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.”

INTRODUCTION

Given prosecutors’ extraordinary power, it is important that they be effectively regulated and held accountable for misconduct. Although prosecutors perceive that they are in fact well-regulated, if not over-regulated, 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.\textsuperscript{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."\textsuperscript{6} The New York Times editorial page has criticized discovery abuse by the New Orleans prosecutor’s office.\textsuperscript{7} Significantly, conservative publications have roundly condemned prosecutorial misconduct and urged elevating the problem to the national political agenda.\textsuperscript{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."\textsuperscript{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

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Judge Kozinski’s 2013 declaration that there is a national “epidemic” of prosecutorial misconduct.  

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)).


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, but more often, courts expressed faith in the
general integrity of individual prosecutors and their offices.

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. Three decades later, even as the Warren Court expanded protections against police abuse, it did not question criminal procedure law’s underlying “confidence in the integrity of the federal prosecutor.” Later Supreme Court jurisprudence, building upon *Brady v. Maryland*, 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. Further, the Warren Court left other large and important swaths of

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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)).


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)).

20 375 U.S. 83 (1965). 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.\textsuperscript{22}

Thus, the Warren Court’s criminal procedure revolution largely overlooked prosecutors. The Court evidently regarded prosecutorial misconduct as a rare and individual problem,\textsuperscript{23} not one, like police investigative conduct, requiring sweeping reform.\textsuperscript{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.\textsuperscript{25} That level of confidence is apparently shared by most current-day Justices, including another former local prosecutor, Justice Sonia Sotomayor.\textsuperscript{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

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  \item 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, \textit{Judicial Power to Regulate Plea Bargaining}, 57 Wm. & Mary L. Rev. 1225, 1253 (2016).
  \item 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))).
  \item 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”).
  \item See Yale Kamisar, \textit{How Earl Warren’s Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice}, 5 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, \textit{Chief Justice: A Biography of Earl Warren} 48 (1997))).
  \item See, e.g., Callhoun 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).
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1985, surveyed a wide range of prosecutorial misdeeds. Other academics, joined by some practitioners, also surveyed prosecutors’ misconduct or targeted wrongdoing in aspects of prosecutors’ work, such as misconduct in discovery, jury arguments, or other phases of the trial.

Some academic writings identified apparent patterns of misconduct among prosecutors within a specific jurisdiction. Some suggested that the tendency to commit misconduct may be intrinsic to the role of a lawyer for the prosecution in an adversarial system, while others attributed this tendency to prosecution cultures that value winning cases or convicting criminals over playing by the rules. 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.” However, these critics’ accounts were largely

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).
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-

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 harmful or unintentional”).
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. 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.

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. 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 error and that actual misconduct by prosecutors that is significant and intentional is exceedingly rare.

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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) (A.M. 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.


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-

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47 *See*, e.g., Gersham, *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/20101005/28585584437709 (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.


*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

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/01detroit.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, initiate contempt findings, recommend the institution of formal disciplinary proceedings, and afford remedies for harms caused by some professional misconduct. Furthermore, some have suggested that naming prosecutors in judicial opinions would lead to greater accountability. 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.


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

See, e.g., D. Minn. Local R. 83.6; see generally Green, supra note 54, at 345, 389; Rosen, supra note 29, at 697.

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. Nemehhard, 676 F.2d 193, 200 (6th Cir. 1982), cert. denied, 464 U.S. 801 (1983))); United States v. Campagnuolo, 392 F.2d 852, 865 (5th Cir. 1967) (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.”).

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, 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’ zealousness and therefore were indisposed to hold the prosecutor accountable. Appellate courts sometimes admonished the prosecution but they almost universally refused to overturn convictions unless the improper argument was prejudicial and evidence of guilt was thin. In general, courts assumed that prosecutorial misconduct was primarily the province of internal office regulation or perhaps of attorney disciplinary agencies.

In 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. 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.

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).

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.”).


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).

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.

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))).


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)).


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.

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


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.”).


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/its-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


\(^{83}\) Id. at 4–5.


\(^{85}\) United States v. Olsen, 704 F.3d 625 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc).


\(^{87}\) 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).
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-
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. 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. 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.

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.”).


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


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 overcharged[,]” 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-swarz.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.\footnote{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.\footnote{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.\footnote{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.\footnote{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


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), https://nsnbcc.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).
122 Id.
124 Id.
ment’s key witness."\textsuperscript{125} Although Judge Sullivan ultimately settled for referring the prosecutors to the Justice Department’s internal disciplinary process,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{129} In other cases, federal courts have targeted state prosecutors’ misconduct and called upon Attorney General Kamala Harris to respond.\textsuperscript{130}

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

\textsuperscript{130} Maura Dolan, \textit{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 \textit{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, \textit{For Shame}, State (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 \textit{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. He advocated judicial oversight of plea bargaining, which current federal procedure rules foreclose. 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. 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. 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.

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. On the state level, the most notable reforms owe much to

132 Id. at 8.
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_47518f4e-03e3-8c7c-5696-8cc20ddd78bd9b1
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. 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. Amid extensive national and international news coverage, the charges were dropped, and the following year, Nifong was brought up on disciplinary charges. He was ultimately disbarred for, among other things, withholding exculpatory DNA evidence, dishonesty, and making improper public comments. 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. It also created an Innocence Inquiry Commission to investigate and evaluate post-conviction claims of innocence.

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. In an unusual procedure, a Texas court ordered a judicial inquiry into the con-


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_exculpat


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 adjudication.” Janet Moore, Democracy and Criminal Discovery Reform After Connick and Garcetti, 77 BROOK. L. REV. 1329, 1332 (2012).


duct of the prosecutor, who by then was a sitting state judge.\textsuperscript{144} The former prosecutor was jailed and disbarred after a finding that he had engaged in serious, willful misconduct.\textsuperscript{145} In turn, the Texas legislature, without organized opposition or complaint from state and local prosecutors,\textsuperscript{146} liberalized state criminal procedure rules governing prosecutors’ disclosure. The Michael Morton Act significantly expands discovery both pretrial and post-conviction.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{151} But proponents of the Commission collected examples of prosecutorial wrongdoing in New York and nationally to illustrate the need

\textsuperscript{144} Id.
\textsuperscript{148} Green, supra note 3, at 641–42.
\textsuperscript{149} See id. at 655.
for it, and not-for-profit groups, in addition to representatives of the criminal defense bar, joined in support.

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. 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. 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.

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-

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.").
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. 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. More than a dozen state courts have adopted versions of these provisions and others are considering whether to do so.

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 unsupportive. In Tennessee and Wisconsin, institutional representatives of state prosecutors affirmatively endorsed the courts’ adoption of state versions of the new provisions. 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-


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. 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. The opinion has proven controversial, as some federal and state prosecutors have challenged the ABA’s interpretation, sometimes successfully.

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. 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].

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. 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. The Department of Justice secured judicial review of the bar opinion, but when the Kentucky Supreme Court confirmed the opinion...

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**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).


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

Just as significant, disciplinary enforcement has begun to expand in at least some jurisdictions in recent years. Highly publicized examples include Michael Nifong’s disbarment in connection with the Duke Lacrosse case and the disbarment and jailing of Judge Ken Anderson in the Michael Morton case. Other notable examples similarly involved prosecutors’ alleged suppression of evidence: disciplinary proceedings were instituted against federal prosecutors Andrew Kline in Washington, D.C., and Jeffrey Auerhahn in Boston, 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. 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, to the disbarment of the Kansas attorney general, to the suspension of the Pennsylvania attorney general and to the suspension of the Delaware deputy attorney general.

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 105 (1st Cir. 2013).
179 In re Kline, 311 P.3d 321 (Kan. 2013).
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” 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. 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. Most recently, as noted, the Department responded to an adverse state court

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

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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.


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.


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.\textsuperscript{194} Others have the similar potential to develop robust practices and procedures to prevent wrongful convictions.\textsuperscript{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 \textit{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
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

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 209 (Leslie C. Levin & Lynn Mather eds., 2012).
200 See, e.g., Editorial, supra note 100.
other laws and practices. More likely, as others have noted with regard to police shootings, 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. 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. 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.

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)).


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.


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

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-


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).


ence.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-


215 See supra notes 117–19 and accompanying text.


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. 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.” The resulting harsh sentences, especially for drug offenses, elicited judicial and public criticism.

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. 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.

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


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 CARM. 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. 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. 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. Forfeiture of assets, penalties, and fines often result in serious negative consequences for those involved with the criminal justice system. Increasingly, prosecutors are urged to ameliorate these harsh consequences by referring individuals to diversion programs in lieu of filing criminal charges, considering immigration and other consequences in

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 practice\(^ {231}\) 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-
als.\textsuperscript{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.\textsuperscript{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 Project\textsuperscript{237} 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


\textsuperscript{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.” \textit{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.’” \textit{Id.} at 91–92 (alteration in original) (quoting United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923)).

\textsuperscript{237} By 2000, there were ten innocence organizations or programs, primarily in law school clinics, that met to hold the first Innocence Network Conference. \textit{See About the Innocence Network, Innocence Network}, http://innocencenetwork.org/about (last visited Oct. 19, 2016); \textit{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); \textit{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. 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.

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. 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.”


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 exonerations 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. 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 Gershman and H. Richard Uviller. 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, Michael Cassidy, Kevin McMunigal, Laurie Levenson, Daniel Richman, and Paul Butler. Former criminal defense lawyers and others have also focused on aspects of prosecutors’ work.

242 Perhaps the most prominent contrary example is Bennett L. Gershman’s treatise, Prosecutorial Misconduct, supra note 27, first published in 1985.


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


251 See, e.g., Rachel E. Barkow, Prosecutorial Administration: Prosecutor Bias and the Department of Justice, 99 Va. L. REV. 271 (2013); Josh Bowets, 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’ behavior—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. 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.

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” and “hindsight bias,” 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.

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).

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).

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

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

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.

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.

Scholars have written about the impact of these biases on prosecutorial as well as police decisionmaking, including in wrongful conviction cases such as the well-known Central Park Jogger and the Duke Lacrosse cases. 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. These tendencies have an even greater impact following a conviction, given the psychological difficulty of acknowledging one’s possible


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. & Lib. 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).


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. 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. 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. Reformers now spring into action when prosecutorial misconduct comes to light, especially in high-profile cases such as the Ted Stevens prosecution and portray each new example as the lat-
test in a string of similar prosecutorial misdeeds. Most recently, in the wake of the Orange County prosecutor’s scandal, 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.

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. 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. 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. The NACDL has targeted prosecutorial conduct as an aspect of

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271 See, e.g., THE CONSTITUTION PROJECT, A CALL FOR CONGRESS TO REFORM FEDERAL CRIMINAL DISCOVERY 1 (2012), http://www.constitutionproject.org/pdf/BradyStmt_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.legislature.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.


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


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 unvalidated and unreliable forensic science, and improving systems to deter government misconduct.


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, 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.”

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. So can not-for-profit reform groups.


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-fedral-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.\footnote{See, e.g., Armstrong & Possley, supra note 34; Weeks, supra note 29 (examining Brady violations).} 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.\footnote{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/usa1313_ForUpload_0_0_0.pdf.} One law school has even made prosecutorial misconduct a separate subject of academic study.\footnote{See James R. Elkins, Course on Prosecutorial Misconduct, http://myweb.wnet.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).} 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.\footnote{See, e.g., Keenan et al., supra note 78.} 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.\footnote{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.} 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.\footnote{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-consequences_of-prosecutorial-misconduct.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).} 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.
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 office and to note similar misconduct in other jurisdictions. 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.

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. Citizen journalism has allowed interested individuals to employ press tools to inform one another. 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 misconduct

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.


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 COULDN’T 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.


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.”).


306 See Human Rights Watch, supra note 287.

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


310 See Balko, supra note 99.

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, dis-
ciplinary authorities, editors and reporters, and voters can have different atti-
tudes 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 skepti-
cal, 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, prima-
rily 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 mis-
conduct, however conceived, is prevalent and systematic or whether it is unu-
usual 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 prosecu-
tors 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 govern-
ment, 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 jurisdic-
tion, 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

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 and United States v. Bowen. 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. 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.’” 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.

In stark contrast, the district judge in Bowen initiated an inquiry that became a “legal odyssey” into the prosecutors’ conduct. 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.”

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

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).
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.
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).
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.\footnote{See supra notes 61–65 and accompanying text.}

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.\footnote{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).} The federal prosecution did so unsuccessfully in \textit{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,\footnote{See Green, supra note 4, at 892–903.} in opposing an interpretation of the discovery pro-
vision to go beyond the constitutional requirement,\textsuperscript{343} and in opposing proposed legislation on federal criminal discovery.\textsuperscript{344} Some state and local prosecutors have pushed back in similar ways.\textsuperscript{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.\textsuperscript{346} The revision of federal discovery policy after the collapse of the Ted Stevens prosecution is a recent example.\textsuperscript{347} State prosecutors’ establishment of Conviction Integrity Units is a comparable response, in part, to regulatory pressures.\textsuperscript{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.

\section*{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

\textsuperscript{343} See Brief for the United States as Amicus Curiae in Support of Appellee Jeffrey Auerhahn, \textit{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, \textit{In re} Kline, 113 A.3d 202 (D.C. 2015) (No. 11-BD-007).

\textsuperscript{344} See \textit{Green}, supra note 3, at 641–42.

\textsuperscript{345} See \textit{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.njjusticetaskforce.com/pdfs/Criminal-Discovery.pdf.


\textsuperscript{347} See supra note 185 and accompanying text.

\textsuperscript{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, lists, 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.