

PROSECUTORIAL ACCOUNTABILITY 2.0

Bruce Green & Ellen Yaroshefsky***

*“There is an epidemic of Brady violations abroad in the land.
Only judges can put a stop to it.”¹*

INTRODUCTION

Given prosecutors’ extraordinary power,² it is important that they be effectively regulated and held accountable for misconduct. Although prosecutors perceive that they are in fact well-regulated,³ if not over-regulated,⁴ public complaints about prosecutorial misconduct and demands to reform the regulation of prosecutors have grown louder and carried further in the information age. The clamor over prosecutorial misconduct derives from many quarters and consists of critiques that build upon each other. National

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1 *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc).

2 See Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (“The prosecutor has more control over life, liberty, and reputation than any other person in America.”).

3 See *Ensuring That Federal Prosecutors Meet Discovery Obligations: Hearing on S. 2197 Before the S. Comm. on the Judiciary*, 112th Cong. 15 (2012) (statement of James M. Cole, Deputy Att’y Gen. of the United States) [hereinafter Cole Statement] (maintaining that the incidence of federal prosecutors’ discovery violations is “infinitesimally small” and that with disclosure obligations is adequately addressed by internal self-regulation); see also Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 655 (2013) (discussing argument that prosecutors are well-regulated).

4 See Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 879 (2012).

and local publications, websites, and blogs regularly chronicle prosecutorial misconduct.⁵ In a 2015 article on criminal justice reform, Judge Kozinski of the Ninth Circuit Court of Appeals called for holding prosecutorial misconduct “up to the light of public scrutiny.”⁶ *The New York Times* editorial page has criticized discovery abuse by the New Orleans prosecutor’s office.⁷ Significantly, conservative publications have roundly condemned prosecutorial misconduct and urged elevating the problem to the national political agenda.⁸

The discourse about prosecutorial misconduct has expanded and evolved in the past two decades. For a long time, the media and judiciaries focused primarily on intentional violations of law, not abuses of discretion or negligent law-breaking. They assumed intentional prosecutorial law-breaking was aberrational, the fault of rogue prosecutors—“a few bad apples.”⁹ The public and judicial response was limited to calls to punish individual wrongdoers, whose misconduct did not seriously erode public and judicial confidence in the prosecution’s basic fairness and integrity. But over time, there has been increased acceptance of the argument that prosecutorial misconduct is widespread and systemic, as reflected in the popularization of

5 See, e.g., Robyn Hagan Cain, *No Sympathy for Prosecutorial Misconduct Discretion Plea*, FINDLAW BLOG (Feb. 17, 2012, 3:05 PM), http://blogs.findlaw.com/ninth_circuit/2012/02/no-sympathy-for-prosecutorial-misconduct-discretion-plea.html; see also Brenda Grantland, *More on Prosecutorial Misconduct*, TRUTH & JUSTICE BLOG (Nov. 18, 2014), <http://truthandjusticeblog.com/more-on-prosecutorial-misconduct/>; MARSHALL PROJECT, <https://www.themarshallproject.org> (last visited Oct. 19, 2016); *New Report: A Path for Prosecutors to Reduce Incarceration*, BRENNAN CTR. FOR JUSTICE AT N.Y.U. (Sept. 23, 2014), <https://www.brennancenter.org/press-release/new-report-path-prosecutors-reduce-incarceration>; Joe Newman, *Report Finds Prosecutorial Misconduct and Secrecy at Justice Department*, PROJECT ON GOV’T OVERSIGHT (Mar. 13, 2014), <http://www.pogo.org/blog/2014/03/report-finds-prosecutorial-misconduct-and-secrecy-at-justice-department.html>; *Prosecutorial Misconduct and Accountability*, OPEN FILE, <http://www.prosecutorialaccountability.com> (last visited Oct. 19, 2016); SEEKING JUSTICE, <http://seeking-justice.org> (last visited Oct. 19, 2016); “*The GOP Should Turn Its Attention to Prosecutorial Misconduct*”, SENTENCING L. & POL’Y (June 1, 2015, 9:06 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2015/06/the-gop-should-turn-its-attention-to-prosecutorial-misconduct.html.

6 Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxxvi (2015); see also Jacob Gershman, *Judge Kozinski: Time to Reign in Prosecutors*, WALL ST. J.: L. BLOG (June 30, 2015, 12:53 PM), <http://blogs.wsj.com/law/2015/06/30/judge-kozinski-time-to-rein-in-prosecutors/>.

7 See Editorial, *How to Force Prosecutors to Play Fair*, N.Y. TIMES (Feb. 16, 2015), http://www.nytimes.com/2015/02/16/opinion/how-to-force-prosecutors-to-play-fair.html?_r=0.

8 See, e.g., Kevin D. Williamson, *When District Attorneys Attack*, NAT’L REV. (May 31, 2015), <http://www.nationalreview.com/article/419110/when-district-attorneys-attack-kevin-d-williamson>; see also *Prosecutors Burn Down the Law: How Five Investigators Distorted Evidence to Loot a Company*, WALL ST. J. (Jan. 2, 2015) <http://www.wsj.com/articles/prosecutors-burn-down-the-law-1420242330>.

9 Bennett L. Gershman, *New Commission to Regulate Prosecutorial Misconduct*, HUFFINGTON POST (May 20, 2014, 12:09 PM), http://www.huffingtonpost.com/bennett-l-gershman/new-commission-to-prosecutorial-misconduct_b_5353570.html.

Judge Kozinski's 2013 declaration that there is a national "epidemic" of prosecutorial misconduct.¹⁰

A regulatory shift has accompanied this rhetorical shift. Slowly and sporadically, courts and other regulators have become more receptive to allegations of prosecutorial misconduct, more inclined to initiate inquiries into these allegations, and somewhat more willing to afford remedies and impose punishment. Perhaps most importantly, the public and regulators have become increasingly supportive of systemic measures aimed at deterring or preventing prosecutorial wrongdoing. These evolutionary changes are significant because they point toward greater legal and political accountability for prosecutors, both individually and institutionally, for errant behavior. This regulatory shift is a transition toward what this Article terms "Prosecutorial Accountability 2.0."

This Article describes the rhetorical and regulatory changes that characterize the new prosecutorial accountability, identifies the conditions that have enabled them to occur, and considers their implications. While identifying various necessary conditions, the Article argues that information technology has been the essential catalyst; the evolution could not be sustained without the aggregation, accessibility, and communication of data and commentary about prosecutorial misconduct that new information technology makes readily available to the public. Given the permanence of information technology in modern society, the Article concludes by cautiously predicting that the contemporary regulatory movement will be sustained; the pendulum will *not* swing back to the period when courts and the media presumed the integrity of prosecutors and counted on them to ameliorate the excesses and injustices of the police. Rather, the current pressure to hold prosecutors accountable will be ongoing.

This Article proceeds in four Parts. Part I describes the traditional rhetoric of, and regulatory approaches to, prosecutorial misconduct. Part II then discusses how rhetoric and regulation are changing in the information age. Part III looks at the conditions contributing to these changes, emphasizing the role of information technology. Finally, Part IV considers the future of the new prosecutorial accountability.

I. PROSECUTORIAL ACCOUNTABILITY 1.0

This Part looks at prosecutorial accountability prior to the information age. It focuses on two defining features—the discourse about, and the regulation of, prosecutorial misconduct. It describes the traditional view—the view that most prosecutors could be counted on to act lawfully and ethically and that their offices promote lawful and ethical conduct. Wrongdoing, as narrowly conceived, was assumed to be rare and the fault of a few rogue prosecutors. This rhetoric impelled courts and other regulators to focus on individuals, and, in many cases, defer to prosecutors' offices to deal with presumably aberrant misbehavior.

10 See *infra* notes 92–106 and accompanying text.

A. *The Traditional Rhetoric*

Judges have traditionally professed that the overwhelming majority of prosecutors are honest and law-abiding, and they have sometimes elevated this belief to the level of a legal presumption.¹¹ When there is a question of whether a prosecutor's wrongdoing was willful or simply careless, judges tended to give the prosecutor the benefit of the doubt.¹² Likewise, judges assumed that most prosecutors' offices could be trusted to, and had the means to, regulate their prosecutors, by, for example, punishing individual misconduct.¹³ Judges occasionally remarked on the prevalence of certain kinds of prosecutorial misconduct within their jurisdictions,¹⁴ and on the

11 See *United States v. Navarro*, 608 F.3d 529, 536–40 (9th Cir. 2010) (upholding the district court's instruction to the grand jury, which stated that “[i]f past experience is any indication of what to expect in the future, then you can expect that the U.S. Attorneys that will appear in front of you will be candid, they'll be honest, that they'll act in good faith in all matters presented to you”); see also *United States v. Johnson*, 241 F.3d 1049, 1055 n.4 (8th Cir. 2001) (expressing hope that prosecutors' integrity will deter them from misleading future courts about their assessment of cooperators' assistance); *United States v. Turner*, 104 F.3d 1180, 1185–86 (9th Cir. 1997) (reversing district court finding that prosecutors targeted street gangs for racially discriminatory purposes and stating that “[n]o reason was given by the district court to doubt the ‘background presumption’ that United States Attorneys are properly discharging their duties, no reason given to doubt the integrity of prosecutors and investigators whose honesty, good faith, and absence of racial bias are unimpaired by anything in evidence before the court”); *United States v. Bernal-Obeso*, 989 F.2d 331, 335 (9th Cir. 1993) (explaining that with regard to accomplice testimony, the law relies on “the integrity of government agents and prosecutors not to introduce untrustworthy evidence into the system” (first citing *Berger v. United States*, 295 U.S. 78, 88 (1935); and then citing *United States v. Agurs*, 427 U.S. 97 (1976))); *People v. Jackson*, 548 N.Y.S.2d 987, 994 (N.Y. Sup. Ct. 1989) (noting prosecutors are generally taken at their word), *rev'd*, 558 N.Y.S.2d 590, 590 (N.Y. App. Div. 1990).

12 See, e.g., *Rice v. Collins*, 546 U.S. 333, 337–38 (2006) (sustaining the state trial court's grant of “the benefit of the doubt” to a district attorney accused of striking a juror for racial reasons (quoting 2 App. 14–15)).

13 Of most pertinence, federal courts traditionally had confidence in the Justice Department's Office of Professional Responsibility and referred federal prosecutors to that office to investigate possible misconduct. See *United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983); *Jefferson v. Reno*, 123 F. Supp. 2d 1, 5–6 (D.D.C. 2000). But in general, U.S. Attorneys' Offices and state and local prosecutors' offices were assumed to engage in adequate self-regulation. See *Reid v. Beard*, 420 F. App'x 156, 160 n.8 (3d Cir. 2011) (encouraging Philadelphia District Attorney's office to counsel and discipline a prosecutor who engaged in misconduct).

14 See *United States v. Peveto*, 881 F.2d 844, 862 (10th Cir. 1989) (“[T]here has over a substantial period of time, nearly since I have been here, but at least with the present administration of the United States Attorney's office [been] a pattern of conduct or misconduct of not presenting evidence until very late, many times during the trial. . . .” (alteration in original) (quoting from the trial record at IV R. 17–18)); *People v. Pigage*, 6 Cal. Rptr. 3d 88, 101 (Cal. Ct. App. 2003) (“[T]his type of misconduct is but one example of an alarming trend.”).

courts' ineffectual responses,¹⁵ but more often, courts expressed faith in the general integrity of individual prosecutors and their offices.¹⁶

Judges took this position based on cues from the U.S. Supreme Court. Eighty years ago, in its classic elaboration on the prosecutor's quasi-judicial role, the Court echoed the public's confidence that prosecutors will faithfully observe their obligations to play fairly and seek justice.¹⁷ Three decades later, even as the Warren Court expanded protections against police abuse,¹⁸ it did not question criminal procedure law's underlying "confidence in the integrity of the federal prosecutor."¹⁹ Later Supreme Court jurisprudence, building upon *Brady v. Maryland*,²⁰ the Warren Court's most significant decision regarding prosecutorial conduct, trusted prosecutors to decide for themselves whether evidence in the state's possession is exculpatory and material and, if so, to disclose it, notwithstanding temptations to do otherwise.²¹ Further, the Warren Court left other large and important swaths of

15 See *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting) (criticizing courts' "attitude of helpless piety" in condemning prosecutors' misconduct, but upholding convictions under the harmless error rule); *People v. Johnson*, 803 N.E.2d 405, 412 (Ill. 2003) (describing prosecutorial misconduct as "a problem that courts across the country have, for the most part, been unable or unwilling to control" (citing Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 115–18 (1999))).

16 See, e.g., *Kiser v. State*, 893 S.W.2d 277, 285 (Tex. App. 1995) (explaining that in finding that the prosecutor improperly introduced and relied on inadmissible evidence, "we [the court] in no way attempt to impugn the integrity of Texas prosecutors generally").

17 *Berger v. United States*, 295 U.S. 78, 88 (1935) ("It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed."). As a general matter, the Court "presume[s] that public officials have 'properly discharged their official duties.'" *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (citation omitted) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 15 (1926)).

18 See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); see also *Mapp v. Ohio*, 367 U.S. 643 (1961).

19 *Singer v. United States*, 380 U.S. 24, 37 (1965) ("[T]he government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer'. . . . Because of this confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver" (alteration in original) (quoting *Berger*, 295 U.S. at 88)).

20 373 U.S. 83 (1963). The decision assumed that government lawyers embraced the idea that the prosecutor's "chief business is not to achieve victory but to establish justice." *Id.* at 87 n.2.

21 Trial judges do not ordinarily oversee prosecutors' decisions about what evidence to disclose to the defense. See, e.g., *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it."); see also *United States v. Cobb*, 271 F. Supp. 159, 164 n.4 (S.D.N.Y. 1967) ("[T]he Court believes that the best solution in terms of the interest of both the defendant and the public is to rely on the integrity and judg-

prosecutorial conduct to essentially unreviewable discretion, subject at best to unenforceable professional or internal guidelines.²²

Thus, the Warren Court's criminal procedure revolution largely overlooked prosecutors. The Court evidently regarded prosecutorial misconduct as a rare and individual problem,²³ not one, like police investigative conduct, requiring sweeping reform.²⁴ No doubt, the Court's general confidence in the professionalism of prosecutors partly reflected Chief Justice Warren's confidence, as a former Alameda County prosecutor, that other prosecutors' offices maintained the high professional standards he attributed to his own former office.²⁵ That level of confidence is apparently shared by most current-day Justices, including another former local prosecutor, Justice Sonia Sotomayor.²⁶

For the most part, in the years leading up to the Internet era, only academics and defense and civil rights lawyers offered a counter-narrative that depicted prosecutorial misconduct as a widespread, systemic problem. Academics examined how prosecutors conducted their work and identified how some prosecutors violated laws or ethics rules or otherwise abused their power, whether intentionally or inadvertently. For example, Professor Bennett Gershman's treatise on prosecutorial misconduct, first published in

ment of the United States Attorney" to determine whether evidence in the government's possession is exculpatory.). See generally Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 *FORDHAM L. REV.* 391 (1984).

22 See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 365 & n.9 (1978) (acknowledging that the risk of individual and institutional abuses of prosecutorial discretion have "led to many recommendations that the prosecutor's discretion should be controlled by means of either internal or external guidelines"). Although separation of powers considerations restrict federal courts' authority to review prosecutors' discretionary decisions, many state courts interpret their state constitutions to allow more meaningful judicial review of charging and plea bargaining decisions. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 *WM. & MARY L. REV.* 1225, 1253 (2016).

23 See *Burgett v. Texas*, 389 U.S. 109, 116 n.1 (1967) (Warren, C.J., concurring) ("Prosecutorial bad faith, of course, is not an irrelevant element in our review of state criminal convictions. It can often make even more intolerable errors which demand correction in this Court." (first citing *Miller v. Pate*, 386 U.S. 1 (1967); then citing *Napue v. Illinois*, 360 U.S. 264 (1959); and then citing *Mooney v. Holohan*, 294 U.S. 103 (1935))).

24 See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 447 (1966) (explaining that police misconduct in interrogations is "sufficiently widespread to be the object of concern" and that without "a proper limitation . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future").

25 See Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 *OHIO ST. J. CRIM. L.* 11, 12 (2005) (noting that Justice Warren's deputy district attorneys were so keen to avoid shady practices that they were known around the courthouse as the "Boy Scouts" (quoting ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 48 (1997))).

26 See, e.g., *Calhoun v. United States*, 133 S. Ct. 1136, 1337–38 (2013) (Sotomayor, J., respecting the denial of certiorari) (portraying a federal prosecutor's appeal to racial prejudice as a vestige of a bygone era, rather than as an expression of racial prejudice that still pervades the criminal justice system).

1985, surveyed a wide range of prosecutorial misdeeds.²⁷ Other academics, joined by some practitioners, also surveyed prosecutors' misconduct²⁸ or targeted wrongdoing in aspects of prosecutors' work, such as misconduct in discovery,²⁹ jury arguments,³⁰ or other phases of the trial.³¹

Some academic writings identified apparent patterns of misconduct among prosecutors within a specific jurisdiction.³² Some suggested that the tendency to commit misconduct may be intrinsic to the role of a lawyer for the prosecution in an adversarial system,³³ while others attributed this tendency to prosecution cultures that value winning cases or convicting criminals over playing by the rules.³⁴ Furthermore, a handful of legal academics and many practicing defense lawyers inferred that certain known violations—in particular, discovery violations, which were not easily exposed—were the “tip of the iceberg.”³⁵ However, these critics' accounts were largely

27 BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (1985).

28 See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* § 10.14 (4th ed. 2010); MONROE H. FREEDMAN, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967); JOSEPH F. LAWLESS, JR., & KENNETH E. NORTH, *Prosecutorial Misconduct: A Battleground in Criminal Law*, TRIAL, Oct. 1984, at 26.

29 See RICHARD A. ROSEN, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (stating that there are “enough reported cases containing strong evidence of intentional prosecutorial withholding of exculpatory evidence and presentation of false evidence to demonstrate that this kind of misconduct occurs frequently enough”); JOSEPH R. WEEKS, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997) (addressing the inadequacy of remedies for prosecutorial violations of disclosure obligations).

30 See CANDICE D. TOBIN, *Misconduct During Closing Arguments in Civil and Criminal Cases: Florida Case Law*, 24 NOVA L. REV. 35 (1999) (discussing misconduct that occurs during closing arguments); TARA J. TOBIN, Note, *Miscarriage of Justice During Closing Arguments by an Overzealous Prosecutor and a Timid Supreme Court in State v. Smith*, 45 S.D. L. REV. 186, 199–200 (2000) (“In the criminal justice system, no where is this overzealous mentality more readily apparent than in the prosecutor’s closing argument to the jury.” (citing ROSEMARY NIDIRY, Note, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1307–08 (1996))).

31 See ALBERT W. ALSCHULER, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972); see also BENNETT L. GERSHMAN, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131 (1986).

32 See, e.g., EDWARD M. GENSON & MARC W. MARTIN, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39 (1987) (discussing misconduct in Illinois courtrooms).

33 See CHARLES L. CANTRELL, *Prosecutorial Misconduct: Closing Argument in Oklahoma*, 31 OKLA. CITY U. L. REV. 379, 379 (2006) (“This problem continues because of built-in pressures of the legal system that allow and even encourage it.”); KEVIN C. McMUNIGAL, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1462–68 (2000) (stating that disclosure rules for prosecutors permit prosecutors to take a more adversarial stance than civil litigators).

34 See KEN ARMSTRONG & MAURICE POSSLEY, *Part I: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html>.

35 See, e.g., KEVIN C. McMUNIGAL, *Prosecutorial Disclosure Violations: Punishment vs. Treatment*, 64 MERCER L. REV. 711, 712 (2013) (discussing claims that discovery violations are the

ignored or dismissed by mainstream government and media institutions. Organizations such as the National Association of Criminal Defense Lawyers (NACDL) assisted lawyers around the country who alleged prosecutorial misconduct, but these efforts were mostly unrecognized on a broader scale.³⁶

At the same time, prosecutors and their defenders insisted that instances of prosecutorial misconduct were in fact isolated and disconnected, not systematic.³⁷ This position relied on a conception of prosecutorial misconduct that is narrow in two respects.

First, the rhetoric in defense of prosecutors has focused on intentional wrongdoing, not negligent or inadvertent wrongdoing. The prosecutorial view has been that prosecutorial misconduct should mean *willful* misconduct—a departure from how the term is used in judicial decisions in criminal cases. Courts use “prosecutorial misconduct” as a term of art to cover violations of law, particularly discovery law, whether or not the violation is intentional, since the question of whether a discovery violation occurred does not turn on the prosecutor’s state of mind.³⁸ Ostensibly to spare prosecutors embarrassment, and to reinforce distinctions between the individual’s intentional and negligent conduct, prosecutors have urged courts to use the term “error” in referring to prosecutors’ inadvertent or negligent violation of discovery provisions or other laws.³⁹

Second, prosecutors have sought to focus the discussion of prosecutorial misconduct on violations of enforceable legal standards. This excludes abuses of prosecutorial discretion that are not judicially remedial.⁴⁰ For example, prosecutors might be said to abuse their discretion in making arbi-

“tip of the iceberg”); see also Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1762 (1993); Saul M. Kassin, *False Confessions*, 73 ALB. L. REV. 1227, 1228 (2010); Barry Tarlow, *RICO Report*, 22 CHAMPION 47, 55 (1998); Craig M. Bradley, *Texas Justice*, TRIAL, Aug. 2003, at 64, 65.

36 See *Examples of Prosecutorial Misconduct*, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, <https://www.nacdl.org/criminaldefense.aspx?id=19574&terms=%22prosecutorial+misconduct> (last visited Aug. 28, 2016).

37 See, e.g., Richard L. Braun, *Ethics in Criminal Cases: A Response*, 55 GEO. L.J. 1048 (1967) (responding to criticisms of a lack of ethical practices or policies of prosecutors).

38 See, e.g., *State v. Maluia*, 108 P.3d 974, 979 (Haw. 2005) (observing that “‘prosecutorial misconduct’ is a legal term of art that refers to *any* improper action committed by a prosecutor, however harmless or unintentional”).

39 See, e.g., Memorandum from John Kingrey to the Minn. Cty. Attorneys. (Apr. 25, 2007) (on file with *Notre Dame Law Review*). Without necessarily agreeing that intentional misconduct is aberrational, the American Bar Association has supported prosecutors’ efforts to persuade judges to use the term “error” rather than “misconduct” in reference to prosecutors’ unintentional violations of law. ABA, Recommendation 100B Adopted by the House of Delegates (Aug. 9–10, 2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf>.

40 The public might regard a prosecutor’s misuse of charging power—e.g., overcharging where criminal conduct was relatively insignificant—as an abuse of discretion. But because this conduct is not subject to judicial review or disciplinary oversight, prosecutors would not concede that abuses of discretion might be a species of misconduct (assuming they even conceded that discretion was subject to abuse and that abuses occurred).

trary decisions about charging and plea bargaining, but courts have limited authority to review these decisions and identify and remedy abuses.⁴¹ Prosecutors' narrow construction of misconduct also excludes other individual conduct that might be criticized but is not susceptible to discipline or other legal or judicial recourse because of the underdevelopment of legal and disciplinary standards governing prosecutors' professional conduct. For example, in the disciplinary system, prosecutors are not accountable for the use of jailhouse informants' and accomplice witnesses' false testimony or unreliable forensic evidence unless they *know* the evidence to be false.⁴²

This narrow conception of prosecutorial misconduct has institutional implications for prosecutors' offices. In this conception, the buck stops with the line prosecutor who personally transgressed, whether or not intentionally, and ignores the possibility that the office is blameworthy in failing to train, supervise, and establish internal processes and systems to prevent unintentional error. It ignores an examination of office culture that may promote aggressive interpretation of and indifference to ethical obligations.⁴³

Prosecutors' conception of misconduct—as solely “legal wrongs”—is significant given both courts' traditional deference to prosecutorial self-regulation and prosecutors' influence on how judges and the public perceive prosecutors' conduct. Consistently, prosecutors have dismissed many failings as involving misjudgments, excused most discovery violations, improper closing arguments, and other legal wrongs as unintentional, and, at least until recently, persuaded the public and the judiciary that intentional “prosecutorial misconduct” is either police misconduct or mere prosecutorial error⁴⁴ and that actual misconduct by prosecutors that is significant and intentional is exceedingly rare.⁴⁵ They have described prosecutorial miscon-

41 See, e.g., *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299–1300 (9th Cir. 1992) (observing that courts lack authority to remedy prosecutors' arbitrary or capricious charging and plea bargaining decisions).

42 Ethics rules governing the presentation of false testimony hold prosecutors to the same requirement as lawyers for private litigants: a duty to refrain from offering evidence they “know” to be false. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM. BAR. ASS'N 2013). Although the ABA has published non-enforceable guidelines recognizing that prosecutors should not offer evidence that they do not “reasonably believe to be true,” ABA, STANDARDS OF CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.4(b) (4th ed. 2015), http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html, no enforceable rule establishes prosecutors' gatekeeping duty as ministers of justice to take care to avoid the use of unreliable evidence and testimony.

43 See Cyrus R. Vance, Jr., *The Conscience and Culture of a Prosecutor*, 50 AM. CRIM. L. REV. 629, 633–34 (2013).

44 See, e.g., Steve Weinburg, *A Question of Integrity: Prosecutors Dispute the Significance of 'Prosecutorial Misconduct'*, CTR. FOR PUB. INTEGRITY (June 26, 2003), <http://www.publicintegrity.org/2003/06/26/5525/question-integrity>.

45 See, e.g., TEX. DIST. & CITY. ATTORNEYS ASS'N, SETTING THE RECORD STRAIGHT ON PROSECUTORIAL MISCONDUCT (2012), <http://www.tdcaa.com/sites/default/files/page/Setting%20the%20Record%20Straight%20on%20Prosecutorial%20Misconduct.pdf>.

duct as “more episodic than epidemic”⁴⁶ and evoked the image of the “rogue” prosecutor to convey that wrongdoing is not endemic, but instead occurs despite good prosecutorial cultures, training, oversight, and regulation.⁴⁷ When critics suggest that an instance of prosecutorial misconduct was symptomatic, prosecutors typically dismiss the criticism as exaggerated or based on over-generalization.⁴⁸

Academics’ and defense lawyers’ more sweeping challenges could not easily gain traction. Until recently, if the press looked into prosecutorial misconduct, it typically examined individual cases. It would have been labor intensive to aggregate information about a large sample size of prosecutorial conduct, even if the conduct could be gleaned from courthouse files. The first significant national news study of prosecutorial misconduct was not published until 1999, when the *Chicago Tribune* produced a groundbreaking series on homicide prosecutions, which analyzed “thousands of court records, appellate rulings and lawyer disciplinary records from across the United States.”⁴⁹ Based on its painstaking review, the newspaper concluded that to win convictions, prosecutors throughout the country had “committ[ed] the worst kinds of deception,” such as hiding exculpatory evidence “in the most serious of cases.”⁵⁰ Occasionally, legislatures inquired into pos-

46 Laura Parker, *Court Cases Raise Conduct Concerns*, USA TODAY (June 26, 2003), http://usatoday30.usatoday.com/news/nation/2003-06-25-prosecute-usat_x.htm (quoting Oregon District Attorney Joshua Marquis, a board member of the National District Attorneys Association); see also Cole Statement, *supra* note 3.

47 See, e.g., Gershman, *supra* note 9 (“Prosecutors claim that reports of misconduct are exaggerated, and that misconduct is the work of a few bad apples, or a handful of rogue prosecutors.”).

48 See, e.g., Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price*, N.Y. TIMES, Mar. 21, 2004, at N25 (quoting Bronx District Attorney Robert T. Johnson: “The term ‘prosecutorial misconduct’ is very broad . . . and could run the gamut from an inadvertent error to an intentional abuse, and rarely have we seen a flagrant abuse which would be subject to appropriate administrative action.”); Jack Leonard, *Report Urges Justice Reform*, L.A. TIMES (Oct. 5, 2010), <http://www.pressreader.com/usa/los-angeles-times/20101005/285855844437709> (reporting that the chief executive of the California District Attorneys Association criticized an innocence project’s report on prosecutorial misconduct “for exaggerating the scale and severity of prosecutorial misconduct”).

49 Armstrong & Possley, *supra* note 34.

50 *Id.* This was followed by a series highlighting prosecutorial misconduct in Illinois homicide cases, see Maurice Possley & Ken Armstrong, *Part 3: Prosecution on Trial in DuPage*, CHI. TRIB. (Jan. 12, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial3-story.html>, that led the governor to commute all Illinois death sentences. See Steve Weinburg, *A Short History of Exposing Misconduct: An Unlikely Cast of Characters Has Shone a Spotlight on Bad Prosecutors, and on Occasion, Sparked Reform*, CTR. FOR PUB. INTEGRITY (June 26, 2003), <https://www.publicintegrity.org/2003/06/26/5528/short-history-exposing-misconduct>. Noting the significance of the *Chicago Tribune* articles, one commentator observed, “In addition to changing perceptions, they happened to change public policy.” *Id.*

sible patterns of prosecutorial misconduct,⁵¹ but they, too, typically focused on individual cases.⁵²

The defense bar had limited ability to lobby for reform. Defense lawyers might know about their own cases and perhaps those of colleagues, but there was no easy way to access and aggregate additional information. Although criminal defense lawyers undoubtedly groused within their local communities and in national meetings, there was little sustained attention to these issues outside of criminal defense organizations and, consequently, reform efforts were relatively ineffectual.

Initially, the academic and professional writings on the inadequacies of prosecutorial regulation reached only a narrow audience of professors and like-minded lawyers. Occasionally, news media called regulatory failings to broader public attention. For example, the *Chicago Tribune's* 1999 series concluded that prosecutors who engaged in serious misconduct expected to go unpunished.⁵³ But public concern, if aroused, never lasted long. Consequently, lawmakers, regulators, and prosecutors themselves faced minimal pressure to respond to the problem.

B. *The Regulatory Tradition*

Before the Internet age, those concerned with prosecutorial accountability focused on the punishment of individual wrongdoers in order to deter misconduct by rogue prosecutors. But even as to individual proven malefactors, the conventional wisdom of academics and the defense bar was that the rules and law were under-enforced.⁵⁴ The theme of the early professional literature was that rogue prosecutors were not being meaningfully held accountable for their misconduct because no potential regulatory mechanism was being effectively employed to deter or sanction prosecutors' wrongdoing. In effect, judicial sanction, civil liability, professional discipline, and internal discipline added up to very little.⁵⁵

51 See, e.g., H.R. REP. NO. 101-986 (1990).

52 See, e.g., *id.* at 24–25.

53 See Armstrong & Possley, *supra* note 34.

54 See Alschuler, *supra* note 31, at 670–71 (discussing a 1954 study which found that only one prosecutor in the country had ever been publicly disciplined for courtroom misconduct); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 445 (1992) (“[D]espite the recognized frequency of misconduct by prosecutors in argument to the jury, . . . only one decision” was found in which such conduct resulted in discipline.); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 61 (2005); see also Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 345, 389 (1998). The only federal criminal prosecutor who was indicted for alleged professional misconduct was ultimately acquitted. Philip Shenon, *Ex-Prosecutor Acquitted of Misconduct in 9/11 Case*, N.Y. TIMES (Nov. 1, 2007), <http://www.nytimes.com/2007/11/01/us/01/detroit.html>.

55 See, e.g., Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 72 (1995); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 979–82 (1984); Barry Tarlow, *RICO Report: Only in California*, 19 CHAMPION 25, 26 (1995) (“While sanctions such as referral of

One might have expected judges presiding over cases to take the lead in holding prosecutors accountable for misconduct in those matters, since judges have the authority to sanction lawyers who commit misconduct in litigation,⁵⁶ initiate contempt findings,⁵⁷ recommend the institution of formal disciplinary proceedings,⁵⁸ and afford remedies for harms caused by some professional misconduct.⁵⁹ Furthermore, some have suggested that naming prosecutors in judicial opinions would lead to greater accountability.⁶⁰ How-

rogue prosecutors to the OPR, federal civil rights actions, and the exercise of courts' contempt powers, should be pursued where appropriate, in practice they do little to curb prosecutorial misconduct."). This remains the prevailing wisdom. *See, e.g.,* Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 807 (2006); Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 FORDHAM L. REV. 537, 539 (2011); Ellen Yaroshfsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U. D.C. L. REV. 275, 276–77 (2004); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 722–23 (2001).

56 *See generally* Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003).

57 *See, e.g.,* United States v. Eisenberg, 711 F.2d 959, 965 (11th Cir. 1983).

58 *See, e.g.,* D. MINN. LOCAL R. 83.6; *see generally* Green, *supra* note 54, at 345, 389; Rosen, *supra* note 29, at 697.

59 *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 828–31 (1999); Kelly Gier, Note, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191, 205–12 (2006). Many scholars have argued that current remedies are insufficient. *See, e.g.,* Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509 (2009). Nevertheless, courts are highly reluctant to dismiss indictments, overturn convictions, or suppress evidence as a remedy for prosecutorial misconduct. *See, e.g.,* United States v. Griffith, 756 F.2d 1244, 1249 (6th Cir. 1985) (“[A] court may not order dismissal of an indictment under its supervisory power unless the defendant demonstrates that ‘prosecutorial misconduct is a long-standing or common problem in grand jury proceedings in [the] district.’” (alteration in original) (quoting United States v. Nembhard, 676 F.2d 193, 200 (6th Cir. 1982), *cert. denied*, 464 U.S. 801 (1983))); United States v. Campagnuolo, 592 F.2d 852, 865 (5th Cir. 1979) (district courts are permitted “to impose the extreme sanction of dismissal of an indictment with prejudice only in extraordinary situations” (citing United States v. Baskes, 433 F. Supp. 799, 804–07 (N.D. Ill. 1977))); United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978) (“[U]nder the better view, which we adopt, other courts have demanded that there be some prejudice to the accused by virtue of the alleged acts of misconduct.”). *But see* United States v. McCord, 509 F.2d 334, 349 (D.C. Cir. 1974) (“[S]erious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment . . . without regard to prejudice to the accused.”).

60 *See, e.g.,* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1064 (2009). Judges have been reluctant to name the prosecutors who engaged in misconduct. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2126 (2000) (“[E]ven in the face of egregious behavior, orders announcing these reversals rarely single out anyone by name to bear the blame”); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 173 (2004) (“[I]n the rare incidences of reversal, the appellate court opinions invariably neglect to identify the prosecutor by name”). For example, in *United States v. Ramming*, 915 F. Supp. 854, 857 (S.D. Tex.

ever, the courts were unable or unwilling to serve this regulatory function. Much of the misconduct was not called to judges' attention, because it occurred outside the courtroom and was not raised by the defense; in some cases, extrajudicial misconduct was invisible to the defense as well. But even when the defense was on notice, there was a perception that no judicial remedy would be available or that any benefit from complaining would be outweighed by the harm to clients in incurring the prosecution's wrath.

This perception was reinforced by many courts' indifference when prosecutors' misconduct occurred in the court's presence and on the record. The prime example was courts' response to prosecutors' improper closing arguments, which was the focus of much of the early academic writing and many of the judicial opinions on prosecutorial misconduct. Often, trial judges entirely ignored improper summations,⁶¹ perhaps because they did not notice improprieties as they occurred or assumed that prosecutors respected the applicable limits. Many judges were former prosecutors who understood prosecutors' zealotry and therefore were indisposed to hold the prosecutor accountable.⁶² Appellate courts sometimes admonished the prosecution⁶³ but they almost universally refused to overturn convictions unless the improper argument was prejudicial and evidence of guilt was thin.⁶⁴ In general, courts assumed that prosecutorial misconduct was primarily the province of internal office regulation or perhaps of attorney disciplinary agencies.⁶⁵

1996), the court granted defendant's motion to dismiss and acquit, finding that the AUSA engaged in prosecutorial misconduct for, among other things, failing to disclose *Brady* materials. While Judge Hoyt stated, "Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path," the prosecutor was not personally named. *Id.* at 867–68. See generally *Ramming v. United States*, 281 F.3d 158 (5th Cir. 2001) (per curiam) (failing to name the prosecutor throughout the opinion). While "appellate courts have generally been reluctant to name the individual prosecutors whose comments have been found improper," Judge Kozinski is an exception. *United States v. Modica*, 663 F.2d 1173, 1185 n.7 (2d Cir. 1981) (per curiam). In *United States v. Kojayan*, the court named the prosecutor more than forty times in the initial opinion but withdrew the naming in the final opinion. 8 F.3d 1315 (9th Cir. 1993). To date, however, there has not been a systematic analysis of this phenomenon.

61 See, e.g., *United States v. Richardson*, 161 F.3d 728, 737 (D.C. Cir. 1998) (holding that it was plain error for district court to allow prosecutor's improper statement).

62 See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 781 (1995) ("One of the most frequently traveled routes to the state trial bench is through prosecutors' offices.").

63 See, e.g., *People v. Shazier*, 151 Cal. Rptr. 3d 215, 222–23, 229 (Cal. Ct. App. 2012); *Bell v. State*, 723 So. 2d 896, 897 (Fla. Dist. Ct. App. 1998).

64 See *Modica*, 663 F.2d at 1181–82. Given the vast deference that appellate courts grant to trial verdicts, the harmless error doctrine treats most prosecutorial trial errors as irrelevant. See also H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 86 (2013) (describing harmless error doctrine in relation to prosecutorial misconduct).

65 See generally Rudin, *supra* note 55; Yaroshefsky, *supra* note 55; Zacharias, *supra* note 55.

Prosecutors' interest in defending convictions regardless of the questionable propriety of their office's conduct has both rhetorical and regulatory significance. First, because courts generally do not overturn convictions unless the improprieties had a significant effect upon the trial outcome, prosecutors have an incentive to downplay the significance of their alleged wrongdoing. Second, instead of acknowledging improprieties, prosecutors typically defend questionable conduct whenever there is a plausible basis to do so. This means publicly adopting a conception of prosecutorial conduct that tests the outer limits of propriety. This also implicitly conveys to line prosecutors that it is unnecessary to proceed cautiously, regardless of what official policy says on the question, because their aggressive conduct will be defended rather than punished internally.⁶⁶

In theory, prosecutors might alternatively be held accountable for certain misconduct through civil rights actions filed by wronged individuals. In practice, however, civil liability is rarely a viable remedy, in part because the doctrines of absolute and qualified immunity severely limit the circumstances in which prosecutorial misconduct establishes a civil rights claim.⁶⁷ In its leading case regarding prosecutors' civil immunity, the Supreme Court was less concerned with compensating victims of prosecutorial abuse and deterring future wrongdoing than with protecting "honest prosecutor[s]" from the "substantial danger of liability."⁶⁸ The caselaw makes it hard to hold prosecutors' offices accountable for individual prosecutors' misdeeds, even when they are attributable to institutional failings of training and supervision. In a closely divided 2011 decision, the Court majority was emphatic that prosecutors' offices would not be civilly liable for discovery violations attributable to inadequate training because, as lawyers, prosecutors ordinarily should be able to master their professional responsibilities on their own and to otherwise regulate their own professional conduct.⁶⁹ As for punishing and deter-

66 See generally Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161 (2010).

67 See *Van de Kamp v. Goldstein*, 555 U.S. 335, 348–49 (2009) (holding that district attorney supervisors were entitled to absolute immunity from allegations that they failed to ensure prosecutors were aware, and therefore able to disclose to the defendant, that jailhouse informant was receiving benefits in return for his testimony); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 278 (1993) (finding qualified immunity for statements about defendants to the press and for allegedly fabricating evidence); *Burns v. Reed*, 500 U.S. 478, 495–97 (1991) (holding that a prosecutor has absolute immunity for eliciting false statements in a judicial hearing, but only qualified immunity for giving legal advice to police officers); *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976); *Doe v. Phillips*, 81 F.3d 1204, 1211 (2d Cir. 1996) (stating that qualified immunity is lost only when prosecutors should know that their conduct violates clearly established constitutional or statutory rights).

68 *Imbler*, 424 U.S. at 425.

69 See *Connick v. Thompson*, 563 U.S. 51, 64, 71–72 (2011).

ring abuse, the Court regarded professional discipline as an adequate alternative.⁷⁰

Professional discipline was far from robust, however. At least until recently, prosecutors were rarely disciplined for misconduct, and if so, not very seriously.⁷¹ Courts have acknowledged as much.⁷² Although professional conduct rules subject prosecutors to discipline for violating legal as well as ethical obligations, and judges who know of serious prosecutorial misconduct are obligated to refer the prosecutor to the disciplinary authorities, neither judges nor defense lawyers ordinarily alerted disciplinary agencies when prosecutors acted wrongly.⁷³ Of course, disciplinary authorities could read judicial decisions involving prosecutorial misconduct and initiate inquiries on their own. However, disciplinary agencies and the courts overseeing them largely gave prosecutors a pass, perhaps hoping that prosecutors' offices would clean up their own messes.⁷⁴

Internal discipline was generally considered equally ineffective.⁷⁵ At the state and local level in the pre-Internet era, few prosecutors' offices had any formal mechanism to address prosecutorial misconduct comparable to the federal Office of Professional Responsibility (OPR), the office within the U.S. Department of Justice charged with investigating and sanctioning misconduct by federal prosecutors.⁷⁶ OPR itself was too secretive to promote public

70 See *id.* at 66 (“An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.”); see also *Imbler*, 424 U.S. at 429 (“[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.” (citing MODEL CODE OF PROF’L RESPONSIBILITY § EC 7-13 (Am. Bar Ass’n 1980))).

71 See, e.g., Neil Gordon, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct*, CTR. FOR PUB. INTEGRITY (June 26, 2003), <http://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment>; see generally *Harmful Error: Investigating America’s Local Prosecutors*, CTR. FOR PUB. INTEGRITY, <https://www.publicintegrity.org/accountability/harmful-error> (last visited Aug. 23, 2016) (containing links to various articles regarding instances of prosecutorial misconduct).

72 See, e.g., *State ex rel. Okla. Bar Ass’n v. Miller*, 309 P.3d 108, 120 (Okla. 2013) (“Instances of prosecutorial misconduct from previous decades, such as withholding evidence, were often met with nothing more than a reprimand or a short suspension. Some scholars writing during that time theorized that discipline was imposed so rarely and so lightly that it was not effective in deterring misconduct.” (footnote omitted)).

73 See generally Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010) [hereinafter *Cardozo Symposium*]; KATHLEEN RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, *PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009* (2010), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs>.

74 See *State ex rel. Okla. Bar Ass’n*, 309 P.3d. 108.

75 See Caldwell, *supra* note 64, at 98; Rudin, *supra* note 55, at 542–43.

76 *About the Office and OPR Policies and Procedures*, U.S. DEP’T OF JUSTICE (Aug. 16, 2016), <https://www.justice.gov/opr/about-office-and-opr-policies-and-procedures>.

confidence in its work.⁷⁷ There was no greater cause for confidence that prosecutors' offices maintained adequate informal mechanisms for promoting accountability. The operation of prosecutors' offices was so opaque that the public could only take it on faith that prosecutors were adequately trained, supervised, and sanctioned for wrongdoing.⁷⁸

Finally, in theory, political accountability might substitute for professional accountability. Particularly in jurisdictions with elected prosecutors, constituencies might punish chief prosecutors by replacing them when their offices engaged in misconduct. However, the electorate has not been an effective regulator of prosecutorial misconduct.⁷⁹ Holding elected prosecutors and their subordinates to legal and professional standards has not been a high public priority. Many voters tolerated prosecutorial improprieties if prosecutors were apparently effective in convicting lawbreakers.⁸⁰ Further, absent effective media scrutiny of prosecutors' conduct, interested voters could not make informed assessments of an office's professional practices. Other public officials might be better positioned to inquire effectively, but prosecutorial oversight was not a legislative or executive branch priority.

II. PROSECUTORIAL ACCOUNTABILITY 2.0

In recent years, public discourse about prosecutorial misconduct has been changing. Increasingly, credence is given to the idea that visible misconduct is the tip of the iceberg and that prosecutors' institutions, not just deviant individuals, deserve some of the blame. As one vivid example of the rhetorical shift characterizing "Prosecutorial Accountability 2.0," this Article offers the popularization of the idea of an "epidemic" of discovery violations. As this Article then describes, the premise that prosecutorial misconduct is a widespread, systemic problem has coincided with a regulatory shift toward judicial proactivity and systemic reform. This Article's point is not that the rhetorical shift has influenced the regulatory shift, or vice versa, but that

⁷⁷ See generally Letter from Richard M. Stana, Dir., Justice Issues, U.S. Gen. Accounting Office, to Rep. Henry J. Hyde & Rep. William D. Delahunt (Jan. 19, 2001), <http://www.gao.gov/assets/100/90644.pdf> (regarding follow-up information on the operations of the Department of Justice's OPR).

⁷⁸ Critics charged that internal disciplinary processes, lacking objectivity, were too disposed to excuse misconduct as unintentional. See generally David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. FORUM F. 203, 205 (2011) ("Our findings, based on an investigation into the professional conduct rules and attorney discipline procedures of all fifty states, suggest that disciplinary systems as they are currently constituted do a poor job of policing prosecutors.").

⁷⁹ See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009).

⁸⁰ The election of prosecutors arguably promotes undesirable conduct, such as overly aggressive prosecutions. See, e.g., Andrew Novak, *It's Too Dangerous to Elect Prosecutors*, DAILY BEAST (Aug. 24, 2015), <http://www.thedailybeast.com/articles/2015/08/24/it-s-too-dangerous-to-elect-prosecutors.html>.

these are concurrent developments that jointly comprise a shift in public, judicial, and legislative attitudes toward prosecutorial accountability.

A. *The Rhetorical Shifts*

1. The Idea of Systemic Misconduct

In the Internet era, the NACDL, other criminal defense organizations, and not-for-profit organizations have published reports online alleging prosecutorial misconduct and calling for reform.⁸¹ In September 2013, a recently-formed not-for-profit reform group, the Center for Prosecutor Integrity, titled its white paper on the subject, “An Epidemic of Prosecutor Misconduct.”⁸² The paper quoted academics and practitioners who had called prosecutorial wrongdoing “rampant,” “pervasive,” “common,” “ingrained,” and “endemic,” although it provided no independent empirical support for its claim that prosecutorial misconduct was an epidemic.⁸³ The organization posted its paper on the Internet and later added an Internet “Registry of Prosecutorial Misconduct.”⁸⁴

In an earlier decade, prosecutors and many objective observers would have dismissed this rhetoric as hyperbolic and partisan. But in December 2013, the same claim was adopted in a dissenting opinion by then-Chief Judge Kozinski in a federal criminal case, *United States v. Olsen*.⁸⁵ A three-judge appellate panel had earlier upheld Olsen’s criminal conviction despite the trial prosecutor’s suppression of exculpatory information.⁸⁶ The panel opinion was written by a visiting district judge, Paul Friedman, who is generally known for the liberality of his views on prosecutorial disclosure.⁸⁷

The panel concluded that the prosecution did not violate *Brady v. Maryland* because the withheld evidence was not “material.”⁸⁸ Dissenting from

81 See, e.g., INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT, A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK v. THOMPSON* (2016), http://kzqb-2dp8.accessdomain.com/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf; KATHLEEN RIDOLFI ET AL., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES (2014), <http://www.nacdl.org/report/materialindifference/pdf/>; RIDOLFI & POSSLEY, *supra* note 73; NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *The Human Cost of Brady Violations: The Need for Meaningful Discovery Reform*, <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=23715&libID=23684> (last visited Oct. 14, 2016).

82 CTR. FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf>.

83 *Id.* at 4–5.

84 See *Registry Database*, CTR. FOR PROSECUTOR INTEGRITY, <http://www.prosecutorintegrity.org/registry/database/> (last visited Oct. 18, 2016).

85 737 F.3d 625 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc).

86 *United States v. Olsen*, 704 F.3d 1172, 1185 (9th Cir. 2013).

87 See, e.g., *United States v. Safavian*, 233 F.R.D. 12, 14–17 (D.D.C. 2005) (Friedman, J.) (discussing the government’s disclosure obligations under Rule 16 and *Brady*).

88 *Olsen*, 704 F.3d at 1184–85.

the full court's refusal to reconsider the panel's decision and joined by four colleagues, Judge Kozinski argued that the evidence might have led the jury to acquit.⁸⁹

Having written a significant opinion on prosecutorial misconduct two decades earlier⁹⁰ and having recently written the foreword to a book on federal prosecutorial misconduct,⁹¹ Judge Kozinski saw the federal prosecutor's suppression of evidence as a piece of a bigger picture. He began by asserting that "[t]here is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."⁹² After describing the prosecutor's conduct and explaining the importance of the suppressed evidence,⁹³ the opinion returned to its opening theme, ruefully observing:

I wish I could say that the prosecutor's unprofessionalism here is the exception, that his propensity for shortcuts and indifference to his ethical and legal responsibilities is a rare blemish and source of embarrassment to an otherwise diligent and scrupulous corps of attorneys staffing prosecutors' offices across the country. But it wouldn't be true. *Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.⁹⁴

The opinion then cited twenty-eight federal and state court decisions issued between 1998 and 2013 that found that prosecutors in other jurisdictions had previously violated disclosure obligations.⁹⁵

Judge Kozinski's opinion did not carry the day in the Ninth Circuit, but his disparagement of prosecutors fared better in the court of public opinion. His pronouncement that prosecutorial discovery abuse is "epidemic" was endorsed by the Cato Institute's National Police Misconduct Reporting Project⁹⁶ and quoted on the blogs of innocence projects⁹⁷ and others.⁹⁸ It made news.⁹⁹ It caught editorialists' attention: a *New York Times* editorial titled

89 *Id.* at 626–28 (Kozinski, C.J., dissenting from denial of rehearing en banc).

90 *See* *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993) (Kozinski, J.).

91 *See* SIDNEY POWELL, LICENSED TO LIE: EXPOSING CORRUPTION IN THE DEPARTMENT OF JUSTICE xi–xvii (2014). Judge Kozinski also recently published an article addressing prosecutorial conduct, among other criminal justice issues. *See* Kozinski, *supra* note 6.

92 *Olsen*, 737 F.3d at 626 (Kozinski, C.J., dissenting from denial of rehearing en banc).

93 *See id.* at 628–30.

94 *Id.* at 631.

95 *Id.* (citing cases).

96 *See, e.g.*, Tim Lynch, *An 'Epidemic' of Prosecutorial Misconduct*, CATO INST. (Dec. 12, 2013, 12:08 PM), <http://www.policemisconduct.net/epidemic-prosecutorial-misconduct/>.

97 *See, e.g.*, *Judge Says There's an Epidemic of Prosecutorial Misconduct*, INNOCENCE PROJECT (Dec. 16, 2013, 5:45 PM), <http://www.innocenceproject.org/judge-says-theres-an-epidemic-of-prosecutorial-misconduct/>.

98 *See, e.g.*, Carrie Johnson, *Lawyers Use High Court Petition To Highlight Prosecutorial Misconduct*, NPR: THE TWO-WAY (Apr. 14, 2014, 11:05 AM), <http://www.npr.org/blogs/thetwo-way/2014/04/24/306443521/lawyers-use-high-court-petition-to-highlight-prosecutorial-misconduct>.

99 *See, e.g.*, Radley Balko, *Chief Judge for 9th Circuit Cites 'Epidemic' of Prosecutor Misconduct*, HUFFINGTON POST (Dec. 11, 2013, 1:11 PM), http://www.huffingtonpost.com/2013/12/11/blistering-9th-circuit-di_n_4426802.html.

Rampant Prosecutorial Misconduct quoted Judge Kozinski, endorsed his claim, and called on prosecutors to “adopt a standard ‘open file’ policy” to address the prosecution’s “systemic failure” to comply with disclosure obligations.¹⁰⁰ Since then, the idea of an “epidemic” of discovery abuse has continued to linger in the popular, professional, and judicial consciousness.¹⁰¹

The federal appellate opinion’s gratuitous swipe at prosecutors nationwide¹⁰² gave currency to the trope that prosecutors’ wrongdoing was “epidemic,” which entered briefs and other judicial opinions.¹⁰³ In an earlier day, Judge Kozinski’s opinion would likely have escaped notice. But by the end of 2015, a state court justice invoked what she referred to as Judge Kozinski’s “famous[]” observation in her own dissenting opinion maintaining that the prosecution had violated its discovery obligation.¹⁰⁴

Most notable about this rhetorical turn is the foundation on which it is built. The dissent’s claim rested on precisely the same sort of data that has long given prosecutors comfort that intentional prosecutorial discovery abuse is aberrational. As Department of Justice officials belatedly noted, Judge Kozinski cited only a handful of cases from around the country, on average fewer than two per year over a fifteen-year period, in which convictions had been reversed for discovery violations.¹⁰⁵ That is, of course, out of the tens of thousands of prosecutions annually.¹⁰⁶ And because courts overturn con-

100 Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), <http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html>.

101 See, e.g., Andrew Cohen, *Obama’s Final 500 Days*, MARSHALL PROJECT, (Sept. 3, 2015), <https://www.themarshallproject.org/2015/09/03/obama-s-final-500-days?refHP-3-111> (quoting Cato Institute’s Project on Criminal Justice Director Tim Lynch, referring to Judge Kozinski’s observation with approval); see also *supra* notes 99, 100.

102 There was no need to publish an opinion objecting to the denial of en banc review. Nor was there need to address the frequency of discovery abuse. The question was whether information withheld by the prosecutor in the particular case was material, and whether en banc reconsideration was therefore warranted to correct the panel’s mistake. Given the panel’s unanimous conclusion that there was no *Brady* violation because the withheld information was immaterial, the case was not itself symptomatic of the asserted epidemic.

103 See, e.g., *United States v. Hack*, No. 2:12-cr-00063, 2014 U.S. Dist. LEXIS 84273, at *4–5 (D. Nev. June 20, 2014) (defendant made discovery request based on the Kozinski quote); see also *People v. Alvarez*, 176 Cal. Rptr. 3d 890, 905 (Cal. Ct. App. 2014) (quoting Kozinski with approval).

104 *State v. Root*, 359 P.3d 1088, 1095 (Mont. 2015) (Cotter, J., dissenting).

105 Letter from Assoc. Deputy Attorney Gen., Andrew D. Goldsmith and U.S. Attorney John F. Walsh, U.S. Dep’t of Justice, to the Editors of *Georgetown Law Journal* 2 (Nov. 4, 2015), <http://georgetownlawjournal.org/files/2015/11/DOJ-Response-to-Kozinski.pdf>.

106 Of course, courts rarely reverse convictions when discovery violations precede guilty pleas. Since upwards of ninety percent of cases result in guilty pleas, the appropriate numerical comparison is the number of trial cases with reversals due to discovery violations and not the total number of cases filed yearly. LINDSEY DEVERS, U.S. DEP’T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011) (documenting about ninety to ninety-five percent of state and federal cases result in guilty pleas). *But see, e.g., Buffey v. Ballard*, 782 S.E.2d 204 (W. Va. 2015) (remanding to permit defendant to withdraw guilty plea because of prosecutorial failure to disclose exculpatory DNA prior to entry of the guilty plea).

victions for discovery violations without regard to fault, it was unclear that Judge Kozinski envisioned the epidemic as one involving exclusively willful prosecutorial wrongdoing or also sweeping in prosecutors' negligence and inadvertence. Nor was it clear that Judge Kozinski was excluding cases where the blame lay entirely with the police, not the prosecutor. While those who took up Judge Kozinski's charge likely assumed that he was targeting an epidemic of intentional prosecutorial discovery abuse, it is uncertain that he meant to convey that, and evident that, in either case, the asserted "epidemic" was an article of faith, borne of experience. It could not be an empirically established fact because prosecutorial misconduct is often hidden, leaving Judge Kozinski's charge open to challenge as hyperbole.

2. Expanding Concepts of Prosecutorial Misconduct

With the increased public skepticism about prosecutors has come an expanded concept of prosecutorial misconduct beyond intentional, judicially remedial violations of law and disciplinary rules.

First, those seeking to hold prosecutors accountable increasingly question the significance of the distinction between prosecutors' intentional and negligent wrongdoing. These critics assert that prosecutors must take reasonable measures to comply with legal obligations, and therefore negligent wrongdoing is also blameworthy.¹⁰⁷ In other words, censure should not be reserved solely for the "bad apples" and "rogue prosecutors." Further, prosecutors' offices have duties to train and supervise individual prosecutors to promote compliance with legal obligations and may be institutionally blameworthy in many cases of negligent legal violations.¹⁰⁸ Consequently, critics increasingly push blame up the ladder in the prosecutors' office, perceiving low-level prosecutorial wrongdoing as symptomatic of bad culture, bad leadership, bad compliance systems, or other systemic inadequacies for which supervisors and chief prosecutors should be held responsible.¹⁰⁹

107 See, e.g., Rudin, *supra* note 55, at 569–70; see also *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor’s office is an entity and as such it is the spokesman for the Government. . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.”).

108 See generally Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. 2089 (2010).

109 For example, Alafair Burke has challenged the “language of fault” that dominates discussion of prosecutorial decisionmaking and suggested the need for an alternative discourse beyond language of “blame” to change culture. See generally Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119 (2010); see also Jerry P. Coleman & Jordan Lockey, Brady “Epidemic” Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It, 50 U.S.F. L. REV. 199, 200 (2016) (examining *Brady* violations in California cases and arguing that “vigorous ethical training and universal adoption of best practices may well be the best defense against critics”).

Second, the public perception is growing that misconduct is not limited to unlawful conduct. In particular, the public and the media are coming to understand that prosecutors' decisions about whom to charge, what plea bargains to offer, or what sentences to pursue may be not simply unwise, but abusive, reflecting wrongdoing in an ordinary, if not legal, sense.¹¹⁰ A notable example is how the prosecution of Aaron Swartz provoked skepticism about federal prosecutors' use of their charging power. Swartz, the brilliant young computer prodigy and information activist who had surreptitiously entered MIT's computers and installed a program to download academic journals, was charged with fourteen counts for the alleged computer crimes.¹¹¹ Unable to withstand the pressure of the prosecution, he committed suicide.¹¹² His family characterized the prosecution as "the product of a criminal justice system rife with intimidation and prosecutorial overreach."¹¹³ Many scholars, political leaders, and media commentators agreed.¹¹⁴ Attorney General Holder's defense of the prosecution before a congressional committee encountered stinging criticism.¹¹⁵ Prosecutorial

110 See, e.g., Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187 (2010); see also Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009).

111 Douglas Galbi, *Systemic Injustice of the U.S. Criminal Justice System*, PURPLE MOTES (Jan. 20, 2013), <http://purplemotes.net/2013/01/20/injustice-criminal-justice-system/>.

112 Michael Martinez, *Internet Prodigy, Activist Aaron Swartz Commits Suicide*, CNN (Mar. 7, 2013), <http://www.cnn.com/2013/01/12/us/new-york-reddit-founder-suicide/>.

113 Galbi, *supra* note 111.

114 Zach Carter, *Al Franken Sends Eric Holder Letter Over 'Remarkably Aggressive' Aaron Swartz Prosecution*, HUFFINGTON POST (Mar. 22, 2013, 3:55 PM), www.huffingtonpost.com/2013/03/22/al-franken-eric-holder_n_2934627.html; Alex Stamos, *The Truth About Aaron Swartz's "Crime"*, UNHANDLED EXCEPTION (Jan. 12, 2013), <http://unhandled.com/2013/01/12/the-truth-about-aaron-swartzs-crime/> (asserting that Aaron Swartz was "massively overcharge[d]," since his "downloading of journal articles from an unlocked closet [was] not an offense worth 35 years in jail"); see also Lincoln Caplan, *Aaron Swartz and Prosecutorial Discretion*, N.Y. TIMES: TAKING NOTE (Jan. 18, 2013, 10:06 AM), <http://takingnote.blogs.nytimes.com/2013/01/18/aaron-swartz-and-prosecutorial-discretion/> (stating that federal prosecutors "go after defendants tooth and nail, overcharging them from the abundance of criminal laws with sentences so severe and out of proportion to the crime that, as now happens in 95 percent of criminal cases, the prudent choice is to cop a plea"); Stephen L. Carter, *The Overzealous Prosecution of Aaron Swartz*, BLOOMBERG VIEW (Jan. 17, 2013), <http://www.bloomberg.com/news/2013-01-17/the-overzealous-prosecution-of-aaron-swartz.html>; Lawrence Lessig, Opinion, *Prosecutor as Bully*, HUFFINGTON POST (Mar. 15, 2015, 10:02 AM), http://www.huffingtonpost.com/lawrence-lessig/aaron-swartz-suicide_b_2467079.html (observing that "the question this government needs to answer is why it was so necessary that Aaron Swartz be labeled a 'felon.' For in the 18 months of negotiations, that was what he was not willing to accept . . .").

115 Concerns about abuses of discretion were accompanied by other claims of impropriety, including that the prosecutor "instructed the Secret Service to seize and hold evidence without a warrant, . . . lied to the judge about that fact in written briefs, . . . [a]nd withheld exculpatory evidence . . . for over a year . . ." Mike Masnick, *Aaron Swartz's Partner Accuses DOJ of Lying, Seizing Evidence Without A Warrant & Withholding Exculpatory Evidence*, TECHDIRT

overreaching, abuse of power, and lack of proportionality became the buzzwords about the case on the Internet and social media.¹¹⁶

More recently, prosecutors' failure to obtain grand jury indictments in cases involving police killings of unarmed civilians in Ferguson, Missouri, and Staten Island, New York, provoked public pressure to hold the prosecutors accountable for perceived misconduct.¹¹⁷ The sentiment was that prosecutors abused their investigative and charging discretion by treating the police officers more leniently than similarly situated low-income people, presumably because of racial bias or sympathy to the police.¹¹⁸ Critics also claim that in the Ferguson case, prosecutors overseeing the grand jury investigation introduced false testimony that could have influenced the grand jury not to issue an indictment.¹¹⁹

B. *The Regulatory Shift*

Accompanying the increased public skepticism about prosecutors and the broadening concept of prosecutorial impropriety has been a movement to expand judicial, legislative, and disciplinary regulation. While some of this is aimed at individual wrongdoing, much has been aimed at perceived systemic or institutional problems. While the Department of Justice and many

(Mar. 8, 2013, 11:18 AM), <https://www.techdirt.com/articles/20130308/01330322250/aaron-swartzs-partner-accuses-doj-lying-seizing-evidence-without-warrant-withholding-exculpatory-evidence.shtml>.

116 See, e.g., Emily Bazelon, *When the Law Is Worse Than the Crime*, SLATE (Jan. 14, 2013), http://www.slate.com/articles/technology/technology/2013/01/aaron_swartz_suicide_prosecutors_have_too_much_power_to_charge_and_intimidate.html; Glen Greenwald, *Carmen Ortiz and Stephen Heymann: Accountability for Prosecutorial Abuse*, GUARDIAN (Jan. 16, 2013), <http://www.theguardian.com/commentisfree/2013/jan/16/ortiz-heyman-swartz-accountability-abuse>.

117 The Ethics Project filed a complaint with the disciplinary authorities against Ferguson prosecutor Robert McCulloch and two of his deputies relating to their investigation of the police shooting of Michael Brown. See Nadia Prupis, *Ferguson Prosecutor Hit with Ethics Complaint*, COMMON DREAMS (Jan. 6, 2015), <http://www.commondreams.org/news/2015/01/06/ferguson-prosecutor-hit-ethics-complaint>. The NAACP brought an action against the disciplinary authority seeking to compel it to bring ethics charges against Staten Island prosecutor Daniel Donovan based on alleged misconduct in the investigation of the police killing of Eric Garner. See Josh Saul, *NAACP Suit Seeks Probe of Staten Island DA in Eric Garner Case*, N.Y. POST (Mar. 21, 2015) <http://nypost.com/2015/03/21/naACP-suit-seeks-probe-of-staten-island-da-in-eric-garner-case/>.

118 See, e.g., Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1447 (2016) (arguing that "a structural conflict of interest arises when local prosecutors are given the discretion and responsibility to investigate and lead cases against the police"); Mustapha Ndanusa, *Punishing Impunity and Judging Discretion: Michael Brown & Eric Garner*, MR. REFINED, <http://mrrefined.com/punishing-impunity-judging-discretion-michael-brown-eric-garner/> (last visited Aug. 24, 2016); see also Affidavit of Professor Bennett L. Gershman, Missouri *ex inf.* Simmons v. McCulloch, Civ. No. 15SL-CC00177 (Mo. Ct. App. 2015).

119 See Josh Levs, *One Challenge for Ferguson Grand Jury: Some Witnesses' Credibility*, CNN (Dec. 14, 2014), <http://www.cnn.com/2014/12/14/justice/ferguson-witnesses-credibility/>

local prosecutors continue to argue publicly that wrongdoing is rare, some have, at the same time, sought to implement more effective self-regulatory measures.

1. Judicial Skepticism

Judge Kozinski is not alone in criticizing prosecutors. Although many judges continue to profess confidence in the good faith of prosecutors and their institutions, many more than in the past are disposed to identify misconduct, to infer that the misconduct was willful, and to blame prosecutors publicly, including by name.¹²⁰ For example, a federal judge recently excoriated an experienced Florida prosecutor who handled the prosecution of more than fifty Colombian defendants for significant drug smuggling.¹²¹ After the judge found that the prosecutor intentionally withheld key evidence from the defense, articles labeled her a “serial offender” who has “problems staying within the bounds of the law.”¹²²

Further, some judges have initiated inquiries into prosecutorial wrongdoing, exploring whether their institutions are partly blameworthy. Most notably, in 2009, Judge Emmet Sullivan made national headlines when he observed that in all his years on the bench he had “never seen mishandling and misconduct like what I have seen” by the Justice Department prosecutors who tried U.S. Senator Ted Stevens.¹²³ In an earlier time, the trial judge might have left it to the Department of Justice to decide whether internal discipline or reform was warranted. Instead, Judge Sullivan appointed members of the private bar, Henry Schuelke III and William Shields, as special prosecutors to examine the prosecutors’ conduct and recommend whether the court should initiate contempt proceedings.¹²⁴

Schuelke and Shields’ comprehensive report concluded that “[t]he investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens’s defense and his testimony, and seriously damaged the testimony and credibility of the govern-

120 Cf. Gershowitz, *supra* note 60, at 1086–87 (discussing judges’ reasons for refusing to shame prosecutors guilty of misconduct). But due to increased pressure for transparency, in recent police shootings, some prosecutors do not utilize grand juries. Susanne Posel, *Tending: Prosecutors Nixing Grand Juries from Police Shooting Cases*, NSNBC INT’L (Mar. 17, 2016), <http://nsnbc.me/2016/03/17/tending-prosecutors-nixing-grand-juries-from-police-shooting-cases/> (discussing Minneapolis prosecutor’s decision against the use of the grand jury in the Jamar Clark killing and California’s recent law prohibiting the use of the grand jury in these cases).

121 Clarence Walker, *Serial Offender: Miami Fed. Prosecutor Called on Misconduct in Drug Cases*, STOPTHEDRUGWAR.ORG (Aug. 8, 2013, 11:20 AM), http://stopthedrugwar.org/chronicle/2013/aug/08/serial_offender_miami_fed_prosec.

122 *Id.*

123 Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES (Apr. 7, 2009), <http://www.nytimes.com/2009/04/08/us/politics/08stevens.html>.

124 *Id.*

ment's key witness."¹²⁵ Although Judge Sullivan ultimately settled for referring the prosecutors to the Justice Department's internal disciplinary process,¹²⁶ the exercise marked courts' increased receptivity to asserting regulatory authority over prosecutors. Another notable example is District Judge Mark Wolf's criticism of federal prosecutors for discovery failures, followed by an order to show cause as to why sanctions should not be imposed.¹²⁷ Similarly, in October 2015, Judge Raymond Dearie ordered the federal prosecutor's office to produce a report to explain the office's issuance of a subpoena unlawfully directing the witness to keep the subpoena's existence confidential.¹²⁸

In California, in particular, judicial concern has grown regarding prosecutorial misconduct. A trial judge recently disqualified the entire prosecutor's office in Orange County, California, in a death penalty case because of ongoing misconduct involving the use of jailhouse informants, including a cover up and "'chronic failure' to comply with orders to turn over evidence to the defense . . . at the expense of . . . constitutional and statutory obligations."¹²⁹ In other cases, federal courts have targeted state prosecutors' misconduct and called upon Attorney General Kamala Harris to respond.¹³⁰

Although discovery abuse has substantially driven the regulatory shift, judges have scrutinized broader aspects of prosecutors' conduct, even those

125 Jason Ryan, *Sen. Ted Stevens Prosecutors Hid Evidence, Report Concludes*, ABC NEWS (Mar. 16, 2012), <http://abcnews.go.com/blogs/politics/2012/03/sen-ted-stevens-prosecutors-hid-evidence-report-concludes/>.

126 *Id.*; Del Quentin Wilber & Sari Horwitz, *Prosecutors Concealed Evidence in Ted Stevens Case, Report Finds*, WASH. POST (Mar. 15, 2012), <https://www.washingtonpost.com/local/crime/prosecutors-concealed-evidence-in-ted-stevens-case-report-finds/2012/03/15/gIQAJ5GNFSstory.html>.

127 See *United States v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009).

128 James C. McKinley, Jr., *Judge Finds Fault With Gag Order in U.S. Attorney's Subpoena*, N.Y. TIMES (Oct. 8, 2015), http://www.nytimes.com/2015/10/09/nyregion/judge-finds-fault-with-gag-order-in-us-attorneys-subpoena.html?_r=0.

129 Christopher Goffard, *Orange County D.A. Is Removed from Scott Dekraai Murder Trial*, L.A. TIMES (Mar. 12, 2015), <http://www.latimes.com/local/orangecounty/la-me-jailhouse-snitch-20150313-story.html>; see Eve, *CA: Judge Removes DA's Office in Orange County Murder Case Because Office Will Not Comply with Constitution*, OPEN FILE (Mar. 12, 2015), <http://www.prosecutorialaccountability.com/2015/03/12/ca-judge-removes-das-office-in-orange-county-murder-case-because-office-will-not-comply-with-constitution/>.

130 Maura Dolan, *U.S. Judges See 'Epidemic' of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015), <http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html> (Magistrate Judge Patrick J. Walsh stated, "Sadly, this informant's lies were bolstered by a Deputy District Attorney, who also lied What is obvious . . . is that the Riverside County District Attorney's Office turned a blind eye to fundamental principles of justice to obtain a conviction." (internal quotation marks omitted)). Dolan's article discusses *Baca v. Adams*, 777 F.3d 1035 (9th Cir. 2015), where the court called upon the California attorney general to respond to charges of prosecutorial misconduct that did not result in discipline. See Dolan, *supra*; see also Lara Bazelon, *For Shame*, SLATE (Apr. 7, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/04/alex_kozinski_and_the_ninth_circuit_s_crusade_against_prosecutorial_misconduct.html (discussing the Ninth Circuit's attention to prosecutorial misconduct, notably in *Baca v. Adams*).

that are not susceptible to formal judicial oversight. For example, in a recent article, Judge Jed Rakoff asserted that federal prosecutors' charging and plea bargaining practices pressured innocent people to plead guilty.¹³¹ He advocated judicial oversight of plea bargaining, which current federal procedure rules foreclose.¹³² Elsewhere, in a sweeping critique, Judge Emmet Sullivan criticized federal prosecutors for offering deferred prosecution agreements to corporations but not to individuals accused of non-white collar crimes.¹³³ Most recently, West Virginia's supreme court issued a landmark decision recognizing prosecutors' constitutional obligation to disclose exculpatory evidence during plea bargaining—a stage when prosecutorial power is relatively unchecked.¹³⁴ And, in a groundbreaking sentencing decision, Judge Block rendered a non-incarceratory sentence over the objection of prosecutors due to the collateral consequences of conviction.¹³⁵

2. Legislative Reform and Other Forms of Political Accountability

The shifting public rhetoric about prosecutorial misconduct has influenced state legislatures to consider amending criminal procedure rules to impose greater demands or restraints on prosecutors, particularly with regard to discovery. Even some federal legislators have been receptive, notwithstanding the power of the Department of Justice. In the most notable instances, high-profile cases of prosecutorial misconduct have spurred legislative movement. The demands for reform presupposed that these cases could not be dismissed as wholly exceptional, but exemplified deeper, systemic deficiencies.¹³⁶ On the state level, the most notable reforms owe much to

131 Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty>.

132 *Id.* at 8.

133 See Matt Apuzzo, *Criminals Should Get Same Leniency as Corporations, Judge Says*, N.Y. TIMES (Oct. 23, 2015), <http://www.nytimes.com/2015/10/24/us/politics/criminals-should-get-same-leniency-as-corporations-judge-says.html?smprod=nytcare-iphone&smid=nytcare-iphone-share>. Other recent judicial critiques of exercises of prosecutorial discretion include *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at *1, *4–7 (E.D.N.Y. July 1, 2013) (holding that, despite the government's claim, its deferred prosecution agreement is subject to judicial oversight), and *United States v. Stein*, 435 F. Supp. 2d 330, 362–65, 382 (S.D.N.Y. 2006) (finding that the prosecution denied defendants a fair trial by implementing a corporate prosecution policy that pressured their employer not to fund their defense).

134 *Buffey v. Ballard*, 782 S.E.2d 204, 221 (W. Va. 2015) (overturning conviction predicated on guilty plea where prosecutors suppressed favorable DNA test results).

135 *United States v. Nesbeth*, No. 15-CR-18, 2016 WL 3022073, at *1 (E.D.N.Y. May 24, 2016).

136 In contrast, courts acting in their rulemaking capacity have been reluctant to advance reform. For example, in November 2015, the Virginia Supreme Court inexplicably rejected changes to pretrial disclosure rules proposed by a broadly representative committee following almost a year of study. See, e.g., Frank Green, *Justices Reject Recommendations on Pretrial Discovery in Criminal Cases*, RICHMOND TIMES-DISPATCH (Nov. 26, 2015), http://www.richmond.com/news/article_a7518ce0-3e7c-5696-8cc2-0dda708dd9b1

the concern about the association between prosecutorial discovery abuse and the prosecutions and convictions of innocent individuals. Most recently, California adopted legislation making it a felony for prosecutors to intentionally withhold or alter evidence.¹³⁷ In North Carolina, legislation providing for more open discovery followed the unraveling of prosecutor Michael Nifong's prosecution of members of the Duke University lacrosse team on sexual assault charges in 2006.¹³⁸ Amid extensive national and international news coverage, the charges were dropped, and the following year, Nifong was brought up on disciplinary charges.¹³⁹ He was ultimately disbarred for, among other things, withholding exculpatory DNA evidence, dishonesty, and making improper public comments.¹⁴⁰ In the wake of this case, North Carolina liberalized its disclosure rules, reducing the extent to which criminal defendants must rely on prosecutors' good faith evaluations of the significance of evidence.¹⁴¹ It also created an Innocence Inquiry Commission to investigate and evaluate post-conviction claims of innocence.¹⁴²

In Texas, similar reform followed the highly publicized exoneration of Michael Morton, who spent twenty-five years in prison for killing his wife before evidence suppressed by the prosecutor led to his exoneration.¹⁴³ In an unusual procedure, a Texas court ordered a judicial inquiry into the con-

.html. Likewise, for over a decade, the federal judiciary has rejected proposals to expand prosecutorial disclosure under federal procedure rules. *See* United States v. Jones, 620 F. Supp. 2d 163, 171–73 (D. Mass. 2009) (discussing proposed amendments).

137 Lorelei Laird, *California Makes It a Felony for Prosecutors to Withhold or Alter Exculpatory Evidence*, ABA J. (Oct. 5, 2016), http://www.abajournal.com/news/article/california_makes_it_a_felony_for_prosecutors_to_withhold_or_alter_exculpato.

138 *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 274 (2008).

139 Lara Setrakian & Chris Francesciani, *Former Duke Prosecutor Nifong Disbarred*, ABC NEWS (June 16, 2007), <http://abcnews.go.com/TheLaw/story?id=3285862&page=1>.

140 Duff Wilson, *Prosecutor in Duke Case Is Disbarred for Ethics Breaches*, N.Y. TIMES (June 16, 2007), <http://www.nytimes.com/2007/06/16/us/16end-nifong.html>; *see also* Mosteller, *supra* note 138, at 306.

141 *See* N.C. GEN. STAT. § 15A-903 (2011). The North Carolina statute requires the prosecutor to provide the complete investigative files to the defense before trial, including investigators' notes, the required recordation of all oral statements, and any other information obtained during the investigation. *Id.* § 15A-903(a)(1). A study of the statute's implementation found that open-file discovery increases the "fairness, finality, and efficiency of criminal adjudications." Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1332 (2012).

142 N.C. GEN. STAT. §§ 15A-1460–75 (2008). North Carolina was the first and only state in the country to establish such an Innocence Inquiry Commission. *See About Us*, N.C. INNOCENCE INQUIRY COMM'N, <http://www.innocencecommission-nc.gov/about.html> (last visited Oct. 18, 2016). The Commission model was established in England. *See generally* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009).

143 Molly Hennessy-Fiske, *Inquiry Sought for Texas Prosecutor over Wrongful Conviction*, L.A. TIMES (Dec. 20, 2011), <http://articles.latimes.com/2011/dec/20/nation/la-na-texas-prosecutor-20111220>.

duct of the prosecutor, who by then was a sitting state judge.¹⁴⁴ The former prosecutor was jailed and disbarred after a finding that he had engaged in serious, willful misconduct.¹⁴⁵ In turn, the Texas legislature, without organized opposition or complaint from state and local prosecutors,¹⁴⁶ liberalized state criminal procedure rules governing prosecutors' disclosure. The Michael Morton Act significantly expands discovery both pretrial and post-conviction.¹⁴⁷

Although the federal defense bar has not achieved similar success, members of Congress contemplated discovery reform following the aborted Ted Stevens prosecution. Senator Murkowski's bill, drawing significantly on the work of a coalition of reform groups, proposed broadening both prosecutors' discovery obligations and the range of judicial sanctions for noncompliance.¹⁴⁸ In response, the Department of Justice employed its traditional rhetoric of minimizing the problem, and avowed that the Department was capable of handling it internally.¹⁴⁹ The bill did not go far, but the very fact that the Department was called to account in this case, as in the Swartz case, suggests that even on the federal congressional level, there is some movement to expand external oversight of prosecutors individually and institutionally.

Although most proposed legislative reform has addressed discovery, some is farther reaching. Notably, in 2014, New York legislators from both parties proposed establishing a state Commission on Prosecutorial Conduct, modeled on the state's judicial ethics commission, to investigate and sanction state prosecutors who engage in a broader range of wrongdoing.¹⁵⁰ A representative of the prosecution quickly derided the bill, asserting that it was proposed in retaliation for an independent investigation of the state legislature.¹⁵¹ But proponents of the Commission collected examples of prosecutorial wrongdoing in New York and nationally to illustrate the need

144 *Id.*

145 Editorial, *A Prosecutor Is Punished*, N.Y. TIMES (Nov. 8, 2013), <http://www.nytimes.com/2013/11/09/opinion/a-prosecutor-is-punished.html>.

146 See, e.g., Randall Sims, *The Dawn of New Discovery Rules*, 43 PROSECUTOR, no. 4, July–Aug. 2013, <http://www.tdcaa.com/journal/dawn-new-discovery-rules>. Some individual prosecutors did grouse both before and after the law was enacted. See, e.g., Terry Breen, *New Discovery Statute SB 1611*, TEX. DIST. & CTY. ATTORNEYS ASS'N (May 23, 2013, 4:32 PM), <http://tdcaa.infopop.net/eve/forums/a/tpc/f/157098965/m/7457055016>.

147 See Michael Morton Act, S.B. 1611, 2013 Tex. Gen. Laws 106–08 (amending TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2014)); see also Jeremy Rosenthal, *How the Michael Morton Act Overhauls the Texas Criminal Discovery Process*, CRIM. DEF. LAWYER: DWI, DRUG, THEFT & ASSAULT CHARGES (May 17, 2013), <https://roselawtx.wordpress.com/2013/05/>.

148 Green, *supra* note 3, at 641–42.

149 See *id.* at 655.

150 S.B. 6286A, 237th Reg. Sess. (N.Y. 2014), <http://open.nysenate.gov/legislation/bill/S6286-2013>.

151 Letter from Frank A. Sedita, III, President, Dist. Attorneys Ass'n of the State of N.Y., to Sen. John Flanagan, N.Y. State Sen. (June 4, 2015), <http://www.daasny.com/wp-content/uploads/2015/06/Senator-Flanagan-Letter-Re-CPC-6-4-15.pdf>; Teri Weaver, *DA Fitzpatrick: N.Y. Legislature's Prosecutor Conduct Proposal Retaliation for Moreland Commission*,

for it,¹⁵² demonstrators rallied outside a state courthouse in support of the bill,¹⁵³ and not-for-profit groups, in addition to representatives of the criminal defense bar, joined in support.¹⁵⁴

Political accountability for prosecutorial misconduct has taken other forms as well. For example, New York Governor Andrew Cuomo's recent appointment of the state attorney general to handle cases of police shootings of civilians responded to public concerns about biases in the exercise of prosecutorial discretion.¹⁵⁵ The elections of District Attorneys Craig Watkins in Dallas and Ken Thompson in Brooklyn also appeared to respond to complaints about ongoing prosecutorial misconduct. The 2007 Dallas election focused on the need to change the "conviction-at-all-costs mentality" after Dallas had thirteen exonerations of defendants who were, in many cases, victims of prosecutorial misconduct.¹⁵⁶ The Brooklyn primary election focused on the alleged professional misconduct of the incumbent's office, including its reliance on perjurious police testimony and favoritism to certain portions of the community.¹⁵⁷

3. Disciplinary Oversight

Perhaps most dramatically, the institutions that play a significant role in professional regulation—state supreme courts, disciplinary agencies, and the organized bar—have slowly begun to expand their role in overseeing prose-

SYRACUSE.COM (May 12, 2014), http://www.syracuse.com/news/index.ssf/2014/05/fitzpatrick_ny_legislatures_prosecutor_conduct_commission_retaliation_for_morela.html.

152 See Bennett Gershman, *How to Hold Bad Prosecutors Accountable: The Case for a Commission on Prosecutorial Conduct*, DAILY BEAST (Aug. 31, 2015), <http://www.thedailybeast.com/articles/2015/08/31/how-to-hold-bad-prosecutors-accountable-the-case-for-a-commission-on-prosecutorial-conduct.html>; Sophie, *Proposed Prosecutor Misconduct Commission Has Much to Offer*, OPEN FILE (May 15, 2014), <http://www.prosecutorialaccountability.com/proposed-prosecutor-conduct-commission-has-much-to-offer>.

153 Will Bredderman, *Supporters Rally for State Commission on Prosecutorial Conduct Bill*, OBSERVER (June 5, 2015), <http://observer.com/2015/06/supporters-rally-for-state-commission-on-prosecutorial-conduct-bill>.

154 Gershman, *supra* note 152. The bill did not become law in the 2016 legislative session. Joel Stashenko, *Measure Targeting Misconduct by DAs Fails for a Third Time*, N.Y. L.J. (June 22, 2016), <http://www.newyorklawjournal.com/id=1202760601883/Measure-Targeting-Misconduct-by-DAs-Fails-for-Third-Time>.

155 N.Y. Exec. Order No. 147 (July 8, 2015), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO147.pdf>; see Noah Remnick, *Cuomo to Appoint Special Prosecutor for Killings by Police*, N.Y. TIMES (July 7, 2015), http://www.nytimes.com/2015/07/08/nyregion/cuomo-to-appoint-special-prosecutor-for-killings-by-police.html?_r=0.

156 Ralph Blumenthal, *For Dallas, New Prosecutor Means an End to the Old Ways*, N.Y. TIMES (June 3, 2007), http://www.nytimes.com/2007/06/03/us/03dallas.html?_r=0.

157 Vivian Yee, *Thompson Defeats Hynes, Again, for Brooklyn District Attorney*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/nyregion/thompson-claims-victory-over-hynes-again-for-brooklyn-district-attorney.html> (“[Hynes was criticized for the] Police Department’s stop-and-frisk tactics, that affected young minorities. Mr. Hynes was also dogged by negative publicity surrounding his political ties to ultra-Orthodox Jewish leaders, and by possible wrongful murder convictions during his tenure.”).

cutors. The disciplinary regulatory shift has taken two forms—first, the expansion of jurisdiction over prosecutorial conduct through the adoption of new rules and the interpretations of existing rules, and second, the increase in disciplinary scrutiny of prosecutors' conduct.

When the ABA last undertook a comprehensive review of its *Model Rules of Professional Conduct*, its drafters proposed no changes to Rule 3.8, the rule on prosecutorial conduct, fearing opposition from prosecutors, and especially the Department of Justice.¹⁵⁸ But the ABA has grown less timid in recent years, beginning in 2009 when, in the wake of the burgeoning innocence movement, it added provisions (g) and (h) to address prosecutors' post-conviction responsibilities when they discover new exculpatory information. Rules 3.8(g) and (h) require prosecutors to investigate new exculpatory evidence that is material and credible and to attempt to seek a remedy when the new evidence convincingly establishes the defendant's innocence.¹⁵⁹ More than a dozen state courts have adopted versions of these provisions and others are considering whether to do so.¹⁶⁰

The various discussions surrounding the amendment of the Model Rule and its state adoptions illustrate another feature of Prosecutorial Accountability 2.0. Prosecutors' traditional reaction to proposed restrictions on their professional conduct has been to push back, and many have done so in response to the proposed post-conviction measures. But importantly, many prosecutors supported the basic concept as consistent with their duty to seek justice, took part in fashioning the ABA rule or a state counterpart, and ultimately supported its adoption. In the ABA, only the Department of Justice, not state prosecutors' offices, was essentially unresponsive.¹⁶¹ In Tennessee and Wisconsin, institutional representatives of state prosecutors affirmatively endorsed the courts' adoption of state versions of the new provisions.¹⁶² One can only speculate whether this reflects a revised prosecutorial view of the import of ethics rules, whether it reflects that some prosecutors regard it as politically expedient—in the current political atmosphere—to attempt to shape proposed reforms rather than oppose them outright, whether prosecu-

158 See generally Bruce A. Green, *Prosecution Ethics as Usual*, U. ILL. L. REV. 1573 (2003); Niki Kuckes, *The State of Rule 3.8: Prosecution Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009).

159 MODEL RULES OF PROF'L CONDUCT R. 3.8(g)–(h) (AM. BAR. ASS'N 2013) (“When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,” the prosecutor has an obligation to follow up to disclose the evidence and to investigate, and if the prosecutor knows by clear and convincing evidence that the defendant did not commit the offense, the prosecutor shall seek to remedy it.).

160 So far, at least fourteen states have adopted Rules 3.8(g) and (h) either verbatim or with modification. ABA CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE MODEL RULES OF PROF'L CONDUCT (Aug. 15, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.authcheckdam.pdf.

161 Green, *supra* note 4, at 889–93 (discussing history of provisions).

162 *Id.*

tors regard a more conciliatory image as useful in response to portrayals of prosecutorial overreaching, or whether the approach has other explanations.

At around the same time, bar association ethics committees began to focus renewed attention on how existing rules applied to prosecutors.¹⁶³ Following notable cases in which prosecutors suppressed exculpatory evidence, the ABA issued Formal Opinion 09-454, which reminded the profession that almost every state court had adopted a disciplinary rule, based on Model Rule 3.8(d), that, its plain language made clear, augmented prosecutors' constitutional disclosure obligations by requiring broader and earlier disclosure of information helpful to the defense.¹⁶⁴ The opinion has proven controversial, as some federal and state prosecutors have challenged the ABA's interpretation, sometimes successfully.¹⁶⁵

163 The ABA House of Delegates passed a series of resolutions to clarify disclosure obligations, *see* ABA, Resolution 102D Adopted by the House of Delegates (Feb. 8–9, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/102D.authcheckdam.pdf, to improve the discovery process by suggesting the use of checklists, *see* ABA, Resolution 104A Adopted by the House of Delegates (Feb. 14, 2011), http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/104a_2011_my.authcheckdam.pdf, and to clearly identify prosecutorial misconduct as distinct from prosecutorial error, *see* ABA, Resolution 100B Adopted by the House of Delegates (Aug. 9–10, 2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf>.

164 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009) [hereinafter Formal Op. 09-454], http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/aba_formal_opinion_09_454.authcheckdam.pdf. Model Rule 3.8(d) requires a prosecutor to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor” MODEL RULES OF PROF'L CONDUCT r. 3.8(d). In the opinion, the committee concluded that Rule 3.8(d) requires disclosure of favorable evidence and information without regard to its materiality, unlike the constitutional standard on appellate review. Formal Op. 09-454, *supra*, at 2. The committee also concluded that Rule 3.8(d) has no “de minimis” exception that would excuse disclosure of favorable evidence or information if a prosecutor believes the material would have only a minimal tendency to negate the defendant's guilt or that the information is unreliable. *Id.* at 5. Instead, prosecutors should “give the defense the opportunity to decide whether the evidence can be put to effective use.” *Id.* The opinion also addressed the timing of disclosure, stating that disclosure must be made early enough so that defense counsel may use the evidence and information effectively. *Id.* at 6.

165 *Compare* Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125 (Ohio 2010) (holding that materiality is required under disciplinary rule) *and* State *ex rel.* Okla. Bar Ass'n v. Ward, 353 P.3d 509 (Okla. 2015) (same), *with In re* Kline, 113 A.3d 202 (D.C. 2015) (adopting ABA interpretation), *In re* Disciplinary Action Against Feland, 820 N.W.2d 672 (N.D. 2012) (same), *and In re* Larsen, No. 20140535, 2016 WL 3369545 (Utah 2016) (same). Some former prosecutors and senior Department of Justice officials, including former Attorney General Michael B. Mukasey, have agreed that there is an ethical or professional obligation of disclosure that goes farther than the constitutional obligation. *See* Brief of Amici Curiae Former Federal Prosecutors & Former Senior Justice Department & Government Officials Michael B. Mukasey et al. in Support of Petitioner, United States v.

Five years later, the ABA's ethics committee issued another opinion on prosecutors, this time calling attention to the managerial and supervisory responsibility of prosecutors' offices to ensure that the lawyers and non-lawyers in their offices conform to the professional conduct rules.¹⁶⁶ The opinion discussed the responsibility of prosecutors with managerial authority to adopt reasonable policies and procedures to ensure that lawyers and non-lawyers in the office comply with the disciplinary rules. It specifically cited examples of prosecutorial misconduct in New Orleans and Oklahoma to justify examining the obligations of managerial and supervising prosecutors and then noted that:

[T]he frequency of prosecutorial misconduct nationwide documented by, *inter alia*, opinions in criminal cases and disciplinary proceedings reported in the last fifteen years, also underscores this need. These decisions reveal numerous violations of *Brady* in criminal cases . . . and show other examples of misconduct, e.g., prosecutors using false evidence or failing to correct false statements to the court; prosecutors engaging in other improper courtroom conduct; and prosecutors engaging in conduct that would violate [other rules].¹⁶⁷

State bar ethics committees have also targeted prosecutorial conduct. Most notably, a Kentucky bar committee joined various other ethics committees in concluding that it is ethically improper for prosecutors to make it a condition of a plea bargain that the defendant waive future ineffective assistance of counsel claims.¹⁶⁸ The committee's opinion reasoned that doing so is prejudicial to the administration of justice, because a defense lawyer cannot give disinterested advice to the defendant regarding whether to accept the plea offer.¹⁶⁹ The Department of Justice secured judicial review of the bar opinion, but when the Kentucky Supreme Court confirmed the opin-

Georgiou, 773 F.3d 125 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 401 (2015) (No. 14-1535); *see also* Brief of the ABA as Amicus Curiae in Support of Petitioner at 1, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145) (arguing that the Court should distinguish between prosecutor's *Brady* obligation and its broader pretrial ethical obligation).

166 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467, at 9–10 (2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_467.authcheckdam.pdf. The opinion suggested that when courts criticize the conduct of a lawyer or non-lawyer in the prosecution office, supervising prosecutors should conduct trainings to prevent recurrences.

167 *Id.* at 7 (footnotes omitted).

168 Ky. BAR ASS'N, Ethics Op. KBA E-435 (2012) [hereinafter Ethics Op. KBA E-435], [https://c.ymcdn.com/sites/www.kybar.org/resource/resmgr/Ethics_Opinions_\(Part_2\)/kba_e-435.pdf](https://c.ymcdn.com/sites/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)/kba_e-435.pdf) (citing opinions of various states and the NACDL). In 2014, the ABA adopted a resolution opposing the prosecutorial practice of requiring waivers of ineffective assistance of counsel as a condition of entering into a guilty plea agreement. ABA, Resolution 113E Adopted as Revised by the House of Delegates (2014), <http://www.americanbar.org/content/dam/aba/images/news/PDF/113E.pdf>.

169 Ethics Op. KBA E-435, *supra* note 168.

ion,¹⁷⁰ the Department decided to stop seeking ineffective assistance of counsel waivers.¹⁷¹

Just as significant, disciplinary enforcement has begun to expand in at least some jurisdictions in recent years.¹⁷² Highly publicized examples include Michael Nifong's disbarment in connection with the Duke Lacrosse case¹⁷³ and the disbarment and jailing of Judge Ken Anderson in the Michael Morton case.¹⁷⁴ Other notable examples similarly involved prosecutors' alleged suppression of evidence: disciplinary proceedings were instituted against federal prosecutors Andrew Kline in Washington, D.C.,¹⁷⁵ and Jeffrey Auerhahn in Boston,¹⁷⁶ both for alleged discovery violations. Former Texas prosecutor Charles Sebesta, Jr. was disbarred for suppressing exculpatory evidence and offering false testimony in a capital case of an innocent man, Charles Graves.¹⁷⁷ Other disciplinary cases against prosecutors have involved abuses of the criminal process, including those leading to the disbarment of the elected Maricopa County prosecutor and two of his deputies,¹⁷⁸ to the disbarment of the Kansas attorney general,¹⁷⁹ to the suspension of the Pennsylvania attorney general¹⁸⁰ and to the suspension of the Delaware deputy attorney general.¹⁸¹

170 United States *ex rel.* U.S. Attorneys for the E. & W. Dists. of Ky. v. Ky. Bar Ass'n, 439 S.W.3d 136, 157–58 (Ky. 2014).

171 Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, Department Policy on Waivers of Claims of Ineffective Assistance of Counsel (Oct. 14, 2014), http://pdfserver.aflaw.com/nlj/DOJ_Ineffective_Assistance_Counsel.pdf.

172 See generally Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. (forthcoming 2016).

173 See *supra* notes 138–40 and accompanying text.

174 Ken Anderson, a former prosecutor and sitting state judge in Texas, was jailed after a Court of Inquiry found that he engaged in serious acts of misconduct by intentionally withholding key evidence in prosecuting Michael Morton for the murder of his wife in their home. Morton was innocent but spent twenty-five years in prison. His case was highlighted on CBS's *60 Minutes*. *60 Minutes: Evidence of Innocence: The Case of Michael Morton*, CBS NEWS (June 23, 2015), <http://www.cbsnews.com/videos/evidence-of-innocence-the-case-of-michael-morton/>.

175 *In re Kline*, 113 A.3d 202 (D.C. 2015).

176 *In re Auerhahn*, 724 F.3d 103 (1st Cir. 2013).

177 See Martha Neil, *Ex-Prosecutor Is Disbarred for His Role in Capital Murder Conviction of Innocent Man*, A.B.A.J. (June 12, 2015), http://www.abajournal.com/news/article/ex_prosecutor_disbarred_for_his_role_in_capital_murder_conviction_of_innocent.

178 *In re* Members of the State Bar of Ariz. v. Thomas, No. PDJ-2011-9002 (Ariz. Apr. 10, 2012), <http://archive.azcentral.com/ic/news/0410Thomas-Aubuchon.pdf>.

179 *In re Kline*, 311 P.3d 321 (Kan. 2013).

180 See Office of Disciplinary Counsel v. Kane, No. C3-15-558, 2202 Disciplinary Docket No. 3 (Pa. Sept. 21, 2015) (per curiam), <http://www.pacourts.us/assets/opinions/Supreme/out/2202DD3%20-%201023669815398023.pdf?cb=1&cb=53210>; Petition for Emergency Temp. Suspension, Office of Disciplinary Counsel v. Kane, No. C3-15-558, 2202 Disciplinary Docket. No. 3, (Pa. Aug. 25, 2015), <http://www.pacourts.us/assets/files/setting-4359/file-4699.pdf?cb=5263db>.

181 *In re Favata*, 119 A.3d 1283 (Del. 2015) (per curiam).

Furthermore, the Indiana Supreme Court's reprimand of a prosecutor for "surrendering her prosecutorial discretion in plea negotiations entirely to the pecuniary demands of the victim"¹⁸² reflected a court's willingness to oversee an area, the exercise of plea bargaining discretion, which was traditionally off limits to judicial oversight.

In at least one state, some attention was given to reforming the disciplinary process to better address prosecutorial misconduct. A judicial commission in New York specifically acknowledged concerns about redressing prosecutorial abuse and reviewed proposals to encourage judicial reporting of prosecutorial misconduct, compile data about complaints against prosecutors, and better publicize decisions regarding prosecutorial conduct.¹⁸³

4. Prosecutorial Self-Regulation

In recent years, the U.S. Department of Justice has responded to regulatory reform efforts through the exercise of self-restraint in various areas. To blunt reform efforts following the Ted Stevens case, the Department revised internal policy on discovery and appointed an official responsible for training and self-regulation specifically with respect to this subject.¹⁸⁴ Additionally, when bar associations and allied organizations challenged federal prosecutors' practice of pressuring corporations to disclose attorney-client privileged information to obtain prosecutorial leniency in cases of corporate wrongdoing and legislators contemplated curtailing prosecutorial authority, the Department responded by revising its policy to restrict the practice.¹⁸⁵ Most recently, as noted, the Department responded to an adverse state court

182 *In re Flatt-Moore*, 959 N.E.2d 241, 242 (Ind. 2012) (per curiam).

183 The Commission was established in response to various perceived deficiencies in the state disciplinary process. See Debra Cassens Weiss, *Lawyer Ethics Violations in New York Are Punished Too Slowly and Inconsistently Handled, Study Finds*, A.B.A. J. (Apr. 17, 2014), http://www.abajournal.com/news/article/lawyer_ethics_violations_in_new_york_are_punished_too_slowly_and_inconsiste/.

184 In 2010, the Department issued the "Ogden Memorandum," providing guidance for prosecutors on criminal discovery. See Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Dep't Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), <http://www.justice.gov/dag/memorandum-department-prosecutors>. About the same time, Attorney General Holder appointed a National Criminal Discovery Coordinator to oversee training initiatives and resources relating to criminal discovery. See Press Release, U.S. Dep't of Justice, Andrew Goldsmith Appointed as National Coordinator of Criminal Discovery Initiatives (Jan. 15, 2010), <https://www.justice.gov/opa/pr/andrew-goldsmith-appointed-national-coordinator-criminal-discovery-initiatives>.

185 Compare Memorandum from Paul J. McNulty, Deputy U.S. Attorney, U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations 8–11 (Dec. 2006), http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf, with Memorandum from Mark Filip, Deputy U.S. Attorney, U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations 8–9 (Aug. 28, 2008), <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>. See generally Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying*

opinion by resolving not to seek ineffective assistance of counsel waivers anywhere in the country.¹⁸⁶

State and local prosecutors similarly have responded to regulatory pressures by adopting self-restraint,¹⁸⁷ or even by accepting or supporting external restraint.¹⁸⁸ Some state prosecutors' offices have adopted best practices manuals and enhanced discovery training.¹⁸⁹ It appears that some are acknowledging the need to strengthen internal discipline.¹⁹⁰

Perhaps the most significant internal prosecutorial reform at the state level, responding in part to the shifting attitudes toward prosecutorial accountability, is the advent of conviction integrity units (CIUs) and the direction of their efforts at preventing, not merely correcting, wrongful convictions.¹⁹¹ The first unit, established in Dallas, Texas, by District Attorney Craig Watkins, was a highly publicized success story.¹⁹² As of March 2015, eighteen jurisdictions had followed suit.¹⁹³ At least in Manhattan, the CIU is not limited to reviewing past convictions but also examines causes of, and

the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No", 45 AM. CRIM. L. REV. 1237 (2008).

186 See *supra* note 171 and accompanying text. Previously, in response to proposed disciplinary restrictions, the Department voluntarily restricted federal prosecutors' issuance of federal grand jury subpoenas to attorneys. See Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 361 (1996).

187 Some have adopted voluntary open-file discovery policies. See Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 45–51 (2009) (discussing voluntary open-file discovery).

188 Texas prosecutors did not vigorously oppose the Michael Morton Act. See *supra* note 147. And some prosecutors affirmatively supported the adoption of state disciplinary provisions based on Model Rules 3.8(g) and (h). See *supra* note 162 and accompanying text.

189 See, e.g., DIST. ATTORNEY'S ASS'N OF THE STATE OF N.Y., "THE RIGHT THING": ETHICAL GUIDELINES FOR PROSECUTORS (2016), <http://www.daasny.com/wp-content/uploads/2016/02/2016-Ethics-Handbook.pdf>.

190 *Id.* at 6–7 (outlining possible consequences of misconduct, which include censure, being fired, being formally reprimanded, demoted, criminally prosecuted, or civilly sued for damages); see *supra* note 78.

191 See JOHN HOLLWAY, QUATTRONE CTR. FOR FAIR ADMIN. OF JUSTICE, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (2016), <https://www.law.upenn.edu/live/files/5522-cru-final>; Denis Hamill, *Brooklyn Reviews Possible Wrong Convictions*, N.Y. DAILY NEWS (Mar. 25, 2013), <http://www.nydailynews.com/new-york/hamill-b-klyn-reviews-wrong-convictions-article-1.1298934>.

192 See generally Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y. L. SCH. L. REV. 1033 (2011); Molly Hennessy-Fiske, *Dallas County District Attorney a Hero to the Wrongfully Convicted*, L.A. TIMES (May 8, 2012), <http://articles.latimes.com/2012/may/08/nation/la-na-dallas-district-attorney-20120509>; *Conviction Integrity Unit Reviews Possible Wrongful Convictions*, INNOCENCE PROJECT (Mar. 26, 2013), <http://www.innocenceproject.org/news-events-exonerations/conviction-integrity-unit-reviews-possible-wrongful-convictions>.

193 CTR. FOR PROSECUTOR INTEGRITY, CONVICTION INTEGRITY UNITS: VANGUARD OF CRIMINAL JUSTICE REFORM 2 (2014), <http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Conviction-Integrity-Units.pdf> (finding sixteen as of 2014); HOLLWAY, *supra* note 191; Phil Locke, *Conviction Integrity Units—A Skeptic's Perspective*, WRONGFUL CONVICTIONS

remedies for, wrongful convictions.¹⁹⁴ Others have the similar potential to develop robust practices and procedures to prevent wrongful convictions.¹⁹⁵ The effectiveness of CIUs is still an open question, but in establishing them, and particularly in assigning them to develop internal procedures to make prosecutions more reliable, prosecutors implicitly acknowledge the need to address aspects of prosecutorial conduct systemically.

III. FIVE SOCIAL CONDITIONS, AND ONE CATALYTIC MEDIUM, FOR THE NEW PROSECUTORIAL ACCOUNTABILITY

There is probably no single reason why public and judicial attitudes toward prosecutors' conduct are evolving. But we suggest that five interrelated social conditions help account for the changes, sparked by a catalyst: information technology. The first Section in this Part discusses the relevant social conditions and their relative importance, while the following Section describes the significance of information technology as the medium that broadened public understanding and facilitated a reform movement directed at prosecutorial accountability.

A. *Five Conditions for the Evolution of Prosecutorial Accountability*

The persistence of prosecutorial misconduct is a *sine qua non* for the new prosecutorial accountability, but we do not agree with those who posit that there is greater public and judicial concern because there is more prosecutorial wrongdoing. We identify four additional sets of conditions that help explain the rhetorical and regulatory shifts: the broader public awakening to injustices in the criminal justice system; understandings, in particular, regarding wrongful convictions, including the responsibility of prosecutors' conduct; expanded academic attention to prosecutors' conduct, drawing particularly on social science insights into systemic deficiencies; and, most importantly, a burgeoning criminal justice reform movement that has included prosecutorial misconduct on its agenda.

1. Prosecutorial Misconduct and Its Perceived Increase

The most fundamental condition for the evolution of prosecutorial accountability is the persistence of prosecutorial misconduct—actual and perceived. Without misconduct, there would be no need for prosecutorial accountability. And at least occasional misconduct is inevitable, no matter

BLOG (Mar. 4, 2015, 11:25 AM), <http://wrongfulconvictionsblog.org/2015/03/04/a-skeptics-perspective-on-conviction-integrity-units/> (noting units across the country).

194 See *Manhattan District Attorney Hails Conviction Integrity Unit*, INNOCENCE PROJECT (June 22, 2012), <http://www.innocenceproject.org/news-events-exonerations/manhattan-district-attorney-hails-conviction-integrity-unit>.

195 See generally HOLLWAY, *supra* note 191 (identifying essential characteristics of effective conviction integrity units); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010).

how narrowly the concept is defined, because prosecutors are human and imperfect. While one might wish that all prosecutors had impeccable character, the selection process is imperfect and character is variable. Plus, if one defines misconduct broadly, it will occur even among those prosecutors with renowned integrity.

Some scholars and commentators might speculate that there is now more discussion of prosecutorial misconduct simply because there is more misconduct. Bennett Gershman, for one, attributed “[t]he increasing incidence of misconduct by prosecutors . . . to the post-9/11 legal and political culture of fear, secrecy and repression in which the power of law enforcement, especially of prosecutors, has become much more dominant and aggressive.”¹⁹⁶

For several reasons, we join those who doubt that prosecutorial misconduct is on the rise.¹⁹⁷ First, even before 2001, some argued that prosecutorial misconduct was pervasive and that misconduct that came to light was the tip of the iceberg.¹⁹⁸ We see no evidence that misconduct was less frequent then. Second, the cultures of individual prosecutors’ offices, of which there are many, are slow and difficult to change and so it seems unlikely that there was a sea change in prosecutorial cultures on the local, state, and federal levels following the terrorist attacks on September 11, 2001. Third, it appears that, insofar as some prosecutors have made conscious efforts to change office cultures, the contemporary movement has been toward promoting greater compliance with professional and legal standards.¹⁹⁹

It may be true that prosecutors’ aggressive conduct or perceived aggressiveness has increased since the early 1990s as a consequence of changes in criminal law, procedure, policy, and practice, such as the targeting of drug crimes and terrorism, the Federal Sentencing Guidelines, pretrial asset forfeitures, grand jury subpoenas to attorneys, or the Anti-Terrorism Effective Death Penalty Act (AEDPA).²⁰⁰ Nevertheless, there is little data to suggest that there has been increasing prosecutorial misconduct because of these or

196 Bennett L. Gershman, *New Commission to Regulate Prosecutorial Misconduct*, HUFFINGTON POST: THE BLOG (May 20, 2014, 12:09 PM), http://www.huffingtonpost.com/bennett-l-gershman/new-commission-to-prosecutorial-misconduct_b_5353570.html.

197 See, e.g., Michael Volkov, *Is Prosecutorial Misconduct on the Rise?*, CORP. COMPLIANCE INSIGHTS (Aug. 17, 2012), <http://corporatecomplianceinsights.com/is-prosecutorial-misconduct-on-the-rise>.

198 See *supra* notes 32–35 and accompanying text (discussing the likely extent of prosecutorial misconduct, before 2001 and beyond).

199 See generally Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor’s Office*, 84 WASH. L. REV. 11 (2009) (discussing various internal methods, such as careful hiring and proper supervision, to ensure ethical compliance within a prosecutor’s office). Whether such compliance programs are effective depends on a range of factors including leadership and office culture. Ellen Yaroshefsky & Bruce A. Green, *Prosecutors’ Ethics in Context: Influences on Prosecutorial Disclosure*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN PRACTICE* 269 (Leslie C. Levin & Lynn Mather eds., 2012).

200 See, e.g., Editorial, *supra* note 100.

other laws and practices.²⁰¹ More likely, as others have noted with regard to police shootings,²⁰² it is not that there are more instances of prosecutorial misconduct; it is that there is more media coverage of it.

Finally, even if prosecutorial misconduct were on the rise, this alone would not account for the increasing public and judicial concern. Although some of the concern is directed at the prevalence of misconduct—as in the depiction of an “epidemic” of discovery violations—much is directed more broadly at the exercise of discretion in prosecution. In the grand jury investigations of police killings in Ferguson and Staten Island, the prosecution was criticized because prosecutors treated law enforcement suspects differently than other citizens.²⁰³ These cases were not troubling because they were representative of how prosecutors behave, but just the opposite: they were portrayed as departures from how prosecutors ordinarily decide whether to initiate charges.²⁰⁴ Thus, public scrutiny reflects a broader conception of prosecutorial misconduct.

2. The Great Criminal Justice Awakening

The shifting public and judicial perceptions of prosecutors’ conduct and the changes in prosecutorial regulation are taking place against the background of, and as part of, a broader public disenchantment with the criminal process. The public awakening crosses the political spectrum.²⁰⁵

Perhaps in part because of decreasing crime rates, there is less preoccupation with fighting wars on crime and greater interest in how crime is

201 Data about misconduct is notoriously difficult to obtain because most prosecutorial action is hidden from public view. *See id.* (“*Brady* violations are, by their nature, hard to detect” (emphasis added)).

202 *See* Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), <http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/> (discussing thousands killed by police since 2005); Elliott C. McLaughlin, *There Aren’t More Police Shootings, Just More Coverage*, CNN (Apr. 21, 2015), <http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/>.

203 *See supra* note 117 and accompanying text.

204 In the Aaron Swartz case, in contrast, the prosecution was publicly criticized for its harsh charging and plea bargaining decisions. *See supra* notes 111–15 and accompanying text. More broadly, the perceived disparity between how prosecutors charge white-collar defendants as compared with those accused of street crimes has drawn criticism, most notably from Judge Emmet Sullivan. *See supra* note 133 (citing opinion critical of prosecution).

205 In the past five years, there has been a dramatic and bipartisan explosion of concern about deeper and fundamental problems in the criminal justice system. The Heritage Foundation, Charles Koch, and other political conservatives have joined forces with liberal organizations like the NACDL to pressure Congress to reduce over-criminalization as a result of prosecutorial overcharging. *See, e.g.*, BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW*, at vi–vii (2010); Charles G. Koch & Mark V. Holden, Opinion, *The Overcriminalization of America*, POLITICO (Jan. 7, 2015), <http://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991>.

fought.²⁰⁶ Particularly in the last five years, public opinion has changed dramatically as a result of an understanding of fault lines in the criminal justice system, including racial disparities in policing,²⁰⁷ police violence,²⁰⁸ over-criminalization,²⁰⁹ the reduction of judicial sentencing discretion,²¹⁰ collat-

206 In 2015, there was pushback from those who blamed a slight increase in homicides and other violent crimes on police reluctance to use force even where legally justified. *See, e.g.*, Editorial, *Political Lies About Police Brutality*, N.Y. TIMES (Oct. 27, 2015), <http://www.nytimes.com/2015/10/27/opinion/political-lies-about-police-brutality.html>; Michael S. Schmidt & Matt Apuzzo, *F.B.I. Chief Links Scrutiny of Police with Rise in Violent Crime*, N.Y. TIMES (Oct. 23, 2015), <http://www.nytimes.com/2015/10/24/us/politics/fbi-chief-links-scrutiny-of-police-with-rise-in-violent-crime.html>. There has been increased pushback in 2016 as a result of data demonstrating a rise in homicide rates in numerous cities in the United States, *see* Eric Lichtbau & Monica Davey, *Homicide Rates Jump in Many U.S. Cities, Data Shows*, N.Y. TIMES (May 13, 2016), http://www.nytimes.com/2016/05/14/us/murder-rates-cities-fbi.html?_r=0, and in response to Donald Trump's presidential campaign emphasizing "law-and-order," David Dagin et al., *Donald Trump's Law-and-Order Approach Won't Make Us Safer*, WASH. POST (Sept. 19, 2016), https://www.washingtonpost.com/post/everything/wp/2016/09/19/donald-trumps-law-and-order-approach-wont-make-us-safer/?utm_term=.

207 *E.g.*, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (illustrating that in New York, stop-and-frisk police practices, often in the headlines, resulted in litigation); *see also* Daniels v. City of New York, No. 03 Civ. 0809, 2003 WL 22510379 (S.D.N.Y. Nov. 5, 2003) (predecessor case to *Floyd*); Melissa Healy, *Blacks Are More Likely to Be Killed by Police, but That's Because They Are More Likely to Be Stopped, Study Says*, L.A. TIMES (July 25, 2016), <http://www.latimes.com/science/sciencenow/la-sci-sn-cops-race-injury-20160725-snap-story.html>.

208 Rodney King's beating by Los Angeles police was the precursor to the era of cell phones capturing police action. *See, e.g.*, Cydney Adams, *March 3, 1991: Rodney King Beating Caught on Video*, CBS NEWS (Mar. 3, 2016), <http://www.cbsnews.com/news/march-3rd-1991-rodney-king-lapd-beating-caught-on-video/>. Today, cell phones and the increased availability of surveillance in multiple locations have been instrumental in capturing police violence, notably against black men. *See* Kimberly Kindy et al., *Fatal Shootings by Police Are Up in the First Six Months of 2016*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/national/fatal-shootings-by-police-surpass-2015s-rate/2016/07/07/81b708f2-3d42-11e6-84e8-1580c7db5275_story.html; Azi Paybarah, *At Sharpton's Rally, Talk of Garner, Gurely and "Fergusonism"*, POLITICO (Nov. 29, 2014), <http://www.politico.com/states/new-york/city-hall/story/2014/11/at-sharptons-rally-talk-of-garner-gurley-and-fergusonism-017775>; Matt Taibbi, *Are Cell Phones Changing the Narrative on Police Shootings?*, ROLLING STONE (Apr. 9, 2015), <http://www.rollingstone.com/politics/news/are-cell-phones-changing-the-narrative-on-police-shootings-20150409>; *US Police Shootings: How Many Die Each Year?*, BBC NEWS (July 18, 2016), <http://www.bbc.com/news/magazine-36826297>; *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> (last visited Oct. 19, 2016) (tallying police shootings over two-year period).

209 *See, e.g.*, Koch & Holden, *supra* note 205; John G. Malcolm & Norman L. Reimer, Opinion, *Over-Criminalization Undermines Respect for Legal System*, WASH. TIMES (Dec. 11, 2013), <http://www.washingtontimes.com/news/2013/dec/11/malcolmreimer-over-criminalization-undermines-resp>; Ellen Podgor, Opinion, *Laws Have Overcriminalized Business Behavior*, N.Y. TIMES (Nov. 10, 2013), <http://www.nytimes.com/roomfordebate/2013/11/10/prosecuting-executives-not-companies-for-wall-street-crime/laws-have-overcriminalized-business-behavior>; Carrie Severino, *A Rare Bipartisan Consensus in Favor of Overcriminal-*

eral consequences of criminal convictions,²¹¹ and mass incarceration.²¹² Remarkably, in his second term, President Obama and the Justice Department took up the charge of criminal justice reform.²¹³

Also noteworthy is the public demand for prosecutorial accountability in cases of police shootings. The killings of Michael Brown in Ferguson, Eric Garner in Staten Island, Freddie Gray in Baltimore, Walter Scott in South Carolina, Philando Castile in Minneapolis, and Alton Sterling in Baton Rouge challenge not only racially discriminatory policing, but also perceived unfair and unequal treatment by prosecutors in investigating police vio-

ization Reform, NAT'L REV. (Jan. 4, 2015), <http://www.nationalreview.com/bench-memos/395660/rare-bipartisan-consensus-favor-overcriminalization-reform-carrie-severino>.

210 Sentencing Guidelines have effectively shifted sentencing discretion from judges to prosecutors. *See, e.g.*, Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1475 (1993) (explaining how the combination of plea bargaining and the Sentencing Guidelines has “eliminated the discretion of federal judges,” but afforded prosecutors unduly broad and unchecked discretion to determine outcomes prior to the outset of litigation); John Nichols, *Judge Resigns over Congressional Meddling*, NATION (June 25, 2003), <https://www.thenation.com/article/judge-resigns-over-congressional-meddling/> (describing how Federal District Judge John Martin left the bench in 2003, attributing his decision to the constraints on sentencing discretion imposed by the Sentencing Guidelines).

211 *See, e.g.*, United States v. Nesbeth, No. 15-CR-18, 2016 WL 3022073, at *1 (E.D.N.Y. May 24, 2016) (rendering a non-incarceratory sentence because of collateral consequences); *see also* Padilla v. Kentucky, 559 U.S. 356, 366–67 (2010) (requiring non-citizen client to be informed of immigration consequences before entering a guilty plea); MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY & PRACTICE, Westlaw (database updated Feb. 2016); RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, RELIEF IN SIGHT? STATES RETHINK THE CONSEQUENCES OF COLLATERAL CONVICTION, 2009–2014 (2014), <http://www.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v3.pdf>; Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006).

212 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (New Press rev. ed. 2013) (popularized the term “mass incarceration”); Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063 (2016); Erik Eckholm, *How to Cut the Prison Population (See for Yourself)*, N.Y. TIMES (Aug. 11, 2015), <http://www.nytimes.com/2015/08/12/upshot/how-to-cut-the-prison-population-see-for-yourself.html>; Editorial, *End Mass Incarceration Now*, N.Y. TIMES (May 24, 2014), <http://www.nytimes.com/2014/05/25/opinion/sunday/end-mass-incarceration-now.html>.

213 *See, e.g.*, Editorial, *President Obama Takes on the Prison Crisis*, N.Y. TIMES (July 16, 2015), <http://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html>; *see also* Gardiner Harris, *Obama Pushing Criminal Justice Reform Defends “Black Lives Matter”*, N.Y. TIMES (Oct. 22, 2015), <http://www.nytimes.com/2015/10/23/us/politics/obama-in-call-for-reform-defends-the-black-lives-matter-movement.html>; Eric Holder, U.S. Attorney Gen., Remarks at the ABA Annual Meeting (Aug. 12, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> (Attorney General Holder focused particularly on the disproportionate arrest, conviction, and jail and prison terms of young men of color).

lence.²¹⁴ As noted, a popular sentiment has been that prosecutors in the Brown and Garner cases improperly exercised charging discretion by treating the police officers more leniently than similarly situated low-income and minority individuals, presumably because of bias.²¹⁵ By contrast, the indictment of police officers in Baltimore has been characterized as a bold step forward.²¹⁶ Growing public indignation led to the “Black Lives Matter” movement in 2014.²¹⁷ That movement not only focuses upon police shootings of unarmed black men, but also encompasses all of the ways in which the criminal justice system fails and disproportionately punishes communities of color.²¹⁸

Although prosecutors are not directly responsible for all the perceived problems of the criminal justice system, their conduct is implicated in most.²¹⁹ For example, over-incarceration is largely attributable to prosecu-

214 See, e.g., Bill Chappell, *St. Louis Grand Jury Heard Witnesses Who Lied, Prosecutor Says*, NPR: THE TWO-WAY (Dec. 19, 2014, 3:53 PM), <http://www.npr.org/sections/the-two-way/2014/12/19/371940004/st-louis-grand-jury-heard-witnesses-who-lied-prosecutor-says>; Andrew Siff et al., *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec. 3, 2014), <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Staten-Island-Chokehold-Death-NYPD-284595921.html>; see also Richard Fausset et al., *Alton Sterling Shooting in Baton Rouge Prompts Justice Department Investigation*, N.Y. TIMES (July 6, 2016), http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html?_r=0; Matt Furber & Richard Pérez-Peña, *After Philando Castile’s Killing, Obama Calls Police Shooting ‘an American Issue’*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html>; Levs, *supra* note 119.

215 See *supra* notes 117–19 and accompanying text.

216 See, e.g., *A Step Toward Justice for Freddie Gray*, BALT. SUN (May 1, 2015), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-freddie-gray-indictments-20150501-story.html>; Ronald S. Sullivan, *Harvard Law Professor: Criticism of Mosby over Gray Trials Is ‘Wholly Unfounded’*, BALT. SUN (July 25, 2016), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-mosby-defense-20160725-story.html>. But see Kevin Rector, *Activist Law Professor Calls for Mosby Disbarment Over Prosecution in Freddie Gray Case*, BALT. SUN (June 26, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-mosby-attorney-grievance-20160629-story.html> (Professor John Banzhaf charges Baltimore prosecutor with overcharging and unethical practices in the prosecutions of six police officers); see also Tom Jackman, *Baltimore Prosecutor Now Must Weigh Giving Up on Freddie Gray Case*, WASH. POST (June 23, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/06/23/baltimore-prosecutors-now-must-weigh-giving-up-on-freddie-gray-case/> (first two officers were acquitted in judge trials).

217 See NAZGOL GHANDNOOSH, SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 3 (2015), <http://sentencingproject.org/doc/publications/11/Black-Lives-Matter.pdf>.

218 See *id.*; see also Michael Barbaro & Yamiche Alcindor, *Black Lives Matter Was Gaining Ground. Then a Sniper Opened Fire*, N.Y. TIMES (July 9, 2016), <http://www.nytimes.com/2016/07/10/us/black-lives-matter-reaction.html>; *Black Lives Matter Protests Worldwide*, N.Y. TIMES (July 10, 2016), <http://www.nytimes.com/video/us/100000004522034/black-lives-matter-protests-worldwide.html>.

219 Prosecutors’ conduct matters to some issues less than others. For example, prosecutors are not directly to blame for brutal prison conditions, such as the use of solitary confinement and the inadequacy of medical and mental health care. On the other hand,

tors' advocacy for harsher sentencing legislation, to their charging and plea bargaining policies, and to their individual charging and plea bargaining decisions.²²⁰ Particularly in the federal system, prosecutors' charging decisions significantly narrow judges' sentencing discretion. In 1997, the Department of Justice implemented a policy requiring federal prosecutors to charge the "most serious, readily provable offense or offenses consistent with the defendant's conduct."²²¹ The resulting harsh sentences, especially for drug offenses, elicited judicial and public criticism.²²²

Prosecutors' discretionary decisions also contribute to racial disparities in criminal prosecutions. Recent studies, in which progressive prosecutors' offices voluntarily participated, demonstrated the impact of implicit racial bias in charging and other prosecutorial action.²²³ Insofar as prosecutors exploit evidence achieved through the implementation of discriminatory investigative practices, such as racially biased stops and frisks, they encourage the perpetuation of these practices. In the rare instances in which prosecutors have stopped bringing charges arising out of racially discriminatory police practices, they have reduced police incentives to engage in such practices.²²⁴

prosecutors' collective charging decisions and sentencing recommendations might in part be blamed for long prison sentences and prison overcrowding, which exacerbate bad conditions.

220 See John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go from Here*, 26 FED. SENT'G REP. 265 (2014). State and federal prosecutors' associations have long advocated for tougher sentencing laws, including mandatory minimum sentences. The National Association of Assistant United States Attorneys opposes federal reform legislation that would reduce some federal sentences. See NAT'L ASS'N OF ASSISTANT U.S. ATTORNEYS, *THE DANGEROUS MYTHS OF DRUG SENTENCING "REFORM"* (2015), <https://www.naaua.org/2013/images/docs/Dangerous-Myths-of-Drug-Sentencing-Reform.pdf>.

221 U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.300 (1997), <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.300>.

222 See, e.g., Ian Urbina, *New York's Federal Judges Protest Sentencing Procedures*, N.Y. TIMES (Dec. 8, 2003), <http://www.nytimes.com/2003/12/08/nyregion/08JUDG.html?pagewanted=all>.

223 See VERA INST. OF JUSTICE, *A PROSECUTOR'S GUIDE FOR ADVANCING RACIAL EQUITY* (2014), https://cdpsdocs.state.co.us/ccjj/Resources/Ref/prosecutors-advancing-racial-equity_Nov2014.pdf; Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER, May 11, 2015.

224 See, e.g., Joseph Goldstein, *Loitering Rules in Projects Are Too Vague, Judge Says*, N.Y. TIMES (Oct. 4, 2012), <http://www.nytimes.com/2012/10/05/nyregion/federal-judge-says-obscure-loitering-rules-are-unconstitutional.html> (discussing how in Bronx County, New York, for example, two months before a district judge held New York City police stop-and-frisk practices unconstitutional, the elected district attorney announced that his office would limit the circumstances in which it would prosecute cases arising out of stops for trespassing at housing projects); see also Kristine Hamann & Rebecca Brown, *Best Practices for Prosecutors: A Nationwide Movement*, 31 CRIM. JUST. 27, 27 (2016) (noting that the prosecutor's role "has changed. . . beyond . . . [exclusive focus] on the investigation and prosecution of crimes. . . [and] broadened to include proactive, innovative solutions to challenges facing the criminal justice system" and suggesting best practices).

The exercise of prosecutorial discretion is now seen to significantly affect individuals and communities. Prosecutorial charging and plea bargaining decisions, even in misdemeanor cases, have potential implications for immigration, housing, and employment.²²⁵ There is a call for fundamental changes to the prosecutor's processing of misdemeanors, which according to an analysis of eleven states, comprised approximately seventy-nine percent of all those states' criminal cases.²²⁶ Critiques abound of the "plea mill" and prosecutorial bail recommendations that often determine whether a person pleads guilty, even when he or she is not culpable, to avoid lengthy time in jail awaiting trial.²²⁷ Forfeiture of assets, penalties, and fines often result in serious negative consequences for those involved with the criminal justice system.²²⁸ Increasingly, prosecutors are urged to ameliorate these harsh consequences by referring individuals to diversion programs in lieu of filing criminal charges,²²⁹ considering immigration and other consequences in

225 See generally *United States v. Nesbeth*, No. 15-CR-18, 2016 WL 3022073 (E.D.N.Y. May 24, 2016); LOVE ET AL., *supra* note 211; Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, 272 NAT'L INST. JUST. J. 24 (2013), <https://www.ncjrs.gov/pdffiles1/nij/241924.pdf>.

226 See, e.g., Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 281 ("A 2008 analysis of eleven state courts revealed that misdemeanors comprised 79% of the total caseload in those courts." (citing ROBERT C. LAFONTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010))); see also ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 30–38 (2009), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808>; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015); Jenny M. Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013); Steve Zeidman, *Whither the Criminal Court: Confronting Stops-and-Frisks*, 76 ALB. L. REV. 1187, 1201 n.92 (2012) ("In 2011, there were 338,314 total arrests throughout New York City, 249,211 of which were for misdemeanor offenses." (citing N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS: 2002–2011 (2012), <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkCity.pdf>)).

227 See, e.g., John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88 (1977); William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), <http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html?pagewanted=all>.

228 See generally Bridget McCormack, *Economic Incarceration*, 25 WINDSOR Y.B. ACCESS TO JUST. 223 (2007); Radley Balko, Opinion, *New Frontiers in Asset Forfeiture*, WASH. POST (June 8, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/06/08/new-frontiers-in-asset-forfeiture/>; Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>; Carl Takei, *Courts Should Stop Jailing People for Being Poor*, ACLU: SPEAK FREELY (July 3, 2012, 3:00 PM), <https://www.aclu.org/blog/courts-should-stop-jailing-people-being-poor>.

229 See, e.g., CTR. FOR HEALTH AND JUSTICE AT TASC, NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES (2013), http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE,

charging decisions, minimizing bail and other pretrial restrictions, and recommending more lenient sentences.²³⁰ Some prosecutors work with policy organizations to understand the extent to which race affects prosecutorial discretion in practice²³¹ and have explored “community prosecut[ing]”—that is, working with community leaders to “solve problems, improve public safety and enhance the quality of life of community members”—as an adjunct to the traditional approach.²³² Scholars have envisioned an even broader prosecutorial role to include a responsibility to address systemic problems such as excessive sentences and mass incarceration.²³³

This is not to say that contemporary concerns about criminal justice fully explain the changes in how prosecutors are regarded and regulated. After all, in earlier periods, such as leading up to the Warren Court reforms, when police practices were far more brutal and discriminatory and criminal procedures were less protective of the accused,²³⁴ similar arguments could have been made about the centrality of prosecutors’ discretionary decisions, and yet prosecutors were not a focal point of public and judicial criticism. But the general public awakening to the problems of the criminal justice system, if not a complete explanation, is a significant factor contributing to the skeptical shift in public and judicial attitudes toward prosecutors and their work.

3. Understandings Regarding Wrongful Convictions

When it comes to prosecutors’ accountability, the most significant deficiency in the criminal justice system to which the public has awakened is the problem of wrongful convictions—that is, convictions of innocent individu-

AUDIT OF THE DEPARTMENT’S USE OF PRETRIAL DIVERSION AND DIVERSION-BASED COURT PROGRAMS AS ALTERNATIVES TO INCARCERATION (2016), <https://oig.justice.gov/reports/2016/a1619.pdf>; see generally *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (acknowledging our criminal justice system is a plea-bargaining system); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998) (noting that underlying many of these new approaches to criminal justice policy is a recognition that state and federal criminal justice systems do not operate on the traditional adversary model).

230 See, e.g., *Decision Points: Pursuing Innovation in Prosecution*, ASS’N OF PROSECUTING ATTORNEYS, <http://www.apainc.org/decision-points-pursuing-innovation-in-prosecution> (last visited Oct. 19, 2016); *Ending the American Money Bail System*, EQUAL JUSTICE UNDER LAW, <http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/> (last visited Oct. 19, 2016) (documenting litigation challenging bail conditions).

231 BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN (2014), <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf>.

232 NAT’L DIST. ATTORNEYS ASS’N, *National Center for Community Prosecution*, http://www.ndaa.org/nccp_home.html (last visited July 26, 2016).

233 See, e.g., R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 *LOY. U. CHI. L.J.* 981 (2014); Davis, *supra* note 212; Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors?*, 3 *TEX. A&M L. REV.* 515 (2016).

234 See generally, A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 *MICH. L. REV.* 249 (1968).

als.²³⁵ The public awareness of this problem has been integral in shifting perceptions of prosecutorial conduct. Widespread public and professional recognition of the reality of wrongful convictions, including in death-penalty cases, began with the cases in which DNA evidence was used to exonerate convicted defendants.²³⁶ Even for those who previously accepted the reality of wrongful convictions as an abstract proposition, the cases inspired empathy and indignation by putting human faces and stories to the problem.

The innocence cases, spearheaded by lawyers associated with the Innocence Project²³⁷ and others, have demonstrated that prosecutorial misconduct matters. Prosecutors in criminal litigation frequently assert that discovery violations and other misconduct were harmless. The impression given is that misconduct usually does not affect verdicts, and even when it does, a finding of prejudicial misconduct does not mean that the unfairly convicted defendant was innocent and undeserving of punishment. Innocence cases challenge this premise by showing that the criminal justice system is fallible, notwithstanding constitutional safeguards.

In particular, the innocence cases have shown that wrongful convictions are not random and unavoidable but, in many cases, the product of systemic unfairness. As the number of exonerations mounted, Innocence Project lawyers, followed by scholars, inquired into the root causes of wrongful convictions and how to avert them. The studies showed that wrongful convictions were often built on erroneous eyewitness identifications, false confessions, unreliable forensic evidence, and other procedural irregularities. Further, studies showed that the risk of employing unreliable evidence of this nature

235 See Richard A. Leo, *What Innocence Means Today and Why It Matters* (Univ. of S.F. Law Research Paper No. 2016-08, 2015), <http://dx.doi.org/10.2139/ssrn.2682824>; Barry C. Scheck, The David H. Bodiker Lecture on Criminal Justice 2014: Conviction Integrity Revisited: Developing Best Practices, Learning From Error, and Recognizing Ethical and Constitutional Obligations to Correct Wrongful Convictions (Oct. 24, 2014), <http://moritzlaw.osu.edu/briefing-room/multimedia/2014-bodiker-lecture-featuring-barry-scheck/>.

236 See *McKithen v. Brown*, 481 F.3d 89 (2d Cir. 2007). As Judge Calabresi noted, there was a time when no less a jurist than Learned Hand dismissed the risk of wrongful convictions as unrealistic, but “the advance of forensic DNA technology” has proven “the reality of wrongful convictions.” *Id.* at 92. “Judge Learned Hand observed that ‘[o]ur procedure has been always haunted by the ghost of the innocent man convicted,’ but posited, optimistically, that ‘[i]t is an unreal dream.’” *Id.* at 91–92 (alteration in original) (quoting *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923)).

237 By 2000, there were ten innocence organizations or programs, primarily in law school clinics, that met to hold the first Innocence Network Conference. See *About the Innocence Network*, INNOCENCE NETWORK, <http://innocencenetwork.org/about> (last visited Oct. 19, 2016); see also INNOCENCE PROJECT, <http://www.innocenceproject.org/> (last visited Oct. 19, 2016) (the Innocence Project has handled or assisted in the exoneration of more than 340 people); NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Oct. 19, 2016) (overall in the United States approximately 350 people have been exonerated by DNA out of more than 1300 exonerations since 1989).

could be reduced, including through careful prosecutorial conduct.²³⁸ Additionally, the innocence cases have shown that police and prosecutorial misconduct can result in convicting the innocent. Approximately forty-five percent of the initially documented wrongful convictions have been attributed to government misconduct.²³⁹

Insights from wrongful conviction cases deserve significant credit for broadening the concept of prosecutorial misconduct to address prosecutors' gatekeeping function. Prior to DNA exonerations, the public—and many lawyers and judges—could not imagine that systems of eyewitness identifications could be so wrong, that innocent people are pressured to falsely confess to crimes, or that forensic sciences were unreliable. The revelation of these evidentiary deficiencies leads to the question of prosecutors' responsibilities. One's instinct is that even if no specific law or rule requires prosecutors to avoid exploiting unreliable testimony and evidence, prosecutors deserve public and professional opprobrium, if not legal sanction, when they fail to take reasonable precautions against wrongful convictions.²⁴⁰ Indeed, when the ABA responded to the innocence cases by amending Rule 3.8 to address prosecutors' post-conviction obligations, it also expanded its general description of prosecutors' responsibilities as "minister[s] of justice" to include an obligation to take "special precautions . . . to prevent and to rectify the conviction of innocent persons."²⁴¹

238 See, e.g., BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); DANIEL S. MEDWED, *PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT* (2012); BARRY SCHECK ET AL., *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2003); Cardozo Symposium, *supra* note 73; Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001) (discussing prosecutors' obligations in light of the fact of wrongful convictions); Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001); Rudin, *supra* note 55 (describing cases of wrongful conviction). Prosecutors were loath to believe that people falsely confess. See Mark Hansen, *Untrue Confessions*, A.B.A. J., July 1999, at 51, 52 (quoting Joshua Marquis, District Attorney for Clatsop County, Oregon.); cf. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J. CRIM. L. & CRIMINOLOGY 429, 444–66 (1998) (documenting sixty cases of false confessions).

239 See GARRETT, *supra* note 238; SCHECK ET AL., *supra* note 238, at 318 (citing government misconduct as a contributing factor in approximately forty-five percent of cases); see also *Government Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/government-misconduct/> (last visited Oct. 19, 2016) (noting that suppression of exculpatory evidence has been the most common government misconduct in DNA exoneration cases).

240 See generally Zacharias & Green, *supra* note 110 (analyzing the use of the attorney competence rule as a tool for disciplining prosecutors, and ultimately recommending alternative regulatory processes).

241 MODEL RULES OF PROF'L CONDUCT r. 3.8, cmt. 1 (AM. BAR. ASS'N 2013).

4. Expanded Academic Attention to Systemic Causes and Cures

Recent years have seen expanded academic interest in prosecutorial conduct. At one time, criminal procedure scholarship focused almost entirely on police investigative conduct and on judicial doctrine. Legal scholarship focused on prosecutors only infrequently.²⁴² In part, this may be because of the difficulty in studying prosecutors' conduct outside the courtroom, particularly prosecutorial decisionmaking, so little of which is exposed to the public. Much of the earlier work was by those who could draw on their former experience as prosecutors, such as Bennett Gershman²⁴³ and H. Richard Uviller.²⁴⁴ The amount of writing on various aspects of prosecutors' work is burgeoning, and much of it is contributed by later generations of former prosecutors such as Stephanos Bibas,²⁴⁵ Michael Cassidy,²⁴⁶ Kevin McMunigal,²⁴⁷ Laurie Levenson,²⁴⁸ Daniel Richman,²⁴⁹ and Paul Butler.²⁵⁰ Former criminal defense lawyers and others have also focused on aspects of prosecutors' work.²⁵¹

242 Perhaps the most prominent contrary example is Bennett L. Gershman's treatise, *PROSECUTORIAL MISCONDUCT*, *supra* note 27, first published in 1985.

243 See, e.g., Bennett L. Gershman, *Prosecutorial Misconduct in Presenting Evidence: "Backdooring" Hearsay*, 31 CRIM. L. BULL. 99 (1995); Bennett L. Gershman, *Correcting Prosecutorial Misconduct and Judicial Error in Louisiana*, HUFFINGTON POST (May 20, 2016, 2:21 PM), http://www.huffingtonpost.com/bennett-l-gershman/correcting-prosecutorial-_b_10065774.html. Bennett Gershman is a frequent contributor to the Huffington Post about prosecutorial conduct.

244 See, e.g., H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973).

245 See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).

246 See, e.g., R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 LAW & CONTEMP. PROBS. 67 (2008).

247 See, e.g., KEVIN C. McMUNIGAL & PETER A. JOY, *DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENSE LAWYERS* (2009).

248 See, e.g., Laurie L. Levinson, *Prosecutorial Sound Bites: When Do They Cross the Line?*, 44 GA. L. REV. 1021 (2010).

249 See, e.g., Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

250 See, e.g., PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2010).

251 See, e.g., Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013); Josh Bowers, *Plea Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083 (2016) (arguing that the court's examination of coercion of guilty pleas should expand beyond the legalistic inquiry of what a prosecutor is legally entitled to pursue); Kami Chavis, *A New Frontier in Criminal Justice Reform*, 6 WAKE FOREST J. L. & POL'Y 349 (2016) (summarizing scholarly articles discussing aspects of criminal justice with meaningful reforms requiring bold and innovative solutions at each stage of the criminal process, beginning with policing); Davis, *supra* note 212; Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737 (2016) (discussing the need for evidence-based criteria in prosecutors' use of informants); Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY

Among the most important academic insights underlying much of the contemporary work on prosecutors' conduct are those drawn from the social sciences. Early writings by Uviller and others reflected the intuition that psychological and social dynamics were integral to understanding prosecutors' behavior²⁵²—for example, that prosecutors have difficulty reviewing new evidence objectively once they settle on a suspect and that institutional incentives to win cases may influence prosecutors to overreach. More recent writings on cognitive bias reinforce the intuition that even well intentioned prosecutors may abuse their power because of unconscious forces.²⁵³ In other words, misconduct is not just the province of bad apples. Other writings substantiate the assumption that organizational structures can be implemented to improve institutional cultures and develop systems to reduce the risk of erroneous and wrongful conduct.²⁵⁴

The cognitive bias literature bears particularly on understandings of prosecutorial discretion and its perceived abuses. A growing body of literature explains how cognitive biases, such as “confirmation bias”²⁵⁵ and “hindsight bias,”²⁵⁶ affect judgment and account for what is popularly known as “tunnel vision”—the human tendency to evaluate evidence through the lens of one's preexisting expectations and conclusions.²⁵⁷

L. REV. 1505, 1508 (2016) (arguing that plea-bargaining should become an inquisitorial system that is judicially monitored to have to provide a coherent mechanism to achieve better results).

252 See, e.g., George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98 (1975); Uviller, *supra* note 244, at 1167–68 (noting various social and psychological factors that weigh on a prosecutor's discretion).

253 See, e.g., Erin Morris, *Cognitive Bias and the Evaluation of Forensic Evidence*, 36 CHAMPION 12, 12 (2012) (“[Bias] is . . . a largely unconscious process, and cannot be overcome by force of will, good intentions, or even training.”).

254 See, e.g., Yaroshefsky & Green, *supra* note 199.

255 This is the tendency to seek and interpret information in ways that support the person's existing beliefs, expectations, and ideas. See generally Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (discussing individual and institutional sources and effects of tunnel vision and suggesting systemic remedies); Itiel Dror, *Biased Brains*, 116 POLICE REV., June 6, 2008, at 21.

256 See Findley & Scott, *supra* note 255, at 319–22. Also called outcome bias, this is the tendency to interpret the outcome as a confirmation that the result was inevitable or certainly more predictable than one would initially think—i.e., the tendency to say “I knew it all along,” when one was actually unsure.

257 See Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479–80 (2006) (discussing prosecutors and tunnel vision); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM & MARY L. REV. 1587, 1590–91 (2006) (discussing how cognitive biases make prosecutors irrational actors); Findley & Scott, *supra* note 255, at 307–08 (“Psychologists analyze tunnel vision as the product of various cognitive ‘biases,’ such as confirmation bias, hindsight bias, and outcome bias. These cognitive biases help explain how and why tunnel vision is so ubiquitous, even among well-meaning actors in the criminal justice system.” (footnote omitted)); Medwed, *supra* note 187, at 45–46; Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765,

Scholars have written about the impact of these biases on prosecutorial as well as police decisionmaking,²⁵⁸ including in wrongful conviction cases such as the well-known Central Park Jogger²⁵⁹ and the Duke Lacrosse cases.²⁶⁰ Police often focus too quickly upon a particular suspect to the exclusion of others and prosecutors then do the same based on the police investigation.²⁶¹ These tendencies have an even greater impact following a conviction, given the psychological difficulty of acknowledging one's possible

835–36 (2008) (discussing law enforcement tunnel vision—“psychological inertia”—as a cause of wrongful death penalty convictions).

258 See Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (arguing that a structural conflict of interest arises when local prosecutors are given the discretion and responsibility to investigate and lead cases against the police); *supra* notes 33, 35, 250–57.

259 See *McCray v. City of New York*, No. 03 Civ. 9685, 2007 U.S. Dist. LEXIS 90875, at *13–38 (S.D.N.Y. Dec. 11, 2007). The court recited the following history of prosecution and aftermath, as recounted in civil rights complaint: after a brutal attack on a jogger who was found unconscious in Central Park, the police focused upon young men whose behavior was suspicious because they had been engaged in criminal behavior elsewhere in the park that night. After many hours of interrogation, the police obtained what were later learned to be false confessions. The youths were convicted and not exonerated until years later, when a serial rapist/killer, Matias Reyes, came forward to claim responsibility for the Central Park Jogger assault, and subsequent DNA testing conclusively established his responsibility. Although an investigation by a senior prosecutor established the original defendants' innocence to the satisfaction of the Manhattan District Attorney's office, which supported their motion to set aside their convictions, the police remained unconvinced. See also MICHAEL F. ARMSTRONG ET AL., REPORT TO THE POLICE COMMISSIONER ON THE CENTRAL PARK JOGGER CASE 41 (2003), news.findlaw.com/hdocs/docs/cpjgr/nypd12703jgrrpt.pdf (concluding “that it is more likely than not that the defendants participated in an attack upon the jogger” after Reyes sexually assaulted her).

260 STUART TAYLOR, JR. & K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 55 (2007) (discussing that, in their investigations, “[c]ops share the natural human tendency to bend new evidence to fit their preconceived beliefs rather than adjusting their beliefs to fit the new evidence”).

261 Suggestions have been made about how to minimize the impact of cognitive biases in the criminal process. Commentators have proposed: (1) training for prosecutors and police about cognitive biases; (2) greater transparency of prosecutorial and police work; (3) subjecting investigative techniques to reexamination and review; (4) improved management and supervision processes, and (5) reform of prosecutorial cultures. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 917 (2006) (suggesting transparency and monitoring reforms as partial solutions to improve the criminal justice process); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 495, 499 (2009); Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 523–28 (2007) [hereinafter Burke, *Invitation to Prosecutors*]; Burke, *supra* note 257, at 1613–31; Felkenes, *supra* note 252; Findley & Scott, *supra* note 255, at 354–96; Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 703–05 (2000); Medwed, *supra* note 60, at 169–83; Medwed, *supra* note 187, at 45–51.

role in convicting an innocent person.²⁶² A prosecutor is likely to view a conviction as a confirmation that the initial charging decision was correct and then to discount new evidence of innocence.²⁶³ A 2013 report on wrongful convictions recommended changes to criminal justice practices to minimize the effect of prosecutors' tunnel vision.²⁶⁴

More broadly, social science studies demonstrating deficiencies in the evidence on which prosecutors customarily rely has drawn attention to the importance of prosecutors' gatekeeping role. For example, significant social science studies have both demonstrated flaws in eyewitness testimony and shown how to make it more reliable.²⁶⁵ Likewise, social scientists helped expose the problem of false confessions.²⁶⁶ This literature contributes to the

262 Bandes, *supra* note 257, at 491 ("It is difficult to admit mistakes, and certainly difficult for a prosecutor to accept that her actions have led to the conviction of an innocent person."); Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 551 (1987) ("The honorable prosecutor simply cannot believe that he is prosecuting the blameless."); Medwed, *supra* note 60, at 142–43 ("When a jury verdict validates this form of 'pre-conviction' of the defendant, it may become extremely difficult ever to establish the defendant's innocence in the eyes of the prosecuting lawyer.").

263 See Burke, *Invitation to Prosecutors*, *supra* note 261, at 519 ("[T]he vast majority of cases end in conviction, either by trial or more often by guilty plea. Accordingly, prosecutors are likely to see the end results as validation of their initial theories of guilt."); Findley & Scott, *supra* note 255, at 316, 320, 330, 331–33 (discussing impact of cognitive biases; defense lawyers do not necessarily counterbalance these tendencies because they are also prone to tunnel vision, assuming their clients to be guilty and often, therefore, eschewing vigorous investigation); F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 211 (2002).

264 *Predicting and Preventing Wrongful Convictions*, NAT'L INST. OF JUSTICE (Mar. 8, 2013), <http://nij.gov/topics/justice-system/wrongful-convictions/pages/predicting-preventing.aspx>.

265 See NAT'L RESEARCH COUNSEL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (2014), <http://www.nap.edu/read/18891/chapter/1>; see also Saul M. Kassir & Kimberly A. Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. APPLIED SOC. PSYCHOL. 1241 (1992); National Academy of Sciences Releases Landmark Report on Memory and Eyewitness Identification, Urges Reform of Police Identification Procedures, INNOCENCE PROJECT (Oct. 4, 2014), <http://www.innocenceproject.org/news-events-exonerations/national-academy-of-sciences-releases-landmark-report-on-memory-and-eyewitness-identification-urges-reform-of-police-identification-procedures>. Social science insight into deficiencies in eyewitness identifications resulted in two landmark decisions: *State v. Henderson*, 27 A.3d 872 (N.J. 2011), and *State v. Lawson*, 291 P.3d 673 (Or. 2012) (en banc), where the supreme courts of New Jersey and Oregon, respectively, overhauled their states' tests for determining the admissibility and treatment of eyewitness-identification evidence in criminal trials.

266 See, e.g., Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121; Saul M. Kassir, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215, 216, 223 (2005); Saul M. Kassir & Katharine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125 (1996); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1119 (1997) (developing the concept of confession "contamina-

understanding that prosecutorial misconduct can include the willful or negligent exploitation of unreliable evidence.

5. Reform Organizations, Coalitions, and Movements

Perhaps the most essential social condition for the development of Prosecutorial Accountability 2.0 has been the existence of traditional advocacy and reform organizations and the development of new ones, which have given attention to prosecutorial misconduct. Although early interest in prosecutors' conduct was largely incidental, some organizations have begun to make prosecutorial reform an agenda item, if not a high priority.

Initially, reform groups turned their attention to prosecutorial misconduct in connection with discovery reform efforts. Representatives of the criminal defense bar, such as the NACDL and the American College of Trial Lawyers, directed efforts at criminal discovery reform as an aspect of their general interest in improving criminal procedure.²⁶⁷ Their efforts did not necessarily require spotlighting prosecutorial discovery violations, since one could plausibly argue that constitutional and statutory disclosure obligations, which are far narrower than disclosure obligations in civil litigation, are too narrow to ensure fair trials even if prosecutors perfectly comply with their current disclosure obligations.²⁶⁸ But these and other criminal justice reform groups have increasingly argued that broader disclosure law is necessary in response to prosecutors' failure to comply with existing obligations. Institutional advocates have presented testimony and lobbied on behalf of proposed federal discovery reform as well as the successful reform in North Carolina and Texas.²⁶⁹ Reformers now spring into action when prosecutorial misconduct comes to light, especially in high-profile cases such as the Ted Stevens prosecution,²⁷⁰ and portray each new example as the lat-

tion"). The DNA exonerations substantiated the problem and dispelled some skepticism that anyone would falsely confess his or her own guilt. See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010); Saul M. Kassir et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 382 (2007) ("Largely as a result of recent DNA exonerations, many of which had contained false confessions in evidence, a spotlight of scrutiny has been cast on the processes of police interviewing and interrogation.").

267 See generally Robert W. Tarun et al., Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93 (2004); *Discovery Reform*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, <http://www.nacdl.org/discoveryreform/> (last visited Oct. 19, 2016) ("Many recent cases have exposed the fact that federal prosecutors, whether through negligence or by design, all too often fail to abide by their constitutional duty to disclose favorable information to the defense. This is exacerbated by grossly inadequate state discovery statutes.").

268 Green, *supra* note 3, at 681 ("If one looks at the criminal discovery regime using the liberality of civil discovery as the baseline, in contrast, one might question the fairness of the criminal process even if invariable compliance with *Brady* were assured.").

269 See *supra* notes 136–47 and accompanying text.

270 See *supra* notes 123–25 and accompanying text.

est in a string of similar prosecutorial misdeeds.²⁷¹ Most recently, in the wake of the Orange County prosecutor's scandal,²⁷² California reformers successfully obtained legislation authorizing courts to disqualify a prosecutor's office that deliberately withholds evidence, and then to report the errant prosecutors to disciplinary authorities.²⁷³

Recent institutional advocacy and reform efforts have targeted aspects of prosecutorial conduct in addition to discovery violations. Some have been directed at correcting individual perceived injustices. For example, organizations seeking to set aside convictions of those believed to be innocent or to have been punished too harshly sometimes make arguments based on perceived prosecutorial wrongdoing or excess.²⁷⁴ Recently, the NAACP Legal Defense Fund (LDF) alleged prosecutorial misconduct in its open letter to the judge overseeing the grand jury investigation of police officer Darren Wilson for the shooting of Michael Brown, Jr. in Ferguson.²⁷⁵ On other occasions, organizations have cited prosecutorial misconduct in seeking broader criminal procedure reform. For example, death penalty opponents have depicted prosecutorial overreaching as endemic in the capital process.²⁷⁶ The NACDL has targeted prosecutorial conduct as an aspect of

271 See, e.g., THE CONSTITUTION PROJECT, A CALL FOR CONGRESS TO REFORM FEDERAL CRIMINAL DISCOVERY I (2012), http://www.constitutionproject.org/pdf/Brady_Stmt_030812.pdf ("In addition to the Stevens case, a string of recent cases has emerged in which the defense eventually discovered undisclosed evidence that was constitutionally required to have been disclosed.")

272 See *supra* note 129 and accompanying text.

273 See A.B. 1328, 2015 Cal. Legis. Serv. Ch. 467 (West) (codified as amended at CAL. BUS. & PROF. CODE § 6086.7 (West 2016); CAL. PENAL CODE § 1424.5 (West 2016)), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1328. The law authorizes a court to find a violation based on clear and convincing evidence that the prosecutor deliberately and intentionally withheld relevant or material exculpatory evidence or information in violation of law. In cases of the most serious misconduct, the law also requires judges to report the prosecutor to the disciplinary authority and authorizes the court to disqualify the blameworthy prosecutor or the entire office. See *id.*

274 See AMNESTY INT'L, USA: MODEL CRIMINAL JUSTICE? DEATH BY PROSECUTORIAL MISCONDUCT AND A 'STACKED' JURY (2010), <http://www.amnestyusa.org/sites/default/files/pdfs/clemonsreport.pdf>.

275 Letter from Sherrilyn A. Ifill, Dir.-Counsel, NAACP Legal Def. & Educ. Fund, to Maura McShane, Presiding Judge, St. Louis Cty. Circuit Court (Jan. 5, 2015), <http://www.scribd.com/doc/251842888/NAACP-LDF-Open-Letter-to-Judge-Maura-McShane>.

276 See, e.g., FAIR PUNISHMENT PROJECT, HARVARD LAW SCH., AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY (2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf (challenging "personality driven prosecutions" by five prosecutors who are responsible for 440 death sentences in the United States); Press Release, NAACP & Amnesty Int'l, On One-Year Anniversary of Troy Davis Execution, Amnesty International and NAACP Urge Attorney General Eric Holder to Investigate Misconduct in Death Penalty Cases (Sept. 20, 2012), <http://www.amnestyusa.org/news/press-releases/on-one-year-anniversary-of-troy-davis-execution-amnesty-international-and-naacp-urge-attorney-genera> ("[T]he stain of injustice continues to spread, with the death penalty used despite substantial concerns over prosecutorial overreach, wrongful conviction or misapplication of the law.").

broader litigation, legislative, and grassroots strategies for reform of state and federal sentencing, over-criminalization, grand juries, misdemeanor prosecutions, forensics, forfeiture, and problem-solving courts.²⁷⁷

Other reform advocacy has indirect significance for prosecutorial reform insofar as it calls attention to deficiencies that prosecutors could help ameliorate. The legislative and litigation reform efforts of the Innocence Project have been important in this regard. As of this writing, the Innocence Project and some affiliates' websites acknowledged prosecutorial misconduct as a concern²⁷⁸ and recently publicly made prosecutorial misconduct an explicit subject of reform efforts.²⁷⁹

The Innocence Network's current work on the deficiencies of the criminal justice system, especially the various ways in which unreliable evidence is developed and used, calls attention to the possible role of prosecutors as gatekeepers in promoting the reliability of the prosecution's proof. Among other things, the organization has encouraged prosecutors to develop conviction integrity units, not only to re-examine past cases that may involve wrongful convictions, but to develop internal processes to reduce the risk of future miscarriages of justice.²⁸⁰

But in the end, reform organizations receive only partial credit for the accountability movement. Significantly, no major national organization has made prosecutorial accountability a central priority. One can speculate why. Even defense organizations such as the NACDL and civil rights organizations such as LDF target particular issues and cases. These organizations necessarily seek to maintain cooperative relations with prosecutors, their institutions such as the Department of Justice, and their representative organizations.²⁸¹

277 NAT'L ASS'N OF CRIM. DEF. LAWYERS, <http://www.nacdl.org/> (last visited Oct. 19, 2016).

278 See e.g., *Prosecutorial Misconduct*, CAL. INNOCENCE PROJECT, <http://californiainnocenceproject.org/issues-we-face/prosecutorial-misconduct> (last visited Oct. 19, 2016).

279 For the Innocence Project's recent efforts to reform the law through legislation and litigation, see *Improve the Law*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/legislative-reform> (last visited Oct. 19, 2016), and *Reform Through the Courts*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/reform-through-the-courts> (last visited Oct. 19, 2016); see also INNOCENCE PROJECT, *supra* note 81. In 2016, the efforts described were directed at increasing access to DNA evidence, improving eyewitness identification practices, recording interrogations, challenging un-validated and unreliable forensic science, and improving systems to deter government misconduct.

280 See Barry C. Scheck, *Conviction Integrity Re-Visited: Developing Best Practices, Learning from Error, and Recognizing Ethical and Constitutional Obligations to Correct Wrongful Convictions*, OHIO ST. L.J. (forthcoming 2017); Matthew McKnight, *No Justice, No Peace*, NEW YORKER (Jan. 6, 2015), <http://www.newyorker.com/news/news-desk/kenneth-thompson-conviction-review-unit-brooklyn> (hailing Brooklyn's Conviction Integrity Unit); *Manhattan District Attorney Hails Conviction Integrity Unit*, INNOCENCE PROJECT (June 22, 2012), <http://www.innocenceproject.org/news-events-exonerations/manhattan-district-attorney-hails-conviction-integrity-unit>; *supra* notes 191–95 and accompanying text.

281 For example, the NACDL has worked with the Department of Justice on its clemency project and on its efforts to support adequate funding for indigent defense. See *Clem-*

Nothing would do more to poison relations than to confront prosecutors head-on by spotlighting systemic wrongdoing.

B. *The Catalytic Role of Information Technology*

Beginning in the early 1990s, information technology revolutionized how information is gathered, processed, and disseminated, and it consequently has significantly changed public discourse,²⁸² including about prosecutorial accountability. The new medium made Prosecutorial Accountability 2.0 possible by raising public awareness of prosecutorial misconduct, its connection to broader deficiencies in criminal justice, its connection in particular to wrongful convictions, the academic understanding of the systemic and psychological conditions that contribute to misconduct, and the institutional efforts toward reform. Information technology, as a new medium, is essentially the “straw that stirs the drink.”²⁸³

First, it is now less laborious to collect information about prosecutorial misconduct. Whereas public information in the form of court transcripts and filings used to be accessible only by digging through court files, it is now available in electronic databases. Consequently, news media can easily run studies requiring the collection of massive information.²⁸⁴ So can not-for-profit reform groups.²⁸⁵

ency Project Overview and FAQs, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, <http://www.nacdl.org/clemencyproject/> (last visited Oct. 19, 2016). Innocence Projects have sought to collaborate with prosecutors' offices on exoneration cases. See, e.g., Nancy Petro, *Exoneration and "Model for How Prosecution and Defense Can Collaborate"*, WRONGFUL CONVICTIONS BLOG (Nov. 22, 2013, 8:48 AM), <http://wrongfulconvictionsblog.org/2013/11/22/exoneration-and-model-for-how-prosecution-and-defense-can-collaborate/>. It is not in the interest of these or other law-reform organizations to develop antagonistic relations with prosecutors generally.

²⁸² See generally Manuel Castells, *The Impact of the Internet on Society: A Global Perspective*, in CHANGE: 19 KEY ESSAYS ON HOW INTERNET IS CHANGING OUR LIVES 22 (2014), <https://www.bbvaopenmind.com/wp-content/uploads/2014/03/BBVA-OpenMind-Internet-Manuel-Castells-The-Impact-of-the-Internet-on-Society-A-Global-Perspective.pdf> (“[W]ithout the Internet we would not have seen the large-scale development of networking as the fundamental mechanism of social structuring and social change in every domain of social life.”).

²⁸³ The phrase was attributed, perhaps erroneously, to New York Yankees outfielder Reggie Jackson, who, according to a magazine article, used the phrase in reference to his own role on the team. See, e.g., Chad Jennings, *Reggie Jackson Denies "Straw That Stirs the Drink" Comment*, J. NEWS: LOHUD YANKEES BLOG (Oct. 12, 2013, 6:24 PM), <http://yankees.lhblogs.com/2013/10/12/reggie-jackson-denies-straw-that-stirs-the-drink-comment/>.

²⁸⁴ See, e.g., Armstrong & Possley, *supra* note 34; *Fatal Force*, *supra* note 208; Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA TODAY (Sept. 23, 2010), http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm (discussing a six-month investigation of 201 cases involving misconduct by federal prosecutors that disclosed that only one of the prosecutors “was barred even temporarily from practicing law for misconduct”).

²⁸⁵ See, e.g., RIDOLFI & POSSLEY, *supra* note 73 (concluding from a review of over 4000 California cases of alleged prosecutorial misconduct from 1997–2009 that there were extensive and systemic failures of prosecutorial disclosure, judicial reporting of wrongdo-

The easier availability of information has broadened the subjects of concern. Earlier writings focused disproportionately on visible misconduct, such as prejudicial summations, and other misconduct that was the subject of judicial decisions, such as suppression of evidence.²⁸⁶ Today, more attention is given to abuses of charging discretion, such as overcharging in order to extract guilty pleas—dubious conduct that through the aggregation of information comes more readily to light.²⁸⁷ One law school has even made prosecutorial misconduct a separate subject of academic study.²⁸⁸

Second, the relevant information and commentary is accessible universally and permanently. Much relevant legal academic writing, which was once accessible only in law libraries and expensive databases, is permanently available to the general public.²⁸⁹ This has a cumulative effect on reporting. Whenever a new story about prosecutorial misconduct emerges, reporters refer to earlier, similar misconduct and place new wrongdoing in a broader context.²⁹⁰ At the same time, discussions of misconduct build on each other. Reform groups' reports build on news accounts as well as published judicial decisions. News stories and editorials, in turn, draw on the reform groups' reports and recommendations.²⁹¹ As a result, it has become easier to make arguments about the incidence of misconduct and to perceive patterns. What once may have seemed like dots may now be connected.

ing, and professional discipline); *Methodology, The Team for Harmful Error*, CTR. FOR PUB. INTEGRITY (last updated May 19, 2014), <http://www.publicintegrity.org/2003/06/26/5530/methodology-team-harmful-error> (locating hundreds of prosecutorial misconduct cases "by searching the Lexis and Westlaw legal databases for the phrase 'prosecutorial misconduct'"); see also PROJECT ON GOV'T OVERSIGHT, HUNDREDS OF JUSTICE DEPARTMENT ATTORNEYS VIOLATED PROFESSIONAL RULES, LAWS, OR ETHICAL STANDARDS (2014), <http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html>.

286 See, e.g., Armstrong & Possley, *supra* note 34; Weeks, *supra* note 29 (examining *Brady* violations).

287 See, e.g., HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013), https://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf.

288 See James R. Elkins, Course on Prosecutorial Misconduct, <http://myweb.wvnet.edu/~jelkins/adcrimlaw5/syllabus.html> (last visited Oct. 19, 2016) (spring 2012 course syllabus); see also Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391 (2011) (maintaining that recent developments have shed light on the scope and severity of prosecutorial misconduct and that law school clinicians can teach law students to confront the problem).

289 See, e.g., Keenan et al., *supra* note 78.

290 See, e.g., Balko, *supra* note 99; Michael Powell, *Misconduct by Prosecutors, Once Again*, N.Y. TIMES (Aug. 13, 2012), <http://www.nytimes.com/2012/08/14/nyregion/new-charge-of-prosecutorial-misconduct-in-queens.html>.

291 See, e.g., John Terzano, Opinion, *The Devastating Consequences of Prosecutorial Misconduct*, HUFFINGTON POST (May 25, 2011, 1:00 PM), http://www.huffingtonpost.com/john-terzano/the-devastating-consequen_b_161049.html (discussing the Justice Project's recommendations for comprehensive reform, and urging harsher punishment for prosecutorial misconduct); Zoe Tillman, *D.C. Judges Weigh Rule to Curb Prosecutor Misconduct*, NAT'L L.J., Feb. 3, 2016 (proposal to spell out government's disclosure obligations in criminal cases).

This has led to rhetorical changes. Critics and news media are more likely to view prosecutors' misconduct as part of a pattern within the prosecutor's office²⁹² and to note similar misconduct in other jurisdictions.²⁹³ This has increased acceptance of the idea that prosecutors are part of a national prosecutorial corps with a common culture, not just members of isolated, disconnected prosecutors' offices on the federal, state, and local levels. Despite vast differences among individual prosecutors and their offices, the regulatory failures of one prosecutor in one county or district may be viewed as characteristic of prosecutors elsewhere. In turn, there is greater receptivity to descriptions of a "national epidemic" of *Brady* violations or other misconduct based on collected anecdotal evidence and to assertions that revealed misconduct is "the tip of the iceberg," whether or not these claims can be proven.²⁹⁴

Third, the advent and subsequent popularization of blogs and social media sites have made commentary more personal and accessible to the public. Reform-minded organizations and individuals have established blogs that include commentary about prosecutors' misconduct and links to stories on this subject.²⁹⁵ Citizen journalism has allowed interested individuals to employ press tools to inform one another.²⁹⁶ Any motivated individual with a computer can publicly critique or criticize a prosecutor. As a result, there is more discourse and there are more participants in the conversation. This has broadened interest in prosecutorial misconduct from an academic elite to a much more politically and socially diverse readership.

One practical effect of this is that stories about prosecutorial misconduct in a given locale are more likely to go national and to remain longer in the public eye. For example, there was sustained national interest in the miscon-

292 See, e.g., Radley Balko, *Another Orleans Parish Man Freed Due to Prosecutor Misconduct*, WASH. POST (May 12, 2014), <http://www.washingtonpost.com/news/the-watch/wp/2014/05/12/another-orleans-parish-man-freed-due-to-prosecutor-misconduct> (describing the release of Reginald Adams, convicted because of the Orleans Parish prosecution's "intentional prosecutorial misconduct," which was a recurring problem under the former district attorney's leadership).

293 See, e.g., Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System That Protects Them*, HUFFINGTON POST (Aug. 1, 2013, 2:18 PM), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html (examining the Orleans Parish prosecution's suppression of evidence leading to the wrongful conviction of John Thompson, describing other misconduct in the same office, and referring to similar misconduct by other prosecutors' offices).

294 See, e.g., Green, *supra* note 3, at 660–62.

295 See, e.g., Sophie, *supra* note 152; *Police, Prosecutorial and Judicial Misconduct*, TRUTH IN JUSTICE, <http://truthinjustice.org/p-pmisconduct.htm> (last visited Oct. 19, 2016); *Prosecutorial Conduct (Good and Bad)*, WRONGFUL CONVICTIONS BLOG, <http://wrongfulconvictionsblog.org/category/prosecutorial-conduct-good-and-bad> (last visited Oct. 19, 2016); see also Dolan, *supra* note 130.

296 See, e.g., Jay Rosen, *A Most Useful Definition of Citizen Journalism*, PRESSTHINK (July 14, 2008), http://archive.pressthink.org/2008/07/14/a_most_useful_d.html; see also *Coalition for YOU*, IT COULD HAPPEN TO YOU!, <http://www.itcouldhappen2you.org/coalition-news-for-you/> (last visited Oct. 19, 2016).

duct of the local North Carolina prosecutor, Michael Nifong in the Duke Lacrosse case,²⁹⁷ and in the federal prosecutors' discovery violations that required overturning U.S. Senator Ted Stevens's conviction.²⁹⁸ Information technology, including blogs and Twitter, as well as websites, sustained national attention in cases such as the disbarment of former prosecutor Ken Anderson following the Morton case.²⁹⁹

The Black Lives Matter movement, which targeted prosecutorial unfairness in Ferguson and Staten Island, largely transmitted its ideas by YouTube, blogs, Twitter, and other social media, all of which are accessible by video-recording-enabled cell phones. This movement has contributed to a fundamental shift in public attitudes about the fairness of the criminal justice system.³⁰⁰ Consequently, the idea that prosecutorial misconduct is pervasive has become part of mainstream public conversation. Some in the mainstream media accept this premise as an established fact: news editorials have claimed that rampant prosecutorial misconduct is a problem that needs solving.³⁰¹ As importantly, jurists such as Judge Kozinski have echoed this concern.³⁰² The conversation about prosecutorial misconduct has entered the judicial professional literature.³⁰³ Although prosecutors continue to press

297 See *supra* notes 138–40 and accompanying text.

298 In the federal system, the highly publicized critique of government misconduct by Department of Justice attorneys in Ted Stevens's case was not unique. In *United States v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009), Judge Mark Wolf ordered the government to show cause why sanctions should not be imposed upon finding that the government's suppression of "plainly material exculpatory evidence" extended "a dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court." *Id.* at 165 (quoting *United States v. Jones*, 609 F. Supp. 2d 113, 119 & n.2 (D. Mass. 2009) (internal quotation marks omitted)). Other judges have expressed similar concerns. See, e.g., *United States v. Farinella*, 558 F.3d 695, 700–02 (7th Cir. 2009) (criticizing harshly and naming the prosecutor for a range of issues including false and misleading arguments and calls for the imposition of sanctions); *United States v. Ye Gon*, No. 07-181 (D.D.C. Aug. 28, 2009) (granting motion to dismiss and criticizing government for false statements to the court and violation of *Brady/Giglio* obligation to provide information to the defense); *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1315, 1325 (S.D. Fla. 2009) (imposing \$600,000 in sanctions against the government for its "'win-at-all-cost' behavior"), *vacated and remanded*, 652 F.3d 1297 (11th Cir. 2011).

299 See *supra* note 173 and accompanying text.

300 "Black Lives Matter" has spawned many blogs, websites, and social media entries. See, e.g., Rich Juzwiak & Aleksander Chan, *Unarmed People of Color Killed by Police, 1999–2014*, GAWKER (Dec. 18, 2014, 2:15 PM), <http://gawker.com/unarmed-people-of-color-killed-by-police-1999-2014-1666672349>; see *supra* notes 207–13.

301 See *supra* notes 267–69, 286–94 and accompanying text (discussing reporting on prosecutorial misconduct).

302 See *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc).

303 See, e.g., Barry Scheck, *Four Reforms for the Twenty-First Century*, 96 JUDICATURE 323 (2013); see also Kozinski, *supra* note 6.

the point that misconduct is aberrational, their position is now met with more skepticism.³⁰⁴

At the touch of a finger, one can now summon dozens of compilations, reports, and in-depth articles chronicling prosecutors' failure to disclose key evidence, overcharging to obtain plea bargains, reliance on known faulty scientific evidence, and other misconduct. Some have been issued by nonprofit reform groups such as the American Civil Liberties Union (ACLU),³⁰⁵ Human Rights Watch,³⁰⁶ and the Center for Prosecutorial Integrity.³⁰⁷ Others are generated by media outlets such as ProPublica,³⁰⁸ Slate,³⁰⁹ and the Huffington Post,³¹⁰ and publicized by groups such as the Marshall Project.³¹¹ Writings such as these are both a product of rhetorical and regulatory change and a driver of change—they both build on judicial writings and influence future public and judicial opinion; they serve as products of reform efforts and fuel ongoing reform efforts; they serve as an outlet for academic insight and provide fodder for future academic scholarship.

IV. IMPLICATIONS: WHERE DO WE GO FROM HERE?

The description of prosecutorial accountability as evolutionary is meant to convey more than that change comes slowly. More importantly, our point is that change in the attitudes of those to whom prosecutors are accountable is not simultaneous and uniform. There are thousands of prosecutors—local, state, and federal—who appear in different courts of different jurisdictions before thousands of different judges who have opportunities to ignore

304 See, e.g., Johnson, *supra* note 98 (“Since [Olsen], the Justice Department has played down incidents of misconduct by its prosecutors and agents. But a report last month by the Project on Government Oversight found that hundreds of DOJ lawyers had violated rules, laws or ethical standards.”).

305 See *Prosecutorial Misconduct and Capital Punishment*, ACLU, <https://www.aclu.org/issues/capital-punishment/prosecutorial-misconduct-and-capital-punishment> (last visited Oct. 19, 2016) (compiling resources related to prosecutorial misconduct and capital punishment).

306 See HUMAN RIGHTS WATCH, *supra* note 287.

307 See CTR. FOR PROSECUTOR INTEGRITY, *supra* note 82, at app. B.

308 See Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013), <http://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody>.

309 See Dahlia Lithwick, *You're All Out*, SLATE (May 28, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethals_takes_district_attorney.html.

310 See Balko, *supra* note 99.

311 See, e.g., Maurice Possley, *Willingham Prosecutor Accused of Misconduct*, MARSHALL PROJECT (Mar. 18, 2015), <https://www.themarshallproject.org/2015/03/18/willingham-prosecutor-accused-of-misconduct>; *Prosecutors: A Curated Collection of Links*, MARSHALL PROJECT, <https://www.themarshallproject.org/records/60-prosecutors#.k8BvU7qbQ> (last updated Oct. 19, 2016) (a compilation of scores of articles published by the Project about prosecutors); see also John Hollway, *Reining in Prosecutorial Misconduct*, WALL ST. J. (July 4, 2016), http://www.wsj.com/article_email/reining-in-prosecutorial-misconduct-1467673202-1MyQjAxMTA2ODAzNTUwNjU0Wj.

or react to perceived misconduct. Prosecutors are subject to different state disciplinary authorities, have different media representatives looking over their shoulders, and answer to different constituencies. Different judges, disciplinary authorities, editors and reporters, and voters can have different attitudes toward prosecutors, their conduct, and their accountability.

Most important from a regulatory perspective are the judges—both those who preside over or review criminal trials and those who oversee the attorney disciplinary processes. No doubt, some share the assumptions underlying the traditional, trusting, hands-off approach to accountability, and others more fully embrace the assumptions underlying the more skeptical, proactive, Prosecutorial Accountability 2.0 approach. Our point is that the assumptions and attitudes underlying the new approach are catching hold among judges in increasing numbers. Information technology and other conditions described in Part III help explain this shift.

The two approaches reflect both different empirical assumptions, primarily about prosecutorial regulation, and different philosophical premises. Some judges will look at prosecutors through one prism, and other judges will bring the contrasting perspective to bear.

The empirical question occasioning debate is whether prosecutorial misconduct, however conceived, is prevalent and systematic or whether it is unusual and isolated. Evolving judicial attitudes about this issue are inevitably affected by ongoing public discourse about prosecutorial misconduct. Another empirical question is how prosecutors' future conduct will be affected by judicial involvement, whether by way of investigations, informal exhortations, personal sanctions, or reversals of convictions and other judicial remedies. For example, will a stronger judicial role encourage individual prosecutors to be more careful and law-abiding and encourage their offices to improve training and supervision? Will it simply be an ineffective use of judicial resources; or worse, as some prosecutors argue, will it make prosecutors anxious and overly cautious to no good end?

The philosophical disagreements relate to prosecutors' and judges' relative roles. If one focuses on prosecutors' role in a coordinate branch of government, one tends to favor political over regulatory accountability—the judge's role is to ensure fair trials and to apply the law; in general, judges should not be telling prosecutors what to do, especially in areas of prosecutorial discretion or when prosecutors' questionable conduct does not violate the law or affect the outcome of a trial. On the other hand, if one focuses on prosecutors as lawyers who, along with other lawyers in the jurisdiction, are subject to judges' disciplinary authority, judges might be expected to take a more active supervisory role.³¹² Likewise, judges might take a more active role if they believe they have responsibility for improving legal processes by calling attention to deficiencies, including those relating to

312 See generally Zacharias & Green, *supra* note 56.

prosecutors' practices, rather than viewing the judiciary as a collection of neutral umpires whose role is limited to calling balls and strikes.³¹³

These two conflicting approaches to accountability can coexist even among judges on the same court. One recent, somewhat enigmatic, example is *United States v. Adams*,³¹⁴ in which a three-judge Fourth Circuit panel overturned a district judge's decision and filed most of its opinions under seal "due to [its] sensitive nature,"³¹⁵ with the exception of three opinions bearing on the question of the court's role as informal regulator of the prosecutor's office. Judge King's opinion for the court reproduced a footnote from the court's sealed opinion expressing surprise that the government had not confessed error on appeal. The footnote reminded the prosecution of the injunctions in *Berger* that the federal prosecutor is obliged to see that justice is done and to "strive to ensure fairness and justice."³¹⁶ Judge Agee, who disagreed with the footnote, wrote a concurrence referring to prosecutors' broad discretion and the expectation that they will prosecute earnestly and vigorously. He expressed concern that if courts "too eagerly and too often comment on the Government's strategic choices, then the Government could become a less zealous advocate—and our adversarial system of justice would suffer for it."³¹⁷

Finally, Judge Davis published a concurring opinion defending the footnote and rejecting Judge Agee's implication that the court was "operating outside the bounds of [its] adjudicative responsibilities" by criticizing the prosecution's "manifestly irregular, if not illegal, 'strategic choices.'"³¹⁸ Judge Davis asserted that "judges need to say more, not less, to the political branches about the serious deficits in our criminal justice system,"³¹⁹ citing several judges who had previously expressed similar views.³²⁰ He concluded: "In an era of mass incarceration such as ours, any fear that restrained judicial commentary on dicey prosecutorial practices or 'strategic choices' might result in 'the Government [] becom[ing] a less zealous advocate' is most charitably described as fanciful."³²¹

In essence, the two concurring judges expressed the opposing approaches to prosecutorial accountability, sounding the competing themes of these approaches. Judge Agee, representing the traditional approach, stressed the importance of deference to prosecutors' discretionary decisions and the legitimacy of judicial passivity. Judge Davis placed his justification

313 See generally Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497 (2009).

314 788 F.3d 115 (4th Cir. 2015).

315 *Id.* at 115.

316 *Id.* (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

317 *Id.* at 116 (Agee, J., concurring).

318 *Id.* at 116–17 (Davis, J., concurring).

319 *Id.* at 117.

320 *Id.* at 118 (first citing *United States v. Ingram*, 721 F.3d 35, 43 n.9 (2d Cir. 2013) (Calabresi, J., concurring); then citing *United States v. Bonner*, 363 F.3d 213, 220 (3d Cir. 2004) (Smith, J., concurring); and then citing *id.* at 230 (McKee, J., dissenting)).

321 *Id.* at 118 (alterations in original) (citation omitted).

for a more activist judicial role in response to prosecutorial misconduct, broadly construed, against the backdrop of broader deficiencies in the criminal process.

The competing judicial approaches are depicted even more dramatically in the district and appellate court decisions in *United States v. McRae*³²² and *United States v. Bowen*.³²³ These were federal prosecutions of New Orleans police officers who shot civilians after Hurricane Katrina and covered up the shootings. After guilty verdicts in the two cases, the defense challenged the verdicts based on the discovery that federal prosecutors uninvolved in the trials had anonymously posted inflammatory comments about the police on the local newspaper's website.

In *McRae*, the district judge summarily rejected the defense's request for a hearing into the details of the postings and other potential leaks, reasoning that the prosecutors' anonymous blogging, which added only incrementally to other public discussion of the case, undermined neither the fairness of the trial nor the integrity of the jury verdict.³²⁴ Reflecting the traditional approach to accountability, which focuses on punishing individual rogue prosecutors, the district judge noted that "there are other remedies available that 'allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.'" ³²⁵ The appellate court affirmed, finding that while the prosecutors' postings were "unprofessional, inappropriate, and deserving of our condemnation," they were not actually or presumptively prejudicial.³²⁶

In stark contrast, the district judge in *Bowen* initiated an inquiry that became a "legal odyssey" into the prosecutors' conduct.³²⁷ The protracted proceedings never resolved all of the judge's questions but went far enough for him to conclude that online postings by three high-level prosecutors warranted reversing all five officers' convictions. The judge concluded his detailed opinion with a rebuke: "The government's actions, and initial lack of candor and credibility thereafter, is like scar tissue that will long evidence infidelity to the principles of ethics, professionalism, and basic fairness and common sense necessary to every criminal prosecution, wherever it should occur in this country."³²⁸

Two of three appellate judges agreed. The dissenting judge, like the judges in *McRae*, acknowledged that the prosecutors' actions "merit the most

322 795 F.3d 471 (5th Cir. 2015), *aff'g* No. 10-154, 2014 U.S. Dist. LEXIS 74743 (E.D. La. June 2, 2014).

323 799 F.3d 336 (5th Cir. 2015), *aff'g* 969 F. Supp. 2d 546 (E.D. La. 2013), *reh'g denied*, 813 F.3d 600 (5th Cir. 2016).

324 *McRae*, 2014 U.S. Dist. LEXIS 74743, at *13.

325 *Id.* at *13 n.41 (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988)).

326 *McRae*, 795 F.3d at 481.

327 *Bowen*, 969 F. Supp. 2d at 549.

328 *Id.* at 627.

severe sanctions,” but concluded that a retrial was unwarranted because the anonymous postings did not affect the jury’s verdicts.³²⁹

However, the majority saw a potential, even if unprovable, influence on the jury and further, posited that the “mob mentality” to which the prosecutors’ online comments contributed may have influenced other defendants to plead guilty or dissuaded witnesses from testifying.³³⁰ Although the majority stressed the possibility that the trial was prejudiced, its opinion reads like an exercise of regulatory authority that fits squarely into the Prosecutorial Accountability 2.0 model. Even though the three offending prosecutors acted independently, the court characterized their postings as a “pattern of misconduct,” not “isolated missteps.”³³¹ It criticized the prosecution’s inability to effectively self-regulate, observing that “the government refused to adequately investigate its errors, covered up what it knew to be misleading omissions, and in some instances lied directly to the court.”³³² And the court expressly rejected the argument “that official and professional discipline were adequate,” concluding that “[e]xerting professional discipline on three individual government lawyers does nothing to solve the systemic problem.”³³³

One question raised by the conflicting judicial approaches is who will win out in the evolutionary scheme: Will Prosecutorial Accountability 2.0 become the dominant approach? Our cautious prediction is that the two approaches will coexist for the foreseeable future. The underlying empirical assumptions are unprovable and the underlying philosophical debate cannot be conclusively won. The world in which prosecutors function is diverse, and there is ample room for different rhetorical and regulatory approaches.

Another question is what will happen if Prosecutorial Accountability 2.0 becomes more dominant. As reflected in our earlier discussion, the implications will include some or all of the following: disciplinary authorities will pursue more cases against prosecutors; bar associations will push for broader disciplinary regulation of prosecutors, both by interpreting existing rules broadly and by adopting additional restrictive standards and model rules for prosecutors; legislators will adopt more demanding regulations of prosecutors with regard to discovery or other aspects of their conduct; and inroads may slowly be made into absolute prosecutorial immunity from civil liabil-

329 *United States v. Bowen*, 799 F.3d 336, 360, 362 (5th Cir. 2015) (Prado, J., dissenting), *reh’g denied*, 813 F.3d 600 (5th Cir. 2016).

330 *Id.* at 358 (majority opinion).

331 *Id.* at 353.

332 *Id.* The court was also critical of other aspects of the prosecution, including the presentation of a cooperating witness’s testimony “that was inconsistent and incredible,” and the prosecution’s exercise of discretion in giving lenient treatment to cooperating defendants, including one who lied to the grand jury, while “[throwing] the book at those who went to trial.” *Id.* at 347.

333 *Id.* at 358–59. The anomalous result in *Bowen* may reflect judicial bias in favor of police officers on trial more than anything else.

ity.³³⁴ Finally, legislatures will consider regulatory models such as a state commission on prosecutorial conduct or an inspector general for prosecutors' offices.³³⁵

There are also implications for criminal defense and civil rights lawyers, reform groups, the media, and academia. As regulatory institutions become more interested in prosecutorial oversight, there will be more motions practice seeking judicial control of prosecutorial conduct. Overall, there will be greater interest in telling regulators what to do. With respect to reforming prosecutorial practices, for example, robust discussion has already developed within the bar³³⁶ and academia.³³⁷ Increasing attention has also focused on prosecutorial conduct relating to wrongful convictions³³⁸ and racial disparities.³³⁹ One can expect greater scrutiny, and more proposals for reform, with regard to other aspects of prosecutors' conduct.

The shift to Prosecutorial Accountability 2.0 would have particularly profound implications for judges in criminal proceedings. More judges would take an active role in supervising prosecutors as members of the bar. They would be slower to take prosecutors at their word and to assume their good faith, and quicker to identify perceived prosecutorial abuses, including with regard to the exercise of prosecutorial discretion. They would become more critical of prosecutors' negligence and of inadequate supervision, rather than targeting only what they perceive to be intentional wrongdoing. Rather than looking at instances of prosecutorial wrongdoing as individual, isolated, and aberrational occurrences, they would consider whether wrong-

334 See *Morse v. Fusto*, 804 F.3d 538, 547, 550 (2d Cir. 2015) (holding prosecutor civilly liable and denying qualified immunity where prosecutor intentionally manipulated evidence); Scheck, *supra* note 280.

335 See, e.g., S.B. 24, 238th Reg. Sess. (N.Y. 2015), <https://www.nysenate.gov/legislation/bills/2015/S24> (proposing to establish a state commission on prosecutorial conduct).

336 The American Trial Lawyers Association and various other national organizations will likely continue to make proposals for changes in discovery laws. See, e.g., Barry Scheck & Nancy Gertner, *Combating Brady Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, 37 CHAMPION 40 (2013) (proposing an "Ethical Order" that should be adopted by courts to insure compliance with discovery); Irwin H. Schwartz, *Beyond Brady: Using Model Rule 3.8(D) in Federal Court Discovery of Exculpatory Information*, 34 CHAMPION 34 (2010).

337 See, e.g., Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 61–64 (2015) (advocating earlier disclosure of evidence to the defense).

338 See, e.g., Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 854 (2010) (noting that certain prosecutorial conduct, including witness coaching, inappropriate closing arguments, and withholding evidence, results in wrongful convictions); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399; Alisha L. McKay, *Let the Master Answer: Why the Doctrine of Respondeat Superior Should Be Used to Address Egregious Prosecutorial Misconduct Resulting in Wrongful Convictions*, 2012 WIS. L. REV. 1215.

339 See, e.g., Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821 (2013) (examining the role of prosecutors in creating racial disparity within the criminal justice system).

doing, whether or not intentional, is symptomatic of systemic deficiencies. If so, they would seek meaningful assurances that, through training, supervision, and other systemic reforms, the prosecutor's office will reduce the likelihood of recurrences. Judges would be more inclined to refer prosecutors to state disciplinary authorities rather than relying on prosecutorial self-regulation, and they would be more open to initiating their own investigations into legal and ethical wrongdoing. And they would overcome their traditional reluctance to remedy serious prosecutorial wrongdoing in the course of criminal proceedings.³⁴⁰

Finally, a significant implication of Prosecutorial Accountability 2.0, whether or not it comes to dominate, relates to the reactions of prosecutors. No doubt, some will not even acknowledge the shift. Just as some prosecutors consider prosecutorial misconduct to be a problem of rogue prosecutors, some will perceive the responses of judges such as Judge Kozinski, Judge Sullivan, and Chief Judge Wolf as aberrational. Others will assume that both prosecutorial misconduct and the regulatory response are problems in other jurisdictions, not their own. But these assumptions will become increasingly unsustainable as, in the information age, cases of prosecutorial misconduct and judicial criticisms linger in the public eye.

Other prosecutors may hope that shifting attitudes within the judiciary are like the swing of a pendulum. They will await the day when the public again becomes preoccupied with the fear of crime. When public attitudes change, they may assume judges and other regulators will return to being generally unconcerned about occasional, seemingly isolated prosecutorial missteps.

Meanwhile, some or all prosecutors will at times push back against the regulatory shift.³⁴¹ The federal prosecution did so unsuccessfully in *Bowen*, in furtherance of its efforts to avoid a retrial, by arguing that wrongdoing was not systemic, that the Department of Justice could adequately police itself, and that punishing the three individual rogue prosecutors was an adequate remedy. Likewise, the Department of Justice pushed back against regulatory expansion in opposing the adoption of prosecutorial ethics rules on post-conviction obligations,³⁴² in opposing an interpretation of the discovery pro-

340 See *supra* notes 61–65 and accompanying text.

341 Perhaps the most notable example was the Department of Justice's response to efforts to apply disciplinary rules based on Model Rule 4.2 to restrict prosecutors and their agents from interrogating represented suspects and defendants. The Department's reaction included adopting an internal memorandum, followed by a regulation, to authorize prosecutors to engage in conduct that might otherwise be forbidden by the rules. The Department's efforts provoked a judicial and congressional backlash, culminating in legislation nullifying the regulation and expressly subjecting prosecutors to state ethics rules. For accounts of this series of events, see Rima Sirota, *Reassessing the Citizens Protection Act: A Good Thing It Passed, and a Good Thing It Failed*, 43 SW. L. REV. 51, 54–85 (2013); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 211–16 (2000).

342 See Green, *supra* note 4, at 892–903.

vision to go beyond the constitutional requirement,³⁴³ and in opposing proposed legislation on federal criminal discovery.³⁴⁴ Some state and local prosecutors have pushed back in similar ways.³⁴⁵

But that said, prosecutors' responses have not been uniformly unyielding. Prosecutors have a long tradition of being conciliatory when they think they must. The Department of Justice, for example, has often adopted voluntary, unenforceable self-restraint, as a matter of internal policy, if only to discourage courts or legislatures from adopting enforceable restraints.³⁴⁶ The revision of federal discovery policy after the collapse of the Ted Stevens prosecution is a recent example.³⁴⁷ State prosecutors' establishment of Conviction Integrity Units is a comparable response, in part, to regulatory pressures.³⁴⁸ Prosecutors are sensitive to small regulatory shifts. Even if only a handful of judges take a more aggressive regulatory approach, prosecutors will have an incentive to be more careful lest they come before a more progressive judge.

CONCLUSION

Attention to prosecutorial misconduct has grown in the Internet era. Traditionally, prosecutorial misconduct was viewed as episodic, where the perception was that only a few "rogue prosecutors" engaged in such conduct. Historically, there was limited examination of the issue beyond some defense organizations and a few judges, and regulation of prosecutorial conduct, either by courts or disciplinary authorities, was scant. Discipline within prosecutors' offices was considered ineffective. It was difficult to obtain information about prosecutorial misconduct in cases and, to the extent the issues were exposed, discussions reached a limited audience.

This has changed significantly in the Internet era. The rhetorical shift has moved toward the perception that prosecutorial misconduct is recurring and systemic. Moreover, there has been a regulatory shift toward examining prosecutorial conduct more broadly. Judges more readily express skepticism about prosecutorial compliance with law and ethics rules, and legislative reform has targeted prosecutorial conduct, most notably in areas regarding

343 See Brief for the United States as Amicus Curiae in Support of Appellee Jeffrey Auerhahn, *In re Auerhahn*, 724 F.3d 103 (1st Cir. 2013) (No. 11-2206); Brief for the United States as Amicus Curiae in Support of Respondent Andrew J. Kline at v, *In re Kline*, 113 A.3d 202 (D.C. 2015) (No. 11-BD-007).

344 See Green, *supra* note 3, at 641-42.

345 See Green, *supra* note 4, at 889-93 (discussing state prosecutors' opposition to ABA Model Rules 3.8(g), (h)); Weaver, *supra* note 151 (discussing the pushback of New York District Attorney Fitzpatrick); see also N.Y. STATE JUSTICE TASK FORCE, REPORT OF THE NEW YORK STATE JUSTICE TASK FORCE OF ITS RECOMMENDATIONS REGARDING CRIMINAL DISCOVERY REFORM 13 (2014), <http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf>.

346 See generally Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice"*, 13 CORNELL J.L. & PUB. POL'Y 167, 169 (2004).

347 See *supra* note 183 and accompanying text.

348 See *supra* notes 191-205 and accompanying text.

compliance with discovery in criminal cases. Even disciplinary authorities have stepped up action against errant prosecutors.

The reasons for the shift in attention to prosecutorial misconduct are multiple and interrelated. We have highlighted five necessary social conditions, beginning with the obvious one—the recurrence of prosecutorial misconduct.

Second, failings of the criminal justice system are front and center in the American discourse. Over-criminalization, mass incarceration, racial disparity in policing, and a myriad of other criminal justice concerns are the fodder of daily news stories. Many of these implicate prosecutors' work, especially their exercise of discretion in investigation, charging, plea bargaining, and sentencing. Concern about prosecutorial conduct is no longer limited to intentional lawbreaking.

Third, hundreds of DNA exonerations and the work of innocence projects exposing the causes of wrongful convictions have prompted public and professional discourse about the prosecutorial responsibility to avert wrongful convictions. Years of litigation, scientific research, and policy work exposed cases where prosecutors relied upon faulty eyewitness identification, false confessions, bad science, and police misconduct in obtaining criminal convictions of innocent people. Many of those cases also involved intentional and negligent failure to disclose evidence favorable to the defense.

Fourth, academic scholarship, particularly in the social sciences, has demonstrated deficiencies in the criminal justice process that prosecutors can ameliorate, and deficiencies in prosecutors' decisionmaking. The scholarship has contributed to the expansion of concern from deliberate prosecutorial wrongdoing to a concept of misconduct that encompasses both negligent wrongdoing and failures to take reasonable measures to ensure the fairness and reliability of the criminal process.

Fifth, as a consequence of and contributor to increased public attention to prosecutorial misconduct, reform organizations slowly built momentum toward discovery reform and other reform directed at prosecutors' conduct.

However, it is unlikely that any of these conditions, individually or collectively, would have resulted in the rhetorical and regulatory shift we describe but for a change in the medium by which prosecutors' conduct is catalogued and debated and made a subject of reform. Information technology has served as a catalyst for change. The Internet has expanded public exposure to wrongful conviction cases, the fault lines in the criminal justice system, the misconduct of prosecutors, and work of reform organizations. Blogs, listservs, Twitter, evolving sites, and new applications contribute to a flurry and exchange of information that was impossible in the pre-Internet days.

There has been a shifting discourse about prosecutorial misconduct, its causes, and potential remedies. Attention to the issue has not waned in the past decade. If anything, public attention is relatively constant and sustained by Internet exposure of new cases, issues, proposed reforms, and new programs. Slowly, but in significant measure, courts, legislatures, and disciplinary authorities have responded to the call for enhanced accountability

measures. One cannot predict the future, but the inevitable increase in the sources, availability, and dissemination of information suggests that at the very least, information technology will continue to fuel a movement toward expanded judicial, legislative, and disciplinary regulation of prosecutors and attention to systemic changes in the role of prosecutors in our criminal justice system.