and duties

A. The Board shall conduct random, unannounced audits of cases, as appropriate and feasible. The Board shall have full access to the prosecution's files, and shall investigate the chosen case(s) to search for prosecutorial misconduct. The Board shall have the power to subpoena witnesses to testify before

the Board. The Board shall issue a report on the case to the prosecutor's office that is being investigated upon the investigation's completion, describing any problems with the investigation, and suggesting any changes that are needed. These reports shall be public documents. If any misconduct is discovered, the Board may remedy the misconduct as described in subsection D of this section.

B. The Board shall consider complaints filed by judges, pursuant to Section IX of this Act.

C. The Board shall hear complaints from citizens alleging prosecutorial misconduct. Citizens may file complaints with the Board for the following offenses:
    1. Seeking an indictment of any person despite an absence of probable cause,
    2. Failing to promptly reveal information that would exonerate a person under indictment,
    3. Intentionally or knowingly misleading the court as to the guilt of any person(s),
    4. Intentionally or knowingly misstating evidence,
    5. Intentionally or knowingly altering evidence,
    6. Attempting to unduly influence a witness' testimony,
    7. Acting to frustrate a defendant's right to discovery,
    8. Leaking or otherwise improperly disseminating information to any person during an investigation, or
    9. Engaging in conduct that discredits the department.

E. The Board shall act as it deems appropriate to remedy any found misconduct. Their actions may include, but are not limited to, the following sanctions:
    1. Issuing of an admonition,
    2. Requiring additional training or education,
    3. A monetary fine,
    4. A suspension from practicing as a prosecutor,
    5. Termination, and
    6. Disbarment

F. The Board shall ensure that all prosecutors' offices within [state] develop a manual stating their official policies and procedures on the proper use of prosecutorial discretion in criminal cases.
    1. The Board shall take steps necessary to ensure that prosecutors' develop a manual one year of the effective date of this act.
    2. Policies and procedures manuals developed by prosecution offices are public documents. Each prosecutor's office shall make its policies and procedures manual available at the office for public inspection. Each prosecutorial office shall furnish each public and archival library within its jurisdiction with at least one reference copy and at least one circulation copy of its policies and procedures manual. Where possible, the Board shall make a reasonable effort to ensure that all policies and procedures manuals of each prosecutorial office in [state] are publicly available on the internet. Policies and procedures manuals shall also be made available at any other location that the Board deems appropriate for the public dissemination of these manuals.

G. The Board shall develop standards for and ensure the implementation of initial and continuing training and education programs focusing on the unique ethical obligations of prosecutors as discussed by the American Bar Association in *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed.
    1. The Board shall ensure that prosecutorial offices demonstrate that all incoming prosecutors successfully complete training that meets the standards set forth by the Board under this subsection.
    2. The Board shall ensure that all prosecutorial offices demonstrate that all attorneys on staff successfully complete continuing training at a regular interval set by the board and not to exceed once every five years that meets the standards set forth by the Board under this subsection.

Section VI. Discovery Obligations

A. Not later than twenty (20) days after the filing of charges, and independent of motion or request, the prosecution must disclose any material or information within the prosecutor's possession or control that could be, should be, or is known to negate the guilt of the defendant as to the offense charged, or that would tend to mitigate or aggravate the punishment of the defendant.

B. Not later than twenty (20) days after the filing of charges, and independent of motion or request, and regardless of whether the prosecution determines material to be material or immaterial to either guilt or punishment, relevant, irrelevant, inculpatory, or exculpatory, the prosecution shall disclose the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" shall be understood to include, but shall not be understood as being limited to, the following:

1. All written and all oral statements made by the defendant or any co-defendant, and the names and addresses of any witnesses to such statements. This shall be disclosed regardless of when the statement was made, and any oral statement must be memorialized in writing.
2. The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person. The prosecution shall also identify the persons it intends to call as witnesses at trial, even if the prosecution intends to call the witness as a rebuttal or character witness.
    a. The trial judge may, upon clear and convincing showing of cause by the prosecution that disclosure of a witness' name or address would present a threat to the physical and bodily safety of a witness, allow the prosecution to keep secret that witness' name or address.
3. All written and all oral statements made by witnesses;
4. The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding, or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness. Specifically, for informants, the term "file" encompasses:
    a. A written statement setting out any and all consideration promised to, received by, or to be received by the informant. This requirement applies even if the prosecution is not the source of the consideration.
    b. The complete criminal history of the informant.
    c. The names and addresses of any and all persons with information concerning the defendant's alleged statements, including but not limited to: law enforcement and/or prison officers to whom the informant related the alleged statements, other persons named or included in the alleged statement, and other persons who were witness and who can be reasonably expected to have been witness to the alleged statements.
    d. Any prior cases in which the informant testified and any consideration promised to or received by the informant, provided such information may be obtained by reasonable inquiry.
    e. Any and all statements by the informant concerning the offense charged.
    f. Any other information that tends to undermine the informant's credibility.
    g. This section does not alter other disclosure or discovery obligations imposed by state or federal law.
    h. Any materials that the prosecution must disclose under this section are admissible to impeach the credibility of the informant if such informant testifies at trial.

5. The notes of the investigating officer(s);
6. Results of tests and examinations, or any other matter of evidence obtained during the investigation of the offense alleged to have been committed by the defendant, including, but not limited to:
    a. Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and without regard to whether the prosecution intends to call parties conducting the reports, tests, examinations, experiments, comparisons, or statements to testify. Tests, reports, and case notes prepared by state agencies or laboratories qualify as reports or written statements of experts under this section. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.
    b. Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, that pertain to the case or that were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.
    c. Any materials, documents, or statements relating to any searches or seizures conducted in connection with the investigation of the offense charged or relating to any material discoverable under this act.
    d. Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeachment of any witness to be called by either party at trial. While the prosecution is under no duty to conduct background checks of all witnesses, if the prosecution runs a general criminal records search for defense witnesses, the prosecution must make the same search with respect to prosecution witnesses and must disclose the results to the defense.
    e. Any materials, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case, and the identity of any witnesses to such lineup, showup, and picture or voice identifications.

C. If the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

D. If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

E. The prosecution shall disclose any and all contents of the files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant file not specifically listed or named above.
    1. Upon request by the State, a law enforcement or prosecutorial agency shall make available to the State a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant for compliance with this section.

F. At least five (5) days before trial, the State's attorney shall certify to the Court in writing that:
    1. The State's attorney has provided the defense counsel with all discoverable material and information;
    2. The State's attorney has exercised due diligence in locating all discoverable material and information known to:

a. The State's attorney; and
b. All individuals who participated in the investigation or evaluation of the offense for which the defendant is being tried;

3. To the best of the State's attorney's knowledge, all individuals involved in the investigation, evaluation, or prosecution of the offense being tried have exercised due diligence in locating all discoverable materials and information in their possession to the State's attorney; and
4. All individuals involved in the investigation, evaluation, or prosecution of the offense being tried acknowledge their continuing obligation to exercise due diligence in disclosing discoverable material and information as soon as the information is known to the individual.
5. The certification filed by the State's attorney shall include a written statement from the designated lead investigator of each law enforcement agency involved in the investigation of the offense being tried that confirms that all discoverable materials and information in the possession of the law enforcement agency has been provided to the State's attorney.

G. If the Court finds that the certification required under subsection F of this section was given in bad faith, in addition to any other remedy available to the Court, the Court shall impose a fine on the offending party, and/or the lead investigator at its discretion
H. The prosecution has a continuing duty to disclose materials that are added to their file after the initial disclosure of materials, up to the start of the trial.

Section VII. Failure to Comply with Discovery Obligations, sanctions

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with their discovery obligations under this Act, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances, including, but not limited to, dismissal with prejudice.

Section VIII. Obligation of Sitting Judges in Cases Involving Prosecutorial Misconduct

A. An appellate judge is required to report, to the bodies referenced in subsection D of this section, the following offenses, when committed by a prosecuting attorney in a criminal case:
    1. A willful misrepresentation of law or fact to a court;
    2. Attempting to unduly influence a witness' testimony;
    3. Acting to frustrate a defendant's right to discovery;
    4. Leaking or otherwise improperly disseminating information to any person during an investigation;
    5. Appearing in a judicial proceeding while intoxicated;
    6. Engaging in willful unlawful discrimination in a judicial proceeding;
    7. Willfully withholding or suppressing evidence that the prosecutor knows or should know to be exculpatory;
    8. Willful presentation of perjured testimony;
    9. Failure to properly identify oneself in interviewing victims or witnesses; and
    10. Any other egregious prosecutorial misconduct.
B. Any question of whether misconduct is egregious shall be resolved in favor of reporting.
C. If the order of contempt, modification or reversal of judgment, imposition of judicial sanctions, or imposition of a civil penalty is signed by a judge or magistrate, that judge or magistrate shall report it to the bodies referenced in subsection D of this section.
D. The judge shall report the misconduct with thirty (30) days of the offense, to the following entities:
    1. The state bar association,
    2. The offending prosecutor's supervisor,
    3. Any prosecutorial review board in [state].

LITERATURE

SUGGESTED READINGS

The following materials are recommended reading for individuals interested in learning more about prosecutorial accountability.

Angela Davis, *Arbitrary Justice: The Power of the American Prosecutor*, Oxford: Oxford University Press, 2007.

The California Commission on the Fair Administration of Justice, Report and Recommendations on Professional Responsibility and Accountability of Prosecutors and Defense Lawyers, October 18, 2007, *available at* http://www.ccfaj.org/rr-pros-official.html

The Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors*, 2003, *available at* http://www.publicintegrity.org/pm/default.aspx

Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393 (Winter 1992).

SELECTED BIBLIOGRAPHY

The following listing includes some of the key source material used in developing the content of this policy review. While by no means an exhaustive list of the sources consulted, it is intended as a convenience for those wishing to engage in further study on the topic of prosecutorial accountability.

1. Journals and Law Reviews

Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm and Mary L. Rev. 1587 (2006).

Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 Seton Hall L. Rev. 335 (2007).

Brandon Crase, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 Geo. J. Legal Ethics 475 (2007).

Lynn Damiano, *Taking a Closer Look at Prosecutorial Misconduct: The Ninth Circuit's Materiality Analysis in* Hayes v. Brown *and its Implications for Wrongful Convictions*, 37 Golden Gate U. L. Rev. 191 (Fall 2006).

Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economic and Transitory Prosecutors*, 61 N.Y.U. Ann. Surv. Am. L. 45 (2005).

J.S. Edwards, *Prosecutorial Misconduct*, 30 Am. Crim. L. Rev. 1221 (1993).

Catherine Ferguson-Gilbert, *It is Not Whether you Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 Cal. W. L. Rev. 283 (Fall 2001).

Adam Gershowitz, *Prosecutorial Shaming*, (September 2008). Available at SSRN: http://ssrn.com/abstract=1265738.

Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531 (2007).

Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393 (1992).

Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 Geo. J. of Legal Ethics 309 (2001).

Leslie C. Griffin, *The Prudent Prosecutor*, 14 Geo. J. Legal Ethics 259 (Winter 2001).

Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L. Q. 713 (Fall 1999).

Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U.L. Rev. 53 (2005).

Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wisc. L. Rev. 399 (2006).

Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 Case W. Res. L. Rev. 619 (2007).

Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in their Investigative Role*, 68 Fordham L. Rev. 723 (December 1999).

Casey P. McFaden, *Prosecutorial Misconduct*, 14 Geo. J. Legal Ethics 1211 (2001).

Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U.L. Rev. 125 (February 2004).

Judy Platania and Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials*, 23 L. & Human Behavior 471 (August 1999).

Sam Roberts, *Should Prosecutors Be Required to Record Their Pre-Trial Interviews with Accomplices and Snitches?*, 74 fordham l.rev. 257 (2005).

Richard A. Rosen, *Disciplinary Sanctions against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C.L. Rev. 693 (April 1987).

Abbe Smith, *Can You be a Good Person and a Good Prosecutor?*, 14 Geo. J. Legal Ethics 355 (Winter 2001).

Walter W. Steele Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L. J. 965 (1984).

K.W. Toryanski, *No Ordinary Party: Prosecutorial Ethics and Errors in Death Penalty Cases*, 54 Federal Lawyer 45 (2007).

James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973 – 1995*, Columbia Law School (June 12, 2000), *Available at* http://www2.law.columbia.edu/instructionalservices/liebman/index.html.

Ellen Yaroshefsy, *Wrongful Convictions: It Is Time To Take Prosecution Discipline Seriously*, 8 D.C. L. Rev. 275 (Fall 2004).

Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721 (March 2001).

2. Commission and Association Reports, Recommendations and Policies

American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct* (Last Amended in 2000).

American Bar Association, Criminal Justice Section Standards, "Prosecution Function" (Approved in 1992).

American Bar Association, *Model Code of Profes-sional Responsibility* (Last Amended in 1980).

Association of the Bar of the City of New York, *Report of the Professional Responsibility Committee: Proposed Prosecutorial Ethics Rules* (May 2005).

The California Commission on the Fair Administration of Justice, *Report and Recommendations on Professional Responsibility and Accountability of Prosecutors and Defense Lawyers* (October 18, 2007).

Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (Rev. 2005).

Federal Judicial Center, *Treatment of Brady v. Maryland Material in United States District and State Courts' Rules, Orders, and Policies* (October 2004).

Illinois Commission on Capital Punishment, *Report of the Commission on Capital Punishment* (April 2002).

National District Attorneys Association, *National Prosecution Standards, Second Edition* (1991).

United States Department of Justice. *United States Attorney's Manual* (2003).

ENDNOTES

[1] *See* Bennett L. Gershman, *Prosecutorial Misconduct* (2d ed. 2007).
[2] *Berger v. U.S.*, 295 U.S. 78, 88 (1935).
[3] American Bar Association [hereinafter A.B.A], *Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-1.2 (3d ed. 1993) http://www.abanet.org/crimjust/standards/pfunc_blk.html.
[4] *See* Gershman, *supra* note 1.
[5] Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors*, 108 (2003).
[6] *Id.* at i.
[7] Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531, 533 ("…violations of *Brady* are the most recurring and pervasive of all constitutional procedural violations…") (2007).
[8] Angela Davis, *Arbitrary Justice* 125 (2007).
[9] *See* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399, 422 ("Despite the recommendation of both the ABA and the NDAA, it appears that a relatively small number of the more than 2300 prosecutors' offices that try felony cases in state courts of general jurisdictions have manuals or written standards, or, if they do, those manuals or standards are not available to the public.") (2006).
[10] *See* Gershman, *supra* note 7.
[11] Davis, *supra* note 8, at 5.
[12] *See* Gershman, *supra* note 1, at § 14.3, 572.
[13] California Commission on the Fair Administration of Justice: Report and Recommendations on Reporting Misconduct, 4 (Oct. 18, 2007) ("Pursuant to Section 6086.7(a)(2), there should have been a report made to the State Bar in each of the 53 cases in which prosecutorial misconduct resulted in a reversal in the past ten years."), http://www.ccfaj.org/documents/reports/

prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf.

[14] Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., January 10, 1999, at C1 ("Since a 1963 U.S. Supreme Court ruling designed to curb misconduct by prosecutors, at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false.").

[15] *See id.* ("…a Tribune search failed to turn up a single prosecutor who was disbarred for securing a conviction while engaging in such misconduct in any kind of criminal case.").

[16] *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

[17] Davis, *supra* note 8, at 22.

[18] *See* Davis, *supra* note 8.

[19] Brandon K. Crase, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 477 ("The discretion afforded to prosecutors extends from the finest detail of the case to the questions of whether to investigate, grant immunity, or even whether to bring the charges at all. Today's prosecutors are constrained only by imprecise ethical guidelines and judicial review for flagrant violations of their duties.").

[20] Davis, *supra* note 8, at 23 ("Very few offices have manuals with guidelines or policies on how to make charging decisions. Offices that do have such guidelines or policies rarely enforce them.").

[21] *See* Davis, *supra* note 8, at 5 ("Prosecutors make the most important of these discretionary decisions behind closed doors and answer only to other prosecutors. Even elected prosecutors, who presumably answer to the electorate, escape accountability, in part because their most important responsibilities—particularly the charging and plea bargaining decisions—are shielded from public view.").

[22] Zacharias, *supra* note 16, at 732.

[23] Davis, *supra* note 8, at 16 ("The lack of enforceable standards and effective accountability to the public has resulted in decisions-making that often appears arbitrary, especially during the critical charging and plea bargaining stages of the process. These decisions result in tremendous disparities among similarly situated people, sometimes along race and/or class lines.").

[24] Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 409 ("Prosecutors historically have sought the death penalty disproportionately against black defendants as opposed to white defendants.") (1992).

[25] A.B.A, *supra* note 3, at Standard 3-2.5; National District Attorneys Association, *National Prosecution Standards*, Standard 10.1 (2d ed. 1991), http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards.pdfhttp://www.ndaa.org/pdf/ndaa_natl_prosecution_standards.pdf

[26] A.B.A, *supra* note 3, at Standard 3-2.5.

[27] A.B.A, *supra* note 3, at Standard 3-2.5 (Commentary) ("Some of the aspects of prosecutorial discretion about which there is widespread agreement are set forth in subsequent Standards.").

[28] Joy, *supra* note 9. Davis, *supra* note 8, at 23 ("Very few offices have manuals with guidelines or policies on how to make charging decisions. Offices that do have such guidelines or policies rarely enforce them.").

[29] United States Department of Justice. *United States Attorney's Manual* (2003). (This manual outlines what factors U.S. Attorney's should take into consideration when pursuing federal prosecution. Some of thee standards include law enforcement priorities, the seriousness of the offense, the deterrent effect of prosecution, the person's culpability, criminal history, willingness to cooperate, and the probable sentence. Additionally, the U.S. Attorney's manual specifically addresses what factors a prosecutor should *not* take into consideration when bringing charges, including the person's race, religion, or natural origin, the attorney's personal feelings regarding the suspect or the victim, or the possible consequences on the attorney's personal or professional life.) http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html.

[30] Davis, *supra* note 8, at 96.

[31] Ellen Yaroshefsky, *Wrongful Convictions: It's Time to Take Prosecution Discipline Seriously*, 8 UDC L. REV 275, 290 (2004).

[32] A.B.A, *supra* note 3, at Standard 3-2.5(b).

[33] *See* A.B.A, *supra* note 3, at Standard 3-2.5(b) (contents can be deemed confidential "when it is reasonably believed that public access to their contents would adversely affect the prosecution function.").

[34] A.B.A, *Standards For Criminal Justice: Discovery and Trial By Jury*, (3d ed. 1996) 11-1.1(a) (Commentary).

[35] *Brady v. Maryland*, 373 U.S. 83 (1963).

[36] Gershman, *supra* note 7, at 533.

[37] *See* Gershman, *supra* note 7, at 536 ("*Brady* is enforced by the judiciary through widely inconsistent approaches as to what constitutes *Brady* evidence, the specific types of information required to be disclosed, when it must be disclosed, and the sanctions for noncompliance.").

[38] Gershman, *supra* note 7, at 549.

[39] Gershman, *supra* note 7.

[40] Armstrong & Possley, *supra* note 14.

[41] James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973 – 1995*, Columbia Law School (June 12, 2000), http://www2.law.columbia.edu/instructionalservices/liebman/index.html. (Last visited July 31, 2008).

[42] *See* Gershman, *supra* note 7.

[43] A.B.A, *supra* note 34.

[44] *See* Gershman, *supra* note 7, at 560 ("Prosecutors know that the judiciary's treatment of "suppression" does not require a prosecutor to make pretrial disclosure, and thus allows a prosecutor considerable latitude to withhold the evidence prior to trial.").

[45] North Carolina's open-file discovery law includes such a provision: *See* N.C GEN. STAT. § 15A-903(c) ("Upon request by the State, a law enforcement or prosecutorial agency shall make available to the State a complete copy of the complete files related to the investigation of the crimes committed or the prosecution of the defendant…").

[46] MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008).

[47] *See, e.g,* N.C MODEL RULES OF PROF'L CONDUCT, R. 3.8(d) (2008). (North Carolina's Model Code of Professional Conduct is phrased in this way in order to ensure compliance with North Carolina's open-file discovery law.)

[48] *See* Sam Roberts, *Should Prosecutors Be Required to Record Their Pre-Trial Interviews with Accomplices and Snitches?*, 74 FORDHAM L.REV. 257, 259 ("Prosecutors tend to rely heavily on the testimony of cooperating witnesses, especially in cases where the prosecution has little independent evidence to martial against the defendant.") (2005).

[49] *Id* at 260.

[50] Gershman, *supra* note 7, at 540.

[51] Center on Wrongful Convictions, *The Snitch System* (2005). http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf (Last visited January 26, 2009).

[52] These factors were largely derived from a statute enacted in Illinois requiring pretrial disclosures and reliability hearings for jailhouse informants in capital cases; *See* 725 ILL. COMP. STAT. 5/115-21(c) (2003).

[53] *See* CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *supra* note 13 ("The State Bar is limited by its reliance upon the receipt of reports of misconduct or incompetence by judges or self-reporting by the offending attorneys. The Commission has discovered that much is not reported which should be…").

[54] *See* Gershman, *supra* note 1, at 572-573.

[55] *See* Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW.L.J 965, 980 ("If the defendant and the defendant's lawyer cannot realistically be expected to report unethical trial conduct by a prosecutor, attention must be focused on the judges. As the Code of Professional Responsibility directs the conduct of practicing lawyers, so does the Code of Judicial Conduct command judges to report instances of unethical conduct to the grievance committee.") (1984).

[56] *See* WEST'S ANN. CAL. BUS & PROF. CODE § 6086.7

[57] *See* Center for Public Integrity, *supra* note 5 (The Center for Public Integrity reviewed 11,452 opinions in which defendants alleged prosecutorial misconduct. In 8,709 of those opinions, judges found there to be misconduct but ruled it "harmless error," as opposed to the 2,012 resulting in reversal). *See also* Professor Kathleen Ridolfi, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, PROSECUTORIAL MISCONDUCT: A SYSTEMIC REVIEW, at 14 (July 11, 2007), http://www.cpda.org/publicarea/CCFAJ/Professional-Responsibility-DAs-and-Defenders/Professional-Responsibility-DAs-and-Defenders/Ridolfi—Prosecutorial%20Misconduct%20A%20systemic%20review.pdf. ("By limiting a judge's duty to report only cases in which the judgment has been 'modified or reversed,' the rule prevents reporting of the vast majority of misconduct cases.").

[58] *See* Ridolfi, *supra* note 57, at 14 ("There is no meaningful difference between the conduct of the prosecutors in the cases 'modified or reversed' from the actions of prosecutors in the harmless error cases. There are multiple examples of the striking similarities in the cases we reviewed.")

[59] Ridolfi, *supra* note 57, at 12 ("Thirty were repeat offenders – two committed misconduct in three different cases. Two-thirds of the repeat offenders committed the exact same misconduct in multiple trials.)

[60] CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *supra* note 13, at 5 ("It is also possible that the current lack of reporting is attributable to confusion as to who has the actual duty to report when a judgment is reversed…")

[61] CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *supra* note 13, at 9 ("…the problem should be addressed directly in Canon 3D by defining the circumstances where a report to the State Bar *should* be made.")

[62] *See* Adam Gershowitz, *Prosecutorial Shaming*, (September 2008). Available at SSRN: http://ssrn.com/abstract=1265738.
[63] *Id.*
[64] Gershowitz, *supra* note 62, at 2 ("Yet, when these serious cases of misconduct are reversed, the appellate courts do not often call out the offending prosecutors by name in judicial opinions.")
[65] *See* Steele, *supra* note 55, at 982 ("conventional grievance mechanisms appear inappropriate for prosecutors, and it may be that the great reluctance to discipline prosecutors derives from that sense of inappropriateness.")
[66] *See* Zacharias, *supra* note 16, at 758 ("the absence of clients makes it far more difficult for the authorities to learn of and prosecute violations.")
[67] Gershowitz, *supra* note 62, at 2 ("Yet, when these serious cases of misconduct are reversed, the appellate courts do not often call out the offending prosecutors by name in judicial opinions.")
[68] *See* Steele, *supra* note 55, at 980.
[69] Zacharias, *supra* note 16, at 754. ("Discipline for lawyering in criminal cases—whether for violations by prosecutors or defense attorneys—is quite rare.")
[70] Zacharias, *supra* note 16, at 753.
[71] Center for Public Integrity, *supra* note 5, at 79.
[72] *See* Steele, *supra* note 55, at 981 ("These committees derive their power from the judiciary and hence share in the reluctance to exert coercive influence on the office of the prosecutor.").
[73] Steele, *supra* note 55, at 981-982 ("Furthermore, most lawyers who serve on grievance bodies practice primarily in the civil branch of the justice system, a fact that may make them reluctant to pass judgment on prosecutors, at least in those instances calling for some insight into the criminal justice system.").
[74] *See* Davis, *supra* note 8, at 184-185.
[75] *See* Gershman, *supra* note 24, at 454 ("However, given the prosecutor's unique role, it may be appropriate to consider creating a disciplinary mechanism aimed solely at prosecutors. The model for such an institutional body would be the state judicial conduct organizations, which exist in every state, and are charged with the responsibility of regulating judicial conduct.")
[76] *See, e.g.* http://www.ajs.org/ethics/eth_conduct-orgs.asp (List of state judicial conduct organizations).
[77] Steele, *supra* note 55, at 985 (proposing a model for a prosecutor grievance counsel based on a Texas statute requiring the counsel to investigate every appellate finding of misconduct, in addition to formal complaints of misconduct).
[78] *See* Steele, *supra* note 55, at 986.
[79] Davis, *supra* note 8, at 185 ("The primary distinction of the prosecution review board would be the addition of a random review process. The board would not only review specific complaints brought to its attention by the public but also conduct random reviews of routine prosecution decisions.").
[80] A.B.A, *supra* note 3, at Standard 3-2.6.
[81] *Id* at Standard 3-2.3.
[82] *See* Gershman, *supra* note 24, at 435-436 ("One of the most disturbing developments in criminal justice over the last two decades has been the judiciary's failure to provide clear standards that would place some rational limits on the prosecutor's discretion.").
[83] *Brady v. Maryland*, *supra* note 35, at 87.
[84] *Id.*
[85] *United States v. Bagley*, 473 U.S. 667 (1998).
[86] *Rose v. Clark*, 478 U.S. 570, at 588-89 (1986).
[87] *See, e.g., Chapman v. California*, 386 U.S. 23 (1967).
[88] Gershman, *supra* note 24, at 426.
[89] *Rose v. Clark*, *supra* note 86.
[90] *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 278 (1993); and *Burns v. Reed*, 500 U.S. 478, 495 (1991), (Prosecutors have full immunity in their judicial capacity, and qualified immunity during their investigative work.).
[91] *See* Joy, *supra* note 9, at 426.
[92] David Winkler-Schmit, *Blood Money*, GAMBIT WEEKLY, Jan. 12, 2009, at 9.
[93] Center for Public Integrity, *supra* note 5.
[94] *Id.*
[95] *See Willis v. Cockrell*, 2004 WL 1812698, at 1 (2004).
[96] Ralph Blumenthal, *Faulty Testimony Sent 2 to Death Row, Panel Finds*, N.Y.TIMES, May 3 2006, at A16.
[97] *Willis v. Cokcrell*, *supra* note 95.
[98] *See id.*
[99] *Willis v. Cockrell*, *supra* note 95, at 4.
[100] *Id.*
[101] *Willis v. Cockrell*, *supra* note 94, at 5, 26.
[102] *Willis v. Cockrell*, *supra* note 94, at 17.
[103] *See* Maro Robbins, *DA Wants Death Row Inmate Freed; West Texas Prosecutor Says Condemned Man Probably Didn't Set Fatal Fire in '86*, SAN ANT. EXP. NEWS, Oct. 5, 2004, at A1.
[104] *Id.*
[105] Benjamin Weiser & Andrea Elliot, *Wrongfully Convicted Man Wins $1 Million Settlement*, N.Y TIMES, Feb. 5, 2005, at B3.
[106] *People v. Lantigua*, 228 A.D.2d 213, 213.
[107] *Id.*
[108] *Id at* 213.
[109] *Id at* 218.
[110] Andrea Elliot & Benjamin Weiser, *When Prosecutors Err; Others Pay the Price; Disciplinary Action Is Rare After Misconduct or Mistakes*, N.Y. TIMES, Mar. 21, 2004, at 25.
[111] Benjamin Weiser & Andrea Elliot, *Wrongfully Convicted Man Wins $1 Million Settlement*, N.Y TIMES, Feb. 5, 2005, at B3.
[112] John Stith, *Roy Brown's Case for Freedom*, THE POST-STANDARD Jan. 1 2007, at A1.
[113] *Id.*
[114] Stith, *supra* note 110.
[115] The Innocence Project, *Know the Cases: Roy Brown*, http://www.innocenceproject.org/Content/425.php.
[116] *See Masters v. People*, 58 P.3d 979 (2002).
[117] Trevor Hues, *Masters to Go Free*, COLORADOAN, Jan. 19, 2008.
[118] Trevor Hues, *Tim Masters Sues City of Fort Collins*, COLORADOAN, Oct. 22, 2008.
[119] Trevor Hues, *Gilmore, Blair Detail, Defend Actions in '99 Masters Case*, COLORADOAN, Feb. 8, 2009.
[120] *See* Trevor Hues, *Tim Masters' Legal Fees Cost City, County*, COLORADOAN, Jan. 18, 2009.
[121] Fredric N. Tulsky, *Review of more than 700 appeals finds problems throughout the justice system*, SAN JOSE MERC. NEWS Jan. 22, 2006.
[122] Howard Mint, *State Bar Judge Wants Santa Clara County Prosecutor Suspended 4 Years for Abusing Power*, SAN JOSE MERC. NEWS, Feb. 11, 2009. State Bar of California, *In the Matter of Benjamin T. Field*, Case Nos. 05-O-0015-PEM; 06-O-12344. http://www.mercurynewsphoto.com/2009/01/benfield.pdf
[123] *Id.*
[124] *See* California District Attorney's Association, *Uniform Crime Charging Manual, available at* http://www.cdaa.org/pubs/pubsindex.htm and http://sfgov.org/site/budanalyst_page.asp?id=5206
[125] Radley Balko, *Is This America's Best Prosecutor? Meet Dallas County District Attorney Craig Watkins*, REASON, Apr. 7, 2008, *available at* http://www.reason.com/news/show/125596.html.
[126] *Id.*
[127] M.S.A. §388.051-3(a) (1997).
[128] Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to Disbarment of Michael Nifong: The Critical Importance of Full Open File Discovery*, 15 GEO. MASON L. REV. 257, 264 (2008).
[129] *Id* at 264.
[130] Mosteller *supra* note 125 at 271.
[131] Mosteller *supra* note 125 at 273.
[132] Mosteller *supra* note 125 at 272.
[133] Ken Armstrong & Maurice Possley, *Illinois Courts May End Secrecy: State's Chief Justice Wants Prosecutorial Abuses Made Public*, CHICAGO TRIB. Feb. 3, 1999.
[134] Ken Armstrong & Maurice Possley, *What Should be Done to Remedy Prosecutor Misconduct*, CHICAGO TRIB., Jan. 14, 1999.
[135] Nedra Pickler, *Holder Tells Prosecutors that Justice Top Priority*, A.P., Apr. 8, 2009.
[136] Certain sections of this model policy were influenced by, or taken directly from: The California Commission on the Fair Administration of Justice, *Report and Recommendations on Professional Responsibility and Accountability of Prosecutors and Defense Lawyers*, October 18, 2007; American Bar Association, *Standards for Criminal Justice: Discovery and Trial by Jury*, "Standard 11" (3d ed. 1996); Walter W. Steele, Jr., *Unethical Lawyers and Inadequate Discipline*, 38 SW.L.J 965, 982-986; N.C GEN. STAT.§15-A 905 (2004) and §15-A 911-915 (2004); and Maryland House Bill 985 (2004).

"Law's evolution is never done,
and for every improvement made
there is another reform that is overdue."

— Justice William J. Brennan, Jr.

THE JUSTICE PROJECT

Prosecutorial misconduct was a factor in dismissed charges, reversed convictions, or reduced sentences in at least 2,012 cases since 1970, 32 of which involved the wrongful convictions of innocent individuals. This policy review outlines the systemic problems that facilitate prosecutorial misconduct and the reforms needed to improve prosecutorial accountability. By improving systems of prosecutorial accountability, we can increase the fairness, reliability, and accuracy of our criminal justice system.

Working to Increase Fairness and Accuracy in the Criminal Justice System

1025 Vermont Avenue, NW • Third Floor • Washington, DC 20005
(202) 638-5855 • Fax (202) 638-6056 • www.thejusticeproject.org