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Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct

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Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct

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Lawyers often refer to criminal litigation as a war between competing adversaries. Yet, one of the central tenets of the law of war – the doctrine of command responsibility – has not been applied to criminal litigation. Under the doctrine of command responsibility, military commanders are held responsible for the misconduct of their subordinates that they knew or should have known would occur. The purpose of the command responsibility doctrine is to ensure that supervisors develop an atmosphere of compliance by training subordinates to avoid misconduct. This article applies the doctrine of command responsibility to civilian prosecutors holding supervisory positions. We argue that instances of prosecutorial misconduct can be reduced by imputing liability to supervising prosecutors who fail to create a culture of ethical compliance and therefore should have known that misconduct could occur.

Prosecutors hold enormous power in the American criminal justice system and are subject to numerous ethics rules to guide them in exercising that power. These ethics rules are taught in law school classes and reiterated in continuing legal education courses. Yet, simply teaching junior prosecutors to comply with the rules is insufficient. Leadership by senior supervising prosecutors is essential to helping junior prosecutors to avoid the pitfalls of prosecutorial misconduct. Effective hands-on leadership by supervising prosecutors

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4 See id. at 997-98.
5 See id. at 998, 1016 (“Leadership by head prosecutors could do more to create and shape office culture, values, norms, and ideals . . . . Telling a prosecutor to behave
establishes a professional environment where ethical behavior can flourish so that prosecutors can “do justice.”

Few would dispute the importance of leadership in ensuring ethical behavior of prosecutors. However, leadership involves more than merely emphasizing certain standards of conduct for subordinates; it requires accountability. Unfortunately, accountability is largely absent from the professional responsibility framework. While individual prosecutors who violate ethical limits may face sanction, the ethics rules provide no mechanism to impute responsibility for misconduct to supervisors who have failed to create a culture of ethical compliance.

The lack of accountability for supervising prosecutors stands in stark contrast to another adversarial context that also involves broad individual discretion: war. Lawyers often borrow generously from military terminology to equate the adversarial system with war. And there is good reason for the analogy. Like the

ethically and consistently is far less fruitful than creating an environment that expects, monitors, and rewards ethical, consistent behavior.”).

6 See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 4 (2007); (quoting the “justice is done” inscription on the U.S. Department of Justice but noting that many prosecutors focus exclusively on winning); Nedra Pickler, Attorney General Holder Tells Prosecutors to “Do the Right Thing”, ASSOC. PRESS, Apr. 9, 2009 (“Your job as assistant U.S. Attorneys is not to convict people. . . Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored.”).

7 See THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW 2 (2009) (“In all aspects of the criminal justice system, there is a dangerous and pervasive lack of prosecutorial accountability.”).

8 See DAVIS, ARBITRARY JUSTICE, supra note 6, at 16; Margaret Z. Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 BYU L. REV. 53, 68 (“Even when the appellate court reverses a conviction on grounds of prosecutorial misconduct, the prosecutor who engaged in the misconduct generally escapes any repercussions.”).

9 The possibility of sanction is remote however because individual prosecutors are rarely disciplined. See Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. REV. 693, 697 (1987) (“[D]isciplinary charges have been brought infrequently.”).

10 Model Rule of Professional Conduct 5.1 provides for supervising lawyers to be accountable only if the superior orders or ratifies the conduct of if she “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.” While this may initially sound sweeping, Rule 5.1 “is seldom read, enforced, or mentioned in disciplinary proceedings. Although intended to impose an affirmative duty to supervise the work of subordinates . . . Rule 5.1 avoids the imposition of vicarious liability for the actions of other attorneys.” Rachel Reiland, The Duty to Supervise and Vicarious Liability: Why Law Forms, Supervising Attorneys and Associates Might Want To Take a Closer Look at Model Rules 5.1, 5.2, and 5.3, 14 GEO. J. LEGAL ETHICS 1151, 1153 (2001).
soldier, the prosecutor is embroiled in an intense adversarial process. Also like the soldier, the prosecutor performs her function to achieve societal goals. And just like the soldier, the prosecutor operates in an environment that requires the exercise of broad discretion that is limited by rules of conduct even during the most intense battles. In this regard, both the soldier and prosecutor must embrace the fundamental tenet that “how we fight” is as important as “what we fight for” and that the ends do not always justify the means.

Yet, while the similarities between the prosecutor and the soldier are great, there is a key difference. In the realm of war it has long been understood that the atmosphere of compliance created by the superior is the most significant influence on subordinate conduct. Because of this, the doctrine of command responsibility emerged to ensure that commanders risk personal criminal responsibility for failing to establish an environment of compliance. The doctrine of command responsibility imposes criminal responsibility on military commanders not only for the misconduct of subordinates procured by the commander, but also for misconduct the commander did not but should have known would occur. The “should have known” standard subjects commanders to criminal responsibility when their own failure to inculcate an appreciation of the significance of compliance produces subordinate misconduct. The law thereby creates an incentive for commanders to provide meaningful training, to promptly respond to indications of deviation from legal standards, and to maintain “situational awareness” of subordinate conduct.

The time has come to apply the lessons of the battlefield to the criminal justice process. Accordingly, this article proposes the adoption of a rule of imputed ethical responsibility for supervisory prosecutors. Like the doctrine of command responsibility, this rule will impose vicarious liability for the ethical violations of subordinates when evidence establishes that a supervisor “should have known” such a violation was likely to occur. The purpose of the rule is not to engage in witch hunts every time an ethical violation occurs. Instead, like the law of war, the purpose is to ensure that supervisory prosecutors embrace their responsibility to develop a culture of ethical compliance within their organizations.

Part I of this article briefly discusses the enormous power held by prosecutors and explains how prosecutors often engage in inadvertent misconduct. Part II then reviews the numerous efforts to cabin prosecutorial misconduct and explains why they have failed. In Part III, we begin to lay out our framework for an alternate proposal that looks to the law of war as a guide for eliminating

11 See infra notes 172-76 and accompanying text.
12 See infra notes 148-155 and accompanying text.
13 See infra notes 156-58 and accompanying text.
14 See infra note 161 and accompanying text.
15 See infra notes 159-60 and accompanying text.
prosecutorial misconduct. Part III explores the analogy between the prosecutor and the warrior. Part IV then describes the doctrine of command responsibility that exists in the law of war by which supervisors are held responsible for misconduct of their subordinates that they knew or should have known would occur. Finally, Part V applies the doctrine of command responsibility to supervising prosecutors and responds to anticipated criticisms.

I. Enormous Prosecutorial Power Leads to Misconduct

A. Prosecutors Hold Enormous Power From Start to Finish

Prosecutors are the most powerful actors in the criminal justice system.\(^{16}\) That power stems from prosecutors’ enormous discretion.\(^ {17}\) As scholars have long recognized, criminal codes are extremely expansive because legislatures regularly add more offenses to the code but rarely remove crimes from the books.\(^ {18}\) The result is that prosecutors have a large menu of crimes to choose from in bringing charges.\(^ {19}\) And while prosecutors’ charging decisions may be bound by strong internal regulations in some offices,\(^ {20}\) they are almost

\(^{16}\) For a thorough discussion of that power, see Davis, Arbitrary Justice, supra note 6.


\(^{19}\) See Daniel C. Richman & William J. Stuntz, Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 Colum. L. Rev. 583, 629-30 (2005) (“Federal law enforcers decide whom to send up the river, then select the appropriate [federal statutes] from the menu in order to induce a guilty plea with the desired sentence.”).

\(^{20}\) While our instinct is to dismiss rules that cannot be enforced by external entities, Professors Wright and Miller have persuasively argued that such rules can be effective. See Marc L. Miller & Ronald F. Wright, The Black Box, 94 Iowa L. Rev. 125 (2008) (arguing that internal regulations are ignored by most scholars and that such regulations can succeed at providing greater predictability and consistency that external
completely unregulated by external authorities. The Supreme Court has been very clear that it will not interfere with prosecutors’ charging decisions, and it has made claims of selective prosecution almost impossible to assert. Indeed, even professional ethics rules have little to say about prosecutors’ broad charging discretion. And the standard to bring charges is quite low. Under the Model Rules of Professional Conduct, prosecutors need only believe that they have probable cause that the defendant committed the crime. Put simply, if prosecutors decide that an individual should be brought within the crosshairs of the criminal justice system, there is little to stop them.

Beyond their initial charging power, prosecutors have the power to plea bargain with defense attorneys. This authority is particularly important in jurisdictions with determinate sentencing schemes because prosecutors can agree to guilty pleas with full knowledge of what sentence is likely to be imposed. Prosecutors can charge, bargain and add or subtract offenses in order to reach the

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21 See JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 3.01 (3rd ed. 2003) (“The decision to charge is virtually unfettered by any significant judicial restraint.”).


23 For instance, there is no specific Model Rule governing prosecutors’ conduct before grand juries and when such a rule was proposed it was defeated by prosecutors’ lobby. See infra notes 190-91 and accompanying text.

24 See Model Rule 3.8(a). This rule is the subject of vigorous debate. For an argument that prosecutors should have to be morally certain that defendants are factually and legally guilty before proceeding to trial, see Bennett Gershman, A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion, 20 FORDHAM URB. L.J. 513, 522-23 (1993) For an endorsement of a lower standard in which prosecutors need not personally believe the defendant guilty but only believe that the jury could fairly find as such, see H. Richard Uviller, The Virtuous Prosecutor in Quest of an Ethical Standard, 71 MICH. L. REV. 1145, 1155-59 (1973).

25 See generally DAVIS, ARBITRARY JUSTICE, supra note 6, at 43-59.

26 As Professor Albert Alschuler recognized over thirty years ago, fixed sentencing system give enormous (and, in his view, undue) power to prosecutors. See Albert W. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of “Fixed” and “Presumptive” Sentencing, 126 U. PA. L. REV. 550 (1978).
prison sentence they desire. This effectively transfers judges' and juries' sentencing power to prosecutors. Even in states with indeterminate sentencing schemes, prosecutors have tremendous power to fix a particular sentence through plea bargaining. Because dockets are congested and judges are busy, prosecutors' sentencing deals are usually accepted by judges. Moreover, as every criminal defendant knows, refusing to plea bargain carries a trial penalty whereby prosecutors seek (and usually attain) longer sentences for defendants who gambled on trial and lost. And prosecutors have authority to make exploding offers on plea bargains, demanding that the defendant plead guilty within a short period of time or lose the offer in the future.

Prosecutors also have enormous power during the discovery process. Prosecutors are obligated to turn over evidence to the defendant that is both favorable and material. Yet, judges do not oversee such discovery unless a dispute is brought to their attention. Prosecutors are therefore on their own in

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27 See id. at 567 ("Under a fixed sentence regime, bargaining about the charge would be bargaining about the sentence. A nonjudicial officer would determine the exact outcome of every guilty plea case, and every defendant who secured an offer from a prosecutor in the plea bargaining process would be informed of the precise sentence that would result from his conviction at trial and also of the precise lesser sentence that would result from his conviction by plea.").

28 See Jeffrey A. Standen, Plea Bargaining in the Shadow of the Guidelines, 81 CAL. L. REV. 1471, 1506 (1993) ("[B]ecause the guidelines constrain the discretion of the judge, they render prosecutorial discretion much more significant.").

29 See Wright, How Prosecutor Elections Fail Us, supra note 18, at 587 ("The caseload would become overwhelming if judges balked regularly at proposals to remove a case from the trial docket."); Albert W. Alschuler, The Trial Judge’s Role in Plea Bargaining, Part I, 76 COLUM. L. REV. 1059, 1065 (1976) (observing plea bargaining in large cities and explaining that judges accepted almost all of the Government’s sentencing recommendations).

30 See Jeffrey T. Limer & Mindy S. Bradley, Variations in Trial Penalties Among Serious Offenders, 44 CRIMINOLOGY 631, 650-52 (2006) (finding that Pennsylvania defendants who went to trial received sentences 57% longer than those who plead guilty).

31 See Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2463, 2470-71 (2004) (discussing prosecutors’ incentives to limit their workloads by disposing of cases through plea bargaining before substantial amounts of work have to be done).

32 See Michael M. O’Hear, Plea Bargaining and Procedural Justice, 42 GA. L. REV. 407, 425 (2008) (“Even when plea bargaining takes on a more adversarial character, there tends to be massive power imbalances between prosecutors and defendants. In light of such considerations as transaction costs and judicially imposed trial penalties, few defendants are willing to go to trial.”);


34 Violations of the so-called Brady doctrine are typically uncovered post-trial. See Scott E. Sundby, Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland, 33 MCGEORGE L. REV. 643, 661 (2002) (explaining that “Brady is not a
determining what evidence should be turned over. This is a crucial responsibility and no easy task given that prosecutors often do not know what strategy the defense team will employ at trial and therefore what evidence would be material.35

As trial draws closer, prosecutors continue to wield vast power. If a key witness is an accomplice or otherwise in trouble with the criminal justice system, prosecutors can strike deals and even grant immunity from prosecution, a power not held by any other actor in the system.36 Prosecutors also have much greater access to witnesses who are not in legal trouble. They can call on police and investigators to locate such witnesses, a resource that most indigent defense lawyers are lacking.37 And once located, witnesses are often much more willing to cooperate with prosecutors than with defense lawyers.38 Prosecutors are then in a position to sculpt witnesses’ testimony (within ethical rules, of course39) in a way that will improve their persuasiveness when they eventually reach the witness stand.40

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36 See DAVIS, ARBITRARY JUSTICE, supra note 6, at 52-56.


38 During the trial of Ken Lay and Jeff Skilling stemming from the collapse of Enron, the defendants complained that prosecutors silenced numerous witnesses through intimidation by listing nearly one-hundred individuals as unindicted co-conspirators. See Mary Flood, The Enron Trial: Only Two Defendants, But Many Accused: Government Will Cite Nearly 100 Unindicted Co-Conspirators, HOUS. CHRON., Jan. 27, 2006, at A1 (explaining that unindicted co-conspirators “actually helps prosecutors” because “[i]n some cases, people learn they have been named as unindicted co-conspirators and could be scared into silence, especially when they have something to say that could help a defendant”).

39 Unfortunately, a survey of judges, public defenders, and state’s attorneys found that “fifteen percent of respondents believe that prosecutors ‘encourage’ police perjury” by steering police testimony. Myron W. Orfield, Jr., Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. COL. L. REV. 75, 110 (1992). Equally unfortunate is that there is likely considerable additional police perjury that is committed without prosecutors’ encouragement. See, e.g., Morgan Cloud, The Dirty Little Secret, 43 EMORY L.J. 1311 (1994). While prosecutors do not encourage most police perjury, it certainly adds to the power imbalance they hold in the criminal justice system.

40 As Professor Bennett Gershman has explained, “there is nothing wrong with a prosecutor assisting a witness to give testimony truthfully and effectively.” Bennett L.
Once the day of trial arrives, prosecutors continue to have certain powerful advantages. Prosecutors will often be presenting the case to the same judge who they appear in front of every day of the week. These prosecutors will have a good sense of which arguments are persuasive to that judge. If the prosecutor is lucky, she may have formed a good relationship with that judge and may benefit if the judge (perhaps subconsciously) leans her way on close legal rulings regarding admission of evidence and jury instructions. Finally, and probably unquantifiably, prosecutors likely receive an added boost by being able to stand in front of the jury and say that they represent the United States or the State.

In sum, from the moment of charging until the end of closing statements, prosecutors wield enormous and unmatched power both inside and outside the courtroom.

B. Inadvertent Misconduct Lies Around Every Corner

With enormous power comes enormous responsibility. As we explain below, prosecutors face so many competing demands for their time and attention that mistakes and misconduct are inevitable. Most prosecutors do not set out to commit misconduct but, instead, do so inadvertently.

First and most importantly, prosecutors have a tremendous amount to learn. On the legal side, junior prosecutors must become familiar with the ins and outs of the criminal code (something rarely taught in law schools) as well as numerous federal and state constitutional rules of criminal procedure that always seem to be changing. On the trial advocacy front, prosecutors must

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42 See id. at 270 (noting the sense of “collaboration” and “team spirit” between a judge and “her prosecutor” and that “[e]ven the most conscientious judge may begin to form a bond with a prosecutor who she privately sees routinely in her chambers”).

43 Anecdotally, consider the remark of one well regarded prosecutor turned professor that “as a practicing prosecutor for nearly five years, she was unaware of any discovery obligations beyond those articulated in Brady and the local rules of criminal procedure.” Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 498 n.98 (2009).


45 For instance, during a random Tuesday in April, the Supreme Court dramatically changed the scope of the search incident to arrest doctrine in its decision in *Arizona v. Gant*, 129 S.Ct. 1710 (2009). Prosecutors who had been relying on the bright line rule
learn techniques for direct and cross examination, opening statements, closing arguments, as well as selecting a favorable jury. Then there is the task of learning which plea bargain offers are appropriate for dozens of different types of crimes, as well as informal office culture for dealing with defense lawyers and judges. And on top of this, many district attorneys’ offices are terribly overburdened, forcing prosecutors to handle excessive caseloads. In short, junior prosecutors have an overwhelming amount to do and learn and there are only so many hours (and training sessions) in a day to do so.

The truly committed prosecutors allow the job to consume their lives, working nights and weekends for no additional pay. These assistant district attorneys spend their free time not only on the cases they must try but on the various other background items – learning the code, the criminal procedure rules, what to do in difficult ethical situations, and a host of other things – on their own time. We might hope – though we cannot really be sure – that these truly committed prosecutors will be the least likely to engage in prosecutorial misconduct. Regardless of whether that is true though, the real problem is that

announced in New York v. Belton, 453 U.S. 454 (1981) almost thirty years ago, were forced to re-assess suppression motions and respond to defense attorneys who began invoking the case almost instantly.

46 See Michael M. O’Hear, Plea Bargaining and Victims: From Consultation to Guidelines, 91 MARQ. L. REV. 323, 335 (2007) (“Field studies demonstrate the existence of well-established “going rates” for different categories of offense and offender. Thus, experienced lawyers are already accustomed to sorting out cases based on a limited number of variables[].”)


49 See, e.g., STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 81-82 (2005) (describing junior prosecutor working late into the night on his closing argument).

50 Professor Alafair Burke and others have raised the question of whether much prosecutorial misconduct may be more attributable to cognitive bias than intentional malfeasance. See Burke, Revisiting Prosecutorial Disclosure, supra note 43, at 492-98 (discussing why ethical prosecutors may fail to properly disclose evidence); see also Susan Bandes, Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision, 49 HOW. L.J. 475 (2006) (focusing on prosecutors acting in good faith and how their loyalties affect them); Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. REV. 125, 138-48 (2004) (discussing how office culture, training,
the ultra-committed, in-it-for-the-long-haul prosecutors are the exception, not the rule. Scholars have recognized that many junior prosecutors intend to work as assistant district attorneys for a few years right after law school before transitioning into private employment.\(^{51}\) While these “transitory” prosecutors have no incentive or desire to commit misconduct,\(^ {52}\) they also may lack the desire to spend their few hours of free time proactively immersing themselves in the multitude of legal and ethical questions they will face during the few years they serve as assistant district attorneys. Moreover, because many district attorneys’ offices reward trial victories,\(^ {53}\) junior prosecutors have an incentive to spend their time honing their litigation skills rather than thinking their way through abstract ethical quandaries.\(^ {54}\)

The result of these enormous burdens and time pressures is that misconduct occurs. Not because most prosecutors are evil, overly results oriented,\(^ {55}\) or intentionally\(^ {56}\) seeking to cheat. Misconduct often occurs inadvertently because there is too much for prosecutors to know and insufficient training to avoid and interaction with victims and police contributes to a conviction psychology that promotes resistance to post-conviction claims of innocence). Career prosecutors are certainly not immune from (and may actually be more susceptible to) cognitive bias.

\(^{51}\) See Gerald Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2149 (1998) (“Some are career civil servants, who join a prosecutor’s office shortly after admission to the bar, and remain in that role essentially for the rest of their career. Others, who might also join the staff at a very young age, are more transient, seeking a few years of excitement, public service, or intense trial experience before pursuing private sector opportunities as criminal defense lawyers or civil litigators.”). In the federal system, tenures are longer, up to eight years on average. See Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in the United States Attorney’s Offices: The Rose of U.S. Attorneys and Their Assistants*, 23 JUST. SY$. J. 221, 282 (2004).

\(^{52}\) To the contrary, transitory prosecutors have a desire to avoid blatant misconduct that could adversely affect their future career prospects. See Gershowitz, *Prosecutorial Shaming*, supra note 1, at 136.

\(^{53}\) See Medwed, supra note 50, at 134-37 (explaining how office culture can place a lot of importance on higher conviction rates for career advancement).

\(^{54}\) For a discussion of the myriad incentives facing line prosecutors, see Bibas, *Plea Bargaining Outside the Shadow*, supra note 31, at 2470-76.

\(^{55}\) But see Zacharias, *Professional Discipline*, supra note 2, at 757 n.123 (“[O]ffending prosecutors typically engage in misconduct not for reasons of personal gain but because they are seeking to convict defendants they honestly believe should be convicted.”).

\(^{56}\) In 1999, the Chicago Tribune wrote an excellent expose on misconduct in the Cook County District Attorney’s Office and detailed how many prosecutors have had cases reversed for misconduct but were subsequently promoted. See Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at A1. One of the prosecutors subsequently wrote a compelling letter to the editor explaining that while one of his cases had been reversed for failure to disclose evidence, any error was due to “inadvertence” and not a “deliberate suppression of evidence.” See Virginia L. Ferrera, *Former Prosecutor Disputes Report*, CHI. TRIB., Feb. 9, 1999, at 14.
misconduct. The potential misconduct runs the gamut from failing to turn over favorable evidence, to striking jurors based on impermissible criteria, to making improper jury argument, to name just a few.

And unfortunately, prosecutorial misconduct is likely pervasive. At the outset, it is important to recognize that because most defendants plead guilty and waive their appellate rights, much misconduct is likely never uncovered. Yet, despite the difficulties of discovering misconduct, media outlets have documented widespread violations. In a recent study, the Center for Public Integrity identified more than 2,000 cases in which prosecutorial misconduct played a role in dismissed charges or reversing convictions or sentences. Focusing solely on homicide cases, the Chicago Tribune found almost 400 cases in which courts threw out charges because prosecutors failed to turn over exculpatory evidence or knowingly used false evidence. The authors of the Tribune study speculated that those reversals accounted for “only a fraction of how often prosecutors commit such deception – which is by design hidden and can take extraordinary efforts to uncover.”

57 See Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 FORDHAM L. REV. 723, 767-69 (1999) (discussing the lack of ethics training provided by prosecutors’ offices); see also Alexandra White Dunahoe, Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors, 61 N.Y.U. ANN. SURV. AM. L. 45, 63 (2005) (“[A]ssistant prosecutors generally have less training and experience prosecuting criminal cases. Consequently, assistants are, for the most part, less familiar with state and federal constitutional strictures applicable to law enforcement, and more susceptible to inadvertent constitutional violations.”); Jamison v. Collins, 100 F. Supp. 2d 647, 673 (S.D. Ohio 2000) (granting writ of habeas corpus in capital case because prosecutors failed to turn over exculpatory evidence and noting that the two lead prosecutors stated in their depositions that “they received no training from the Hamilton County Prosecutor’s Office as to what constituted exculpatory evidence”).

58 For meticulous discussions of the different types of misconduct, see BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT (2007); LAWLESS, PROSECUTORIAL MISCONDUCT, supra note 21.

59 See DAVIS, ARBITRARY JUSTICE, supra note 6, at 127 (“Of course, there is no opportunity to challenge any misconduct in the over 95% of all criminal cases which result in a guilty plea, since defendants give up most of their appellate rights when they plead guilty.”).

60 See THE CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA’S LOCAL PROSECUTORS 3 (2003)

61 See Armstrong & Possley, The Verdict: Dishonor, supra note 56, at 1.

62 Id. See also Bill Moushey, Out of Control: Legal Rules Have Changed, Allowing Federal Agents, Prosecutors to Bypass Basic Rights, PITT. POST-GAZETTE, Nov. 22, 1998, at A1 (reviewing numerous cases).
Put simply, although the vast majority of prosecutors have no desire to violate constitutional, statutory, or ethical rules, prosecutorial misconduct is pervasive.

II. Reasons Why Prosecutorial Misconduct Continues To Occur

That prosecutorial misconduct exists is not controversial. The more difficult question is why it has not been substantially reduced. As we explain below, the traditional remedies that should deter government actors are lacking or not enforced with respect to prosecutors.

A. The Nearly Complete Absence of Criminal Liability for Prosecutors

Starting first with the most serious sanction, assistant district attorneys are almost never criminally prosecuted for their misconduct. Given that much misconduct is inadvertent, it would be difficult to prove the necessary mens rea to hold prosecutors criminally responsible.

And even if proof of intentional misconduct were available, the fate of misbehaving prosecutors would lie in the hands of their brethren – other prosecutors – to bring them to justice. Given the convincing research that lawyers rarely turn in their peers, it seems likely that most criminal charges of prosecutorial misconduct would be dismissed or otherwise made to quietly disappear by the district attorneys charged with handling the cases. Not surprisingly, the Chicago Tribune found that of nearly 400 homicide convictions reversed for using false evidence or withholding exculpatory evidence, only two

63 See Shelby A.D. Moore, Who Is Keeping the Gate?: What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn To Uphold, 47 S. TEX. L. REV. 801, 808 (2006) (explaining that sanctions are “seldom employed”). Professor Moore proposes that federal civil rights and obstruction of justice statutes be used to charge prosecutors who engage in intentional misconduct. See id. at 826-47.


65 See Maurice Possley & Ken Armstrong, Prosecution on Trial in DuPage, CHI. TRIB., Jan. 12, 1999, at N1 (explaining how in a study of 381 homicide convictions that were reversed over thirty-six years because prosecutors used false evidence or withheld exculpatory evidence “not a single prosecutor in those cases was brought to trial for the misconduct” and that “[o]nly two of those cases even resulted in charges being filed and, in both instances, the indictments were dismissed”).
prosecutors were every criminally charged and in both cases the indictments were dismissed.  

B. The Almost Complete Absence of Civil Liability for Prosecutors

A second mechanism for reigning in misconduct – civil liability – has been equally unsuccessful. Courts have cloaked prosecutors in absolute immunity for actions taken as advocates for the state. Thus, even if prosecutors knowingly suborn perjury or purposefully violate the discovery rules, they are immune from civil liability. When prosecutors participate in improper investigative procedures – for instance, illegal wiretapping or directing the police to pursue non-meritorious investigations – they receive qualified immunity. While less desirable than absolute immunity, qualified immunity still provides prosecutors with nearly complete protection from civil liability. And even in the rare instance where damages are assessed, the Government typically indemnifies state actors who are sued for actions taken during the course of their employment.

In sum, prosecutors are almost never forced to pay a single dollar for intentional misconduct, and they certainly are not required to pay damages for inadvertent misconduct. With no prospect of suffering personal financial harm, civil liability cannot deter prosecutors.

66 See Maurice Possley & Ken Armstrong, Prosecution on Trial in Du Page, CHI. TRIB., Jan. 12, 1999, at 1. In fact, the Tribune reporters could only find six cases nationwide during the last century where prosecutors were criminally charged for using false evidence or hiding favorable evidence. See id.
67 See Imbler v. Pachtman, 424 U.S. 409 (1976). For criticism of the granting of absolute immunity, see John M. Johns, supra note 8, at 55 (arguing that “absolute immunity is not needed to prevent frivolous litigation or to protect the political process”).
68 For examples of these and other types of misconduct receiving absolute immunity, see Lesley E. Williams, The Civil Regulation of Prosecutors, 67 FORDHAM L. REV. 3441, 3457-61 (1999).
69 See id. at 3461-63.
70 See id. at 3463 (“As a result of absolute and qualified immunities, a paucity of civil suits against prosecutors reach a full trial on the merits.”).
72 See Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345, 345 (2000) (arguing that government actors respond to political incentives, not financial incentives, and that “[i]f the goal of making government pay compensation is to achieve optimal deterrence with respect to constitutionally problematic conduct, the results are likely to be disappointing and perhaps even perverse”).
C. State Ethics Codes and Boards Fail to Respond to Prosecutorial Misconduct

Misbehaving prosecutors face greater risk from state ethics boards, but only marginally so. As Professor Bruce Green has explained, there are numerous sources of law and institutions that regulate prosecutors’ behavior. Yet, state ethics codes are incomplete and often so vague as to be unhelpful. They do not address common scenarios that prosecutors are faced with everyday. For instance, must prosecutors intervene when defendants are represented by incompetent defense lawyers? Are there limits to how prosecutors can prepare witnesses and what rewards they can be given for their cooperation?

And even when prosecutors commit a clear violation – for instance, withholding exculpatory evidence – the ethics boards rarely impose discipline. The simple fact is that while many criminal convictions are reversed for prosecutorial misconduct, the offending prosecutors are rarely disciplined by state ethics boards.

There are a number of reasons why discipline is rarely imposed. First, many cases of misconduct are not reported to the boards. Defense attorneys often fail

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73 See Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement, 8 ST. THOMAS L. REV. 69, 72 (1995) (explaining how prosecutors are governed by the Federal Rules of Criminal Procedure, statutes, constitutional due process, professional responsibility codes, ad hoc rules imposed by federal courts, and internal guidelines).

74 See Bruce A. Green, Prosecutorial Ethics As Usual, 2003 U. ILL. L. REV. 1573, 1583-87, 1596 (describing failed efforts to amend Model Rule 3.8 (which governs prosecutorial behavior) and stating that “with respect to prosecutorial ethics, the Commission decided to err on the side of conservatism, rather than comprehensiveness . . . [t]he existing provisions of Model Rule 3.8 . . . impose relatively little restraint on prosecutors and leave much troublesome conduct unaddressed”); Bruce A. Green, Why Should Prosecutors “Seek Justice?,” 26 FORDHAM URB. L.J. 607, 616 (1999) (“[T]he rules barely scratch the surface.”).

75 Withholding exculpatory evidence is likely the most commonly alleged type of prosecutorial misconduct. See DAVIS, ARBITRARY JUSTICE, supra note 6, at 131 (“Brady violations are among the most common forms of prosecutorial misconduct.”)

76 See Green, Why Should Prosecutors “Seek Justice?”, supra note 74, at 620-22 (raising these and other vexing questions). As Professor Green also explains, however, some of the gaps have been filled by (albeit unenforceable) guidelines adopted by individual prosecutors’ offices (such as the U.S. Attorneys Manual) and bar associations. See Green, Prosecutorial Ethics as Usual, supra note 74, at 1580-81.

77 See Rosen, supra note 9, at 697; Zacharias, Professional Discipline, supra note 3, at 744-45 (studying all reported cases of prosecutorial discipline and finding about 100 cases, though “many of the cases are old, making the number of reported cases far from staggering in light of the many prosecutors and criminal cases that exist.”).

78 See Rosen, supra note 9, at 697.
to report prosecutorial misconduct because it would jeopardize their plea bargaining relationship with that prosecutor and her colleagues. For less obvious reasons, appellate judges who reverse convictions for misconduct also rarely report the cases to the bar. And although scholars have suggested that disciplinary bodies monitor appellate opinions where prosecutorial misconduct is identified or media stories where it is reported, there is no indication that they do so.

Second, even those cases that are reported often go nowhere. This is because ethics bodies are overwhelmed with cases and understaffed. It also may have something to do with the fact that state ethics boards are geared toward civil cases where identifiable clients, rather than general concepts of justice or disfavored criminals, are the victims.

In sum, as former prosecutor Peter Henning has explained “the professional disciplinary system has proved inadequate in addressing prosecutorial misconduct.”

D. The Prospect of Courts Reversing Defendants’ Convictions Fails to Deter Misconduct

Another possible deterrent to prosecutorial misconduct is the prospect of having criminal defendants’ convictions reversed on appeal. Given that prosecutors become very emotionally involved in their cases and want to see the guilty removed from the streets and punished, the prospect of reversal would seem to be a promising deterrent. Yet, many prosecutors appear not to even think about the prospect of reversal on appeal when they are in the heat of trial.

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80 See id. (“[I]t is unclear why more judges do not refer offending prosecutors to bar counsel, especially when these judges have made a finding of misconduct.”).
81 See Zacharias, Professional Discipline, supra note 2, at 750 (explaining that judges are in a good position to report misconduct).
82 See Rosen, supra note 9, at 735-36.
83 See Zacharias, Professional Discipline, supra note 2, at 774.
84 See Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives, 64 Fordham L. Rev. 851, 901 (1995) (discussing need for disciplinary bodies to have more money and staff, and explaining that at the federal level the Office of Professional Responsibility “would require a very substantial increase in staff just to have a fighting chance”).
85 See Zacharias, Professional Discipline, supra note 2, at 758 (“The absence of individual clients also reduces the likelihood of professional discipline. When prosecutors stray, the regulators no doubt perceive a lesser need to institute discipline in order to protect individuals.”).
Perhaps this is because appeals are typically handled by other lawyers, either from another division of the county prosecutor’s office or by a lawyer from the state attorney general’s office. 

Worse yet, if trial prosecutors carefully thought about the prospects of reversals (and put aside their own moral code against committing misconduct), they would actually have an incentive to behave less ethically. Under the harmless error doctrine, the vast majority of criminal cases are affirmed, even if constitutional error occurred. For this reason, many prosecutors’ offices have affirmance rates in excess of ninety percent on appeal. As Professor Bennett Gershman has explained, the harmless error doctrine has “unleashed prosecutors from the restraining threat of appellate reversal.” This, of course, is not to say that prosecutors will purposely commit misconduct simply because they will be protected by the harmless error doctrine. However, it would seem intuitive that the doctrine minimizes any deterrent effect.

E. Judicial Shaming of Misbehaving Prosecutors Is Too Rare To Be Effective

While individual prosecutors might not fear reversal of their cases, they likely would be more concerned if judges called them out by name in written appellate opinions and criticized their misconduct. Unfortunately, this promising

87 See Dunahoe, supra note 57, at 91, 92 (“[C]onviction reversals offer the most roundabout method for impacting the professional gain incentive of the transitory prosecutor. . . . The costs of reversal are generally not experienced by the prosecutor (or even the agency) responsible for the misconduct.”); Walter W. Steele, Jr., Unethical Prosecutors and Inadequate Discipline, 38 Sw. L.J. 965, 976 (1984) (same).

88 See Adam M. Gershowitz, Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty, 62 Vand. L. Rev. ___ (2010) (lamenting that county prosecutors sometimes fail to choose their death penalty cases carefully because state prosecutors are responsible for the time and money to handle the cases on appeal).

89 See Henning, supra note 86, at 721-22 (“[A] finding of misconduct usually does not trigger relief unless the prosecutor’s acts undermined the fairness of the proceeding or confidence in the jury’s verdict.”)

90 For instance, the Stark County Prosecuting Attorney’s Office in Ohio advertises on its website that it has “an overall affirmance rate of approximately 95%” STARK COUNTY PROSECUTING ATTORNEY: CRIMINAL DIVISION: APPELLATE SECTION (available at http://www.co.stark.oh.us/internet/home.DisplayPage?v_page=prosecutor_Appellate Division).

91 Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 427 (1992); see also Carissa Hessick, Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution, 47 S.D. L. Rev. 255, 263 (2002) (“A prosecutor with a strong case takes only a small risk in suborning perjury because under the harmless error rule, the court may decline to grant a new trial, in spite of perjured testimony where evidence of a defendant’s guilt is overwhelming.”).
approach to deterring misconduct has also failed because it is extremely rare for judges to publicly shame prosecutors.92

Rather than name prosecutors who have committed misconduct, courts go to great lengths to refer to “the State” or “the prosecutors” rather than naming the particular lawyers involved. For instance when the Supreme Court reversed a recent death penalty case because prosecutors had “persisted in hiding [the key witness’] informant status and misleadingly represented that [they] had complied in full with [their] Brady disclosure obligations” the Court never named the prosecutors.93 Instead, the Supreme Court referred forty-two times to “the State” and “the prosecutors.”94

Judges are so reluctant to name misbehaving prosecutors that they will often redact their names from portions of the trial transcript that are quoted in the appellate opinion. For example, in one federal prosecution the judge learned mid-case that the Assistant United States Attorney had purposefully misidentified the name of a witness so that the defense could not learn of the witness’s criminal record.95 The judge ordered a mistrial, took the unusual step of barring a subsequent prosecution and described the prosecutor’s conduct as “patent[ly] disingenuous.”96 Yet, in quoting from the trial transcript to describe her misconduct, the judge redacted the prosecutor’s name three dozen times and replaced it with “AUSA.”97 This same prosecutor went on to commit other acts of misconduct before eventually resigning from the U.S. Attorney’s office.98

While scholars have implored judges to more regularly name misbehaving prosecutors in their opinions, it is unlikely to occur with greater frequency. Many judges are former prosecutors and may identify with those they should be shaming.99 Just as lawyers are reluctant to report misconduct of their peers,100 so

92 See Gershowitz, Prosecutorial Shaming, supra note 1, at 1075-84 (studying reversals in death penalty cases yet finding that prosecutors were rarely mentioned by name and that judges often went to the trouble of redacting prosecutors’ names from quoted portions of the trial transcript); Medwed, supra note 50, at 172-73 (“Indeed, few convictions are overturned by virtue of prosecutorial misconduct and, in the rare incidences of reversal, the appellate court opinions invariably neglect to identify the prosecutor by name.”); James S. Liebman, The Overproduction of Death, 100 COLUM. L. REV. 2030, 2126 (2000) (“[E]ven in the face of egregious behavior, orders announcing these reversals rarely single out anyone by name to bear the blame.”).
94 See id. at 674-689.
96 Id. at 1338.
97 See id. at 1334-38.
98 For more detail, see Gershowitz, Prosecutorial Shaming, supra note 1, at 1072-73; Barry Tarlow, State Bar Discipline: An Essential Remedy for Prosecutorial Misconduct, CHAMPION, Dec. 2001, at 58.
99 See Meares, supra note 84, at 912.
too may judges be reluctant to shame prosecutors who are doing the very challenging job that many judges previously held. Additionally, even for judges who were not prosecutors, simple compassion may inhibit them from ruining the career of a prosecutor by publicly castigating him over what they believe to be an isolated incident.101

In sum, like criminal sanctions, civil liability, and bar discipline, judicial shaming holds little hope of deterring prosecutorial misconduct.

F. In House Discipline by Prosecutors’ Offices Is Also Too Sporadic To Be a Reliable Check on Misconduct

From a scholarly standpoint, little has been written about internal discipline in prosecutors’ offices.102 The conventional wisdom is that district attorneys’ offices impose little in-house punishment when misconduct is discovered. Anecdotally, of course, there are numerous stories of prosecutors committing serious misconduct and not being disciplined. For instance, the California Supreme Court reversed a death sentence because prosecutor Rosalie Morton had mischaracterized evidence, referred to facts not in evidence, and misstated the law.103 Despite this misconduct and the fact the Morton had engaged in similar misbehavior in three prior cases,104 the Los Angeles County District Attorney’s office resisted firing her.105

Or consider the case of Delma Banks who spent more than two decades on death row.106 The Supreme Court reversed Banks’ case because the prosecutor withheld exculpatory evidence and scripted the testimony of the key witness.107

100 Model Rule of Professional Conduct 8.3 requires any attorney to report another attorney’s professional misconduct when that misconduct raises a “substantial question” as to the other attorney’s fitness to practice law. Although it is difficult to measure, compliance with this rule is perceived to be very low. See supra note 64.

101 See Gershowitz, Prosecutorial Shaming, supra note 1, at 1086-87. Of course, the danger is that the prosecutor’s misconduct is not an isolated incident and that the prosecutor hasn’t been castigated in judicial opinions for prior misconduct because of the same (mistaken) belief that a prosecutor’s name shouldn’t be dragged through the mud for a one-time mistake. See id. at 1073-74.

102 See Fred C. Zacharias & Bruce Green, The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors, 89 B.U. L. REV. 1, 43 (2009) (“Little is known about district and county attorney offices’ and state attorney general offices’ internal processes for disciplining prosecutors.”).

103 See People v. Hill, 952 P.2d 673, 698-99 (Cal. 1998)

104 See id. at 699-700.


106 See Banks, 540 U.S. at 679-82.

107 See id. at 684-86.
Yet, despite being castigated by the Supreme Court, the prosecutor kept his job.108

A Chicago Tribune study of the Cook County State’s Attorney’s Office found that of 381 homicide cases that were reversed for withholding evidence or using false testimony only three received serious discipline.109 Officials at the State’s Attorney’s office could not identify a single case in the last two decades in which a prosecutor was fired for trial misconduct.110 Indeed, a number of prosecutors who were rebuked by appellate courts were subsequently promoted and placed in positions to supervise and train junior prosecutors.111

It is unlikely that serious in-house discipline of prosecutors would fly under the radar. If prosecutors who commit serious misconduct were punished severely, such as termination or suspension, it is quite likely that the media would find out and report on it.112 Yet, such stories are rare.113

The extent of lesser discipline is harder to assess. It is quite possible that prosecutors’ offices impose “quieter” sanctions on misbehaving prosecutors, such as docking their pay, moving them to less desirable posts, or pushing them to resign rather than be fired. Because such discipline is done behind closed doors and those disciplined rarely publicize it, it is impossible to say how commonly it occurs. It would seem obvious though that the extent of quiet discipline varies widely by office. Moreover, even where such quieter discipline does occur, it serves virtually no pedagogical or cultural value because other prosecutors – particularly junior prosecutors – will likely be unaware of it.114 The

109 See Armstrong & Possley, The Verdict: Dishonor, supra note 56. One was fired (though he was later reinstated) and two were suspended.
111 See Ken Armstrong & Maurice Possley, Reversal of Fortune, CHI. TRIB., Jan. 13, 1999, at 1 (noting that prosecutors “tapped to put a stop to unfair trial practices included some of the very folks who had resorted to such tactics themselves”).
112 In all large cities (and probably many medium sized cities) newspapers and television stations have reporters whose entire beats are too cover the courthouse. For an in-depth treatment of the media’s incentives to cover crime and the criminal justice system, see Sara Sun Beale, The News Media’s Influence on Criminal Justice Policy: How Market Driven News Promotes Punitiveness, 48 WM. & MARY L. REV. 397, 421-36 (2006).
113 There are, of course, some examples. See, e.g., Brett Barroquerre, Prosecutor Resigns After Controversial Plea Deal, ASSOC. PRESS, June 12, 2009 (explaining how prosecutor failed to disclose cooperation agreement with key witness in death penalty case and quoting District Attorney as saying that if she had not resigned “she would have been fired”).
failure to make an example of misbehaving prosecutors through in-house discipline therefore may convey the message that misconduct is not seriously punished.

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In sum, there is little external or internal pressure on prosecutors to avoid misconduct. They are extremely unlikely to face criminal charges, civil liability, bar discipline, reversal of their cases, judicial shaming, or serious in-house discipline. More creative proposals set forth by scholars have likewise failed to foster change. Accordingly, we suggest a more dramatic incentive – the prospect of imputed liability – drawn from the law of war.

III. The Analogy Between the Prosecutor and the Warrior

Analogizing the prosecutor with the soldier is both logical and valuable in exposing why the concept of command responsibility could substantially enhance the probability of ethical prosecutorial behavior. While the stakes involved in trial and warfare are undoubtedly distinguishable, both endeavors share certain common characteristics. The most obvious of these is they are both defined in terms of an adversarial contest. Trial, like war, involves two
opponents seeking to prevail in their efforts to dominate a “battlefield.” For the soldier, the battlefield is literal; for the prosecutor, metaphorical. Nonetheless, the essence of the adversarial contest thrusts both the soldier and the prosecutor into an environment where there is constant temptation to allow the ends to justify the means. Why submitting to this temptation is antithetical to both war and trial reveals the most significant aspect of the warrior/prosecutor analogy.

Warfare, like trial, is defined not by an “ends justify the means” paradigm, but instead by absolute limitations on permissible warrior conduct. These limitations, established by the laws of war (also referred to as the law of armed conflict or international humanitarian law), trace their origins back to the very inception of organized warfare. This is profoundly significant, for although the rules of war have evolved to a juridical status, they reflect the reasoned judgment of the warrior class itself. Thus, the limitations imposed on warriors are based on the recognition by military leaders that war without limits is antithetical to the concept of disciplined military operations. Perhaps more importantly, these leaders understood that at a strategic level, the means invariably define the ends, and therefore unleashing the destructive force of war with no limits undermines the very strategic impetus for war itself—the restoration of peace. Over time, the pragmatic constraints imposed on

116 The term “soldier” will be used throughout this article as a generic reference to a member of a professional military organization. Although a “soldier” is generally understood to refer to a member of the Army, as used throughout this article it is intended to include members of all branches of the military (marine, sailor, airman, coast guardsman).

117 See LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 15–18 (2d ed. 2000) (collecting various viewpoints regarding limitations on permissible war conduct and concluding that “the principles of humanitarian law are to apply in any conflict”; see also YORAM Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 16–17 (2004) (“[T]he right of belligerents to choose methods or means of warfare is not unlimited.”) (internal quotations deleted); see also 86th LAW OF WAR COURSE: HISTORY OF THE LAW OF WAR A-9 (July 10–14, 2006) (discussing “the essential framework of authority for use of force” and “proportionality” as a limitation on the use of military force).

118 See GREEN, LAW OF ARMED CONFLICT, supra note 117, at 1–3 (tracing the development of organized warfare via early modern writers on the law of armed conflict); see also LAW OF WAR COURSE, supra note 117, at A-1 (“The law of war has evolved to its present content over millennia based on the actions and beliefs of states.”).


120 See GREEN, LAW OF ARMED CONFLICT, supra note 117, at 20 (“[I]t has been recognised since earliest times that some restraints should be observed during armed conflict.”).

121 See FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 9 (July 1996) (“The conduct of armed hostilities on land is regulated by the law of land warfare which is both written
warriors by their leaders evolved into international custom and later into international conventions. While the scope of regulation has become ever more comprehensive, the underlying rationale has remained constant: ensure that the means used to accomplish wartime objectives don’t become so excessive as to nullify the benefit of battlefield success.

These limitations are imposed on warriors because it is at the proverbial “tip of the spear” where the temptation to allow the ends to justify the means becomes most pervasive. It is almost inevitable that for the warrior, the line between the legitimate purpose of his conduct and the illegitimate instinct for revenge or retribution will be blurred. In this regard, the rules of war serve the critical function of preventing the individual warrior from distorting the purpose for his conduct. As Telford Taylor, the Chief U.S. Nuremburg prosecutor, so aptly reminds us:

[An] even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.

Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers. 123

Thus, the warrior, like the prosecutor, is simply the agent of a client. For the warrior, it is the state she fights for. It is therefore essential that the conduct of the warrior serve the interests of that “client”. However, because of the nature of...
the adversarial contest, history has proven that rules of warrior conduct are essential to prevent the soldier from distorting the legitimate purpose of participating in warfare – achieving a state objective, to the satisfaction of personal revenge.

It is axiomatic that the prosecutor, like the warrior, must operate within a normative framework. This framework has, like the laws of war, evolved from the reasoned judgments of members of the regulated profession. And like the laws of war this framework reflects the belief by the profession that the benefit of imposing restraint on the conduct of prosecutors outweighs the cost of such restraint. Thus, both professions operate pursuant to a largely self-imposed professional code of conduct, and although these codes bear differing characterizations, the essence of each is remarkably similar. The similarity does not, however, end with the recognition of the value of operational constraint, but extends to the challenge these respective codes sought to address.

Prosecutors are, in effect, warriors in the battle for justice. Like their battlefield analogues, they routinely confront the inherent friction produced when the apparent need to achieve micro-level success conflicts with a regulatory framework intended to ensure macro-level fairness and credibility. It is at these moments when compliance with the framework is most intensely stressed, and when the “battlefield operatives” confront the temptation to compromise standards of conduct to achieve an ostensibly valid objective. Warriors and prosecutors alike confront these friction points as the result of an inevitable reality that any regulatory framework will at certain points of execution be either overbroad or under-inclusive. Codes of conduct often reflect conclusive presumptions that can never be totally consistent with operational reality. This over-breadth and under-inclusiveness is a price that both professions pay for regulatory certitude and clarity; but the consequence is that individual operatives will inevitably confront clashes between their innate sense of what is the “right thing to do” and what their operative code requires.

This dynamic is illustrated by two comparable “ethical dilemmas.” Imagine a soldier captures an enemy soldier. Once that enemy is subdued, the law of war imposes a bright-line rule of humane treatment and accordant prohibition on abusing the captive. Not even the principle of military necessity may be imposed.  

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124 See MODEL RULES OF PROF’L CONDUCT PREAMBLE (2003) (“The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.”).

125 See id.

126 See GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, August 12, 1949, T.I.A.S. 3364 at art. 13.
invoked to trump this constraint, for that principle allows only those actions not otherwise prohibited by the law.\textsuperscript{127} While this conclusive presumption that it is never necessary to harm a captured enemy is in most cases consistent with operational logic, it is conceivable that the capturing soldier might in an extreme situation believe that this presumption has been pragmatically rebutted. For example, imagine that friendly forces are caught in a minefield and are suffering substantial casualties, and that the prisoner knows the location of the mines. From the point of capture perspective, it would seem logical and perhaps justified to do whatever was necessary to obtain this information. However, the law does not permit such a conclusion, even if respect for the absolute prohibition against cruel treatment resulted in further sacrifice of friendly forces. Thus, the soldier is required to make micro-level sacrifice to advance the macro-level interests of the state and the armed forces that act on its behalf, an interest indelibly linked to national commitment to limits on permissible conduct.

Prosecutors routinely confront comparable ethical challenges. Imagine a prosecutor is trying a child sexual assault case. The key evidence in the trial is forensic testing reports establishing semen recovered in a rape trauma examination matches that of the defendant. Imagine that the prosecutor becomes aware of some irregularities in the testing protocol that are not reflected in the forensic reports. It is clear that both constitutional and ethical rules require the prosecutor to disclose this potentially exculpatory evidence to the defense.\textsuperscript{128} But what if the prosecutor is convinced the defendant is in fact guilty (perhaps a confession by the defendant was suppressed for a \textit{Miranda} violation), and also convinced that disclosure of this evidence will create a high probability of acquittal? The prosecutor will be confronted with a direct conflict between his perception of what justice in the case demands for the victim (conviction and punishment of a confessed sexual predator), and what the conclusive presumption reflected in her professional code demands. Like the soldier, the

\textsuperscript{127} See \textit{Field Manual} 27-10, \textit{supra} note 121, at 9 (“The law of war places limits on the exercise of a belligerent’s power . . . and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry. The prohibitory effect of the law of war is not minimized by “military necessity” which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.”).  

\textsuperscript{128} See Brady v. Maryland, 373 U.S. 83 (1963); McCarty v. State, 114 P.3d 1089 (Okla. Crim. App. 2005) (reversing capital murder case because prosecutors failed to turn over impeachment evidence demonstrating that the chemist’s work was not peer reviewed and that she had not completed her yearly proficiency tests).
A prosecutor is expected to sacrifice success at the micro-level of the trial in order to preserve the macro-level credibility of the justice system.

Another interesting analogy between the soldier and the prosecutor exacerbates the difficulty of maneuvering through this ethically challenging landscape. In both situations, it is common that the constraints imposed by the professional code will not be reciprocally respected by the opponent in the struggle. For the soldier, this lack of reciprocity is endemic to the increasingly common reality of asymmetrical warfare, in which opponents seek to exploit the requirement to comply with “rules” to achieve a tactical advantage and offset operational dominance. A classic example is the reality confronted by U.S. forces fighting al Qaeda operatives. While these operatives must be treated humanely if captured, it is a virtual certainty that no reciprocal treatment will be afforded to captured U.S. personnel. Instead they can expect the exact opposite, and will likely be the victims of summary execution.

For the prosecutor, this lack of reciprocity is not simply de facto, but is actually a component of the de jure regulatory framework. Because the prosecutor represents society as a minister of justice, her ultimate ethical obligation is to do justice, which includes the obligation to ensure the interests of the defendant are protected in criminal adjudication process. In contrast, the defense counterpart bears no responsibility to see that justice – in the sense of an accurate adjudication of actual guilt or innocence - is done. Instead, the defense attorney is obligated to zealously represent the interest of the defendant.

129 Asymmetrical warfare has been defined as “a conflict in which a much weaker opponent uses unorthodox or surprise tactics to attack the weak points of the much stronger opponent, especially involving terrorism, guerilla warfare, etc.” See ASYMMETRICAL WARFARE, available at http://dictionary.reference.com/browse/asymmetrical-warfare.


132 MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2003) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”).

133 See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2003) (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause.”).
obligation places the interest of achieving the most beneficial outcome for the defendant above any interest in exposing the truth. Thus, the prosecutor operates pursuant to unilateral obligations with no expectation of reciprocal concession by an opponent.\textsuperscript{134}

The combination of the intense pressure to achieve results, a code of conduct built upon presumptions that can never be one-hundred percent consistent with “operational” reality, and the lack of “enemy” reciprocity, often challenge even the most ethically and morally grounded “combatants” at the proverbial tip of the spear. This leads to another analogy between the prosecutor and the soldier: the profound impact of role models on ethical and moral development. Trial, like war, is an endeavor that can never truly be replicated in “training.” Thus, whether it is the soldier on an exercise or a law student in a trial advocacy course, it is virtually impossible to replicate the ethical and moral pressures associated with actual war or trial. As a result, the influence of more experienced members of their “units” cannot be understated. The new soldier and prosecutor alike look to “veterans” of the process to gauge how to navigate the daily challenges they confront.

All of this leads to a critical conclusion: genuine commitment to the code of prosecutorial ethics is in large measure contingent on the culture and climate in which inexperienced prosecutors form their individual ethical foundations. This, in turn, highlights the significance of effective leadership. Leaders possess an unrivaled capacity to define operational culture, and to ensure new members of the “unit” are inculcated with not only an understanding of the black letter rules of professional conduct, but more importantly an appreciation of the logic upon which these rules rest. Only such understanding can offset the temptation to engage in gamesmanship, interpretive avoidance, or even willful non-compliance. In short, the prosecutor, like the soldier, will only truly embrace her “code of conduct” when it is understood that this code is premised on an attitude of good faith commitment not only to the rules, but to the spirit the rules manifest.\textsuperscript{135}

Developing this understanding is no simple task. In many ways, it requires a rejection of the “whatever it takes” instinct. But in both the battlefield and criminal justice contexts, allowing warriors to operate in violation of their respective regulatory frameworks is antithetical to the ethos of their professions. In the context of warfare, tremendous thought and effort has been devoted to

\textsuperscript{134} There are minor exceptions to this framework. See, e.g., Williams v. Florida, 399 U.S. 78 (1970) (upholding statute requiring defendant to provide notice of alibi he intends to offer at trial). Such exceptions gather attention for the very reason that they are such a departure from the basic framework imposing unilateral obligations on prosecutors.

\textsuperscript{135} See MODEL RULES OF PROF’L CONDUCT PREAMBLE (2003) (noting that the Model Rules do not “exhaust the moral and ethical considerations that should inform a lawyer” but instead “simply provide a framework for the ethical practice of law.”).
developing methodologies to offset this risk and meet the challenge of ensuring compliance with the constraints of the law.\textsuperscript{136} Because the similarities between the soldier and the prosecutor are so pervasive, these methods offer a viable approach for the development of ethically committed prosecutors.

Education is of course the first step in this process. Both the military and legal professions require instruction in their respective codes of conduct. However, like the soldier, it is unrealistic to expect the newly minted lawyer to truly appreciate the significance of ethical rules without the benefit of contextual application. Even more problematic is the almost inevitable reality that learning the “rules” without genuine contextual sensitivity creates a risk that rules will be seen as primarily sanction oriented. Such an outcome is problematic because it leads to a distorted understanding of the purpose of operational codes of conduct. For the legal profession, ethical rules are first and foremost rules of conduct, not rules of consequence. They are intended to define the outer reaches of acceptable conduct, and not to invite a pattern of operating in that realm. Perhaps more importantly, the efficacy of these rules is contingent on developing throughout the profession a genuine appreciation that the rules provide a macro benefit to the lawyer, the client, and the profession. It is therefore not surprising that the Preamble to the ABA Model Rules provides:

\begin{quote}
Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service . . . Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.\textsuperscript{137}
\end{quote}

\textsuperscript{136} See generally FIELD MANUAL 27-10, supra note 121; see also DINSTEIN, supra note 117, at 238–42 (discussing command responsibility); see also GREEN, LAW OF ARMED CONFLICT, supra note 117, at 280–81 (same).

\textsuperscript{137} MODEL RULES OF PROF'L CONDUCT PREAMBLE (2003).
Developing a culture of ethical compliance is the true *sine qua non* to cultivating genuine commitment to ethical obligations.\(^{138}\) This effect cannot be achieved by a predominant emphasis on sanction for non-compliance. Instead, non-compliance and the accordant sanction must be regarded as an aberration. As the preamble to the ABA Model Rules also indicates, sanction has never been the primary mechanism for achieving compliance:

Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.\(^{139}\)

It is here that the analogy between the laws of war and the lawyers ethical code is perhaps most significant, for the same logic provides the foundation for ensuring compliance. In both contexts, the ultimate challenge of leaders is to cultivate commitment not only to the black letter rules, but the principles they manifest. It is also here where the experience of the battlefield provides insight into how to best achieve this goal: impose liability on the leader for violations of the rules produced by a failure to develop such a culture of compliance. On the battlefield, this is accomplished through the doctrine of command responsibility.\(^{140}\)

IV. The Doctrine of Command Responsibility and the Link to Subordinate Compliance

As we explain below, the military doctrine of command responsibility makes supervising commanders responsible for subordinate misconduct that they knew or should have known would occur. In this Part, we detail the development of

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\(^{138}\) See Bibas, *Prosecutorial Regulation*, supra note 3, at 1000 (“Young attorneys, impressionable and eager to emulate their superiors, take their cues from this rhetorical leadership. In short, rhetoric from the top matters.”).


\(^{140}\) See *Green, Law of Armed Conflict*, supra note 117, at 303–07 (defining command responsibility and discussing potential legal defenses); see also *Dinstein*, supra note 117, at 238–54 (same); see also *Law of War Course*, supra note 117, at J-18 (“Commanders may be held liable for the criminal acts of their subordinates even if the commander did not personally participate in the underlying offenses if certain criteria are met.”).
the command responsibility doctrine and its ability to incentivize supervisors to properly train subordinates. Before advocating an expansive doctrine of imputed liability though, it is important to briefly take a step back and explain how current ethics rules provide for much more limited supervisory liability for prosecutors.

A. The Model Rules Provide for Very Limited Supervisory Liability

Model Rule of Professional Conduct 5.1 establishes a limited degree of supervisory responsibility for the conduct of subordinate lawyers. That rule provides:

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.141

This rule is obviously intended to emphasize the obligation of supervisory lawyers to reverse ethical violations that come to their attention. Accordingly, it creates a sanction based disincentive for ignoring subordinate violations by subjecting the supervisor to liability if he becomes aware of the violation and fails to intervene to remedy or mitigate the harm. But there is really nothing radical about this rule. The first part of the rule is nothing more than a version of accomplice responsibility – the order or ratification making the supervisor directly responsible for the violation. As for the second part of the rule, any supervisor placed on notice of an ethical violation should be expected to impose a prompt remedy, and the failure to do so will almost certainly be regarded by the subordinate as encouraging or condoning the conduct, which is also a classic basis for accomplice responsibility.142 While this rule is certainly an important mechanism for emphasizing the relationship between leaders and the actions of their subordinates, with the exception of the “orders” provision, it is almost entirely reactive. Nothing in the rule addresses the ethical culture in which the


142 See WAYNE R. LAFAVE, CRIMINAL LAW 678 (1972) (discussing willful blindness as a basis for accomplice liability).
subordinate operates. This, however, is the key to ensuring a proactive approach to compliance, a conclusion that is today the cornerstone of the compliance mechanisms of the law of war.

B. The Development of the Doctrine of Command Responsibility

In October 1944, the United States launched a campaign to retake the Philippines from the Japanese forces that had occupied that country since 1941. The commander of the Imperial Japanese Forces was General Tomoyuki Yamashita. Although he had only been in command for ten days prior to the U.S. assault, he was an experienced battlefield commander with a long record of operational success. Fortunately for the U.S. forces, by this point in the war the outcome of the campaign was never in doubt. Nonetheless, Yamashita fought a delaying action that allowed him to hold out with a fifth of his original forces until the final capitulation of Japan.143

Soon after his capture, Yamashita was charged for trial by military commission for violations of the laws and customs of war.144 The allegations indicated that he was responsible for the death of more than 25,000 Philippine civilians.145 Most of these casualties had occurred during the battle for Manila. Ironically, Manila had been fortified contrary to Yamashita’s orders.146 Nonetheless, the battle for Manila involved brutal urban warfare, and as the situation of Japanese troops became untenable, many of them resorted to unjustified brutality directed against the civilian population.147

Yamashita was quickly convicted and sentenced to hang. But the military lawyers representing him challenged the legitimacy of the process and the charges through a writ of habeas corpus. The case was ultimately decided by the Supreme Court of the United States. In 1946, the Court issued its opinion in In re Yamashita,148 a decision that would become the foundation for what is today the law of war doctrine of command responsibility.149 The central challenge raised

144 See id.
145 In re Yamashita, 327 U.S. 1, 14 (1946).
146 See id. at 33.
147 Id.
148 Id.
149 See Dinstein, supra note 117, at 239 (“It is sometimes believed that knowledge was not imperative for conviction in accordance with the seminal Yamashita ruling of 1946 by the Supreme Court of the United States, but this seems to be a misreading of the Judgment.”); see also Green, Law of Armed Conflict, supra note 117, at 214 n.134; Law of War Course, supra note 117, at J-19; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 86 [hereinafter Additional Protocol I] (“The fact that a breach of the Conventions or of this Protocol was committed by a
by the defense was that there was no basis to hold General Yamashita responsible for the misconduct of subordinates that he did not order or even know was taking place. Such a theory of vicarious liability was, according to the defense, an unprecedented extension of criminal responsibility. This was no mere allegation of dereliction of a commander’s duty. Instead, Yamashita had been charged and convicted of the murders of subordinates he did not (and, as Justice Murphy noted in his dissent could not) know were occurring. As the Court noted:

But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by “permitting them to commit” the extensive and widespread atrocities specified.

subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”); ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 12, 1999, art. 28 (“A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control . . . as a result of his or her failure to exercise control properly over such forces, where: [t]hat military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and [t]hat military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”); Yuval Shany & Keren R. Michaeli, The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility, 34 N.Y.U. J. INT’L L. & POL. 797 (2002); Major James D. Levine II, The Doctrine of Command Responsibility and Its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?, 193 MIL. REV. 52 (2007).

Yamashita, 327 U.S. at 28 (Murphy, J. dissenting) (“[Yamashita] was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.”).

Id. (Murphy, J. dissenting).
The question, then, is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.\textsuperscript{152}

The Supreme Court rejected Yamashita’s challenge. It held that a military commander bears a unique obligation to ensure the subordinates comply with the laws and customs of war.\textsuperscript{153} Satisfying this obligation requires more than merely avoiding direct complicity in violations; it requires an affirmative effort to ensure that subordinate conduct comports with these obligations. If evidence establishes that a commander failed to discharge his duty to prevent subordinate violations, thereby allowing a culture of noncompliance to evolve, the commander can be held liable for subordinate misconduct. According to the Court:

\begin{quote}
It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war, and to pass upon its sufficiency to establish guilt.\textsuperscript{154}
\end{quote}

In his dissenting opinion, Justice Murphy emphasized the essence of the charge against Yamashita as follows:

\begin{quote}
In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this . . . Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread,
\end{quote}

\textsuperscript{152} Id. at 14–15 (emphasis added).

\textsuperscript{153} Id. at 25 (“It thus appears that the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with violation of the law of war, and that the commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command.”).

\textsuperscript{154} Id. at 17.
we will not bother to charge or prove that you committed, ordered, or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.\textsuperscript{155}

This indeed was the theory of criminal responsibility imposed upon Yamashita. The “should have known” theory of command responsibility for the misconduct of subordinates took hold in the international community, and it is today a foundational pillar of the law of war.\textsuperscript{156}

To be clear, ignorance standing alone is not sufficient to impute liability to a commander under this doctrine. Instead, liability is based on the omission of the commander to take remedial measures when the commander is aware of a risk that misconduct will occur.\textsuperscript{158} This is the link between “command culture” and

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\textsuperscript{155}Id. at 34–35 (Murphy, J. dissenting).

\textsuperscript{156}See Leslie, C. Green, Command Responsibility in International Humanitarian Law, 5 TRANSNAT L. & CONTEMP. PROBS. 319, 326 (1995); see also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1011-1018 (1987).

\textsuperscript{158}See GREEN, LAW OF ARMED CONFLICT, supra note 117, at 303 (“A commander . . . is also liable if, knowing or having information from which he should have concluded that a subordinate was going to commit such a crime, he failed to prevent it and if, being aware of such commission, fails to initiate disciplinary or penal action.”); see also DINSTEIN, supra note 117, at 238 (suggesting that a commander may be responsible for an “act of omission”); see also ADDITIONAL PROTOCOL I COMMENTARY (“Appropriate authorities shall take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, and shall take all appropriate steps to bring to justice all persons who have willfully committed such acts . . . .”); Victor Hansen, What’s Good for the Goose Is Good for the Gander: Lessons From AbuGhaib: Time for the United States to Adopt a Standard of Command Responsibility for Its Own, 42 GONZ. L. REV. 335, 348 (2006-07) (“[T]he commander’s liability is derived from his relationship to his subordinates and the link between his act or omission and the crimes committed by his subordinates. If a derivative relationship can be established, the criminal liability of the subordinate can be imputed onto the commander.”).
\end{quote}
command responsibility.” Pursuant to this doctrine, evidence that a commander ignored indicators that a reasonable counterpart would have understood were proverbial “red flags” that subordinate non-compliance was likely would be sufficient to impute liability for that misconduct back to the commander. According to this doctrine, evidence that a commander ignored indicators that a reasonable counterpart would have understood were proverbial “red flags” that subordinate non-compliance was likely would be sufficient to impute liability for that misconduct back to the commander. 159 Accordingly, commanders have a powerful incentive to ensure subordinates are well-trained and committed to compliance with the law. More importantly, the commander is compelled to ensure that indications of a breakdown in the culture of compliance produce a prompt and effective command response.160

The doctrine of command responsibility is therefore premised on the assumption that there is a causal link between a commander’s failure to discharge her duty to ensure subordinates comply with the law and subsequent violations by the same or other subordinates. 161 However, what is most significant about the doctrine is that it transforms dereliction of duty liability into liability for the actual subordinate misconduct. 162 In the context of criminal responsibility, this is a profound transformation, for it elevates a relatively minor offense (dereliction) to the potential for even capital liability. This imputed liability for subordinate misconduct is the most important law compliance mechanism on the battlefield, for it creates a direct incentive for commanders to effectively execute their oversight responsibility. 164

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159 Green, Law of Armed Conflict, supra note 117, at 303; Dinstein, supra note 117, at 240 (noting that evidence of subordinate non-compliance from subordinate reports, and even from reputable media outlets, could be sufficient to impute knowledge and thus liability to a commander for failure to take corrective action).

160 See, e.g., Law of War Course, supra note 117, at J-22 (“The commander is responsible if he ordered the commission of the crime, has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.”) (emphasis in original).

161 See, e.g., Additional Protocol I Commentary; see also Hansen, supra note 157, at 348 (discussing the requirement of a causal link between the commander’s “act or omission and the crimes committed by his subordinates” under the doctrine of command responsibility).

162 Id. at 373 (“A commander is not simply guilty of dereliction of duty or some lesser offense, he is guilty of the actual war crimes and can be punished accordingly.”).

163 10 U.S.C. §892 (2002). This provision of the Uniform Code of Military Justice prohibits both willful and negligent dereliction of duty. The maximum punishment for a willful dereliction is 6 months confinement; the maximum punishment for a negligent dereliction is 3 months confinement. Id.

164 See Green, Law of Armed Conflict, supra note 117, at 303–04; see also Hansen, supra note 158, at 371 (highlighting the incentive under command responsibility for commanders “to establish systems that will ensure law of war compliance and then provide command oversight of those systems”).
C. Why Imputed Responsibility Ensures Subordinate Compliance

The absence of an imputed liability analogue in the ethical rules applicable to supervisory prosecutors is apparent. The current ethical rules limit responsibility of supervisors for subordinate ethical misconduct to only those violations that the supervisor either ordered or was aware of and failed to prevent. This limited scope of liability is insufficient to create the same type of direct incentive for ensuring a culture of ethical compliance that is created by the “should have known” prong of the command responsibility doctrine. The experience of the battlefield superior/subordinate relationship bears this out. It is precisely because the role of the front-line prosecutor is so analogous to that of the front-line warrior that reveals why “operational culture” is the most effective mechanism for ensuring these warriors do not submit to the “ends justify the means” temptation.

Under the current ethics rule, the probability that supervisory prosecutors will cultivate a culture of ethical compliance is simply too random to provide any degree of confidence in this critical component of ethical development. There are undoubtedly conscientious attorneys in these positions who understand the significance of this component of effective and responsible leadership, and who accordingly create such operational environments. But it is equally clear that subordinate ethical violations are simply too frequent. This fact, coupled with the inadequacy of outside disciplinary agencies and the difficult hurdles that a defendant must overcome to obtain conviction or sentence relief once such a violation is exposed damages the integrity of our justice system.

What the doctrine of command responsibility reveals is that when the center of gravity for law compliance is leadership, leaders must be held accountable.

165 See generally Model Rules of Prof'l Conduct (2003).

166 And, of course, there are numerous situations in which even the most diligent supervisors could not have recognized that their subordinates were engaged in misconduct. See Bruce A. Green & Fred C. Zacharias, The U.S. Attorneys Scandal and the Allocation of Prosecutorial Power, 69 Ohio St. L.J. 187, 202 (2008) (“Supervisory attorneys who are unfamiliar with the facts and history underlying individual cases ordinarily are not in the optimal position to make routine prosecutorial decisions; line prosecutors often have a better understanding of the strengths and deficiencies of their cases.”).

167 See Dunahoe, supra note 57, at 63 (“[Junior prosecutors] are, for the most part, less familiar with state and federal constitutional strictures applicable to law enforcement, and more susceptible to inadvertent constitutional violations.”); Gershowitz, Prosecutorial Shaming, supra note 1, at 1061-62 (same).

168 See supra notes 77-86 and accompanying text.

169 Under the harmless error doctrine, most instances of prosecutorial misconduct do not result in the defendant’s conviction being overturned. See supra note 91 and accompanying text.
when their failure is causally connected to subordinate misconduct. Adopting an analogous doctrine to impute prosecutorial misconduct to the prosecutor’s supervisor in the right circumstances will incentivize effective supervision of subordinates well beyond that produced by the current rule; it will provide a powerful incentive for establishing a culture of commitment to ethical standards, the first\textsuperscript{170} step in preventing such violations.\textsuperscript{171}

There is, of course, no guarantee that creating such a culture will prevent all ethical violations. However, like a battlefield commander, a supervisory prosecutor who takes steps to establish such a culture will immunize herself from imputed liability for the violations that do occur. This immunization is justified by the simple reality that by taking such measures, the supervisor mitigates the risk such violations will in fact occur.\textsuperscript{172}

What then would satisfy this “culture establishment” requirement? Again, drawing from the battlefield doctrine of command responsibility, two key components become apparent. The first is training. Supervisory prosecutors, like their battlefield counterparts, must ensure that all subordinates are effectively trained in the obligations that guide the execution of their responsibilities. Specially focused professional development programs for new and experienced prosecutors will expose these attorneys to the challenges they are likely to confront in the proverbial heat of battle, and enable them to anticipate how to ethically resolve such challenges.\textsuperscript{173} Embracing the military axiom that “the more you sweat in peacetime the less you bleed in war” is perhaps the most effective prophylactic component to ensuring ethically compliant prosecutorial conduct.\textsuperscript{174}

\textsuperscript{170} Professor Michael Cassidy suggests that one even earlier starting point for creating a culture of professionalism is to focus more on “the virtues of courage, honesty, fairness, and prudence during the entry-level hiring process.” R. Michael Cassidy, Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to Seek Justice, 82 NOTRE DAME L. REV. 635, 694 (2006).

\textsuperscript{171} On the value of using internal cultures and incentives to improve prosecutorial behavior, see Bibas, Prosecutorial Regulation, supra note 3, at 1007-15 (discussing training, pay structure incentives, and different hiring and retention policies).


\textsuperscript{173} See The Justice Project, Improving Prosecutorial Accountability, supra note 7, at 15 (“A key reform aimed at preventing prosecutorial misconduct and abuse of power is improved training and education.”). This is also the position of the American Bar Association. See ABA Standards for Criminal Justice: Prosecution Function, Standard 3-2.6 (3rd ed. 1993) (“Continuing education programs for prosecutors should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs.”).

\textsuperscript{174} See DeP’t of the Army, Law of War Workshop Deskbook (Brian J. Bill ed., 2000).
The second component is ensuring prompt and credible disciplinary responses to even the most minor ethical transgressions.\textsuperscript{175} Nothing will increase the potential for future violations more than the perception that leadership condoned or ignored prior violations. This perception distorts the cost/benefit expectation subordinates will apply to situations in which they are tempted to violate ethical obligations. In contrast, when leaders act promptly and effectively in response to subordinate violations, it creates general deterrence for others to make the same or similar flawed decisions. This does not mean that responses must be draconian or disproportionate. A key obligation of leaders at all levels and in all contexts is the exercise of sound judgment when dealing with subordinate mistakes. But nothing is more likely to produce violations than an expectation of tacit supervisory support.\textsuperscript{176}

By adopting a command responsibility theory of imputed liability in the context of prosecutorial supervision, the ethical rules would provide a tangible incentive to ensure subordinates are effectively trained in their responsibilities, and that all violations are promptly and credibly addressed. These two components of effective leadership should substantially reduce the likelihood of ethical violations by subordinates. And because implementing these components of effective leadership produces this effect, it shields supervisors from the imputation of liability for acts of subordinate misconduct under a “should have known” theory. In fact, effective training and credible responses to past acts of ethical misconduct will establish the exact opposite inference: that the supervisor would have expected compliance, and not violation.\textsuperscript{177}

Ultimately, holding supervisory prosecutors accountable for subordinate ethical violations they not only knew of, but also should have known would occur, synchronizes responsibility with the power to prevent such violations. When properly applied, this doctrine holds supervisors accountable for acts of subordinate ethical misconduct only when a causal connection is established as

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\item \textsuperscript{175} Unfortunately, quite the opposite seems to be true. See Adam Liptak, \textit{Prosecutor Becomes Prosecuted}, Week in Review, N.Y. TIMES, June 24, 2007, at 4 (quoting University of Michigan Law School Professor Sam Gross as saying that “I don’t know of a single case of discipline against a prosecutor who engaged in misconduct that produced [a] wrongful conviction and death sentence, and many of the cases involve serious misconduct.”); see also supra part II.
\item \textsuperscript{176} See Barbara Armacost, \textit{Organizational Culture and Police Misconduct}, 72 GEO. WASH. L. REV. 453, 506 (2004) (discussing pervasive problem of supervisors tolerating the police misconduct and stating that “a law enforcement organization that tolerates repeated, notorious instances of the worst kinds of brutality – even by a minority of police officers – effectively signals to its employees that a certain level of violence is acceptable despite formal policies to the contrary”).
\item \textsuperscript{177} See COMMENTARY ON ADDITIONAL PROTOCOL I, supra note 172, at 1021-23.
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the result of a failure of effective discharge of supervisory responsibility.\textsuperscript{178} What is far more significant, however, is that in so doing, it incentivizes responsible and effective prosecutorial supervision and the creation of a culture of ethical compliance. No disciplinary sanction can hope to match the promise of ensuring the ethical execution of prosecutorial responsibility offered by such an effect.

V. Applying the Doctrine of Command Responsibility to Prosecutors’ Offices

As we outlined above, the doctrine of command responsibility should be applied to civilian prosecutors holding supervisory positions. While the exact language of such a rule could be debated,\textsuperscript{179} we believe the more fruitful endeavor is to endorse the overriding principle and then offer an explanation of how it could be applied on a day-to-day basis to district attorneys’ offices. In section V.A we discuss who can be held responsible and under what circumstances. Thereafter, in section V.B, we lay out some anticipated criticisms of our proposal and offer preliminary responses.

A. Imputing Liability: The Who and When

At the outset, we concede that applying the doctrine of command responsibility on a day-to-day basis in actual district attorneys’ offices is not a simple task. After all, every district attorney’s office is organized differently and they run the gamut from tiny offices with a handful of employees to enormous operations with hundreds of lawyers. We believe the best approach is to impose responsibility that closely tracks each office’s existing organizational chart. In the vast majority of cases, we would impose imputed responsibility only on the immediate supervisors of misbehaving prosecutors. In a smaller number of extremely serious or high profile cases—the very cases that the elected district attorney or high level supervising prosecutors in large offices should be aware

\textsuperscript{178} See Hansen, supra note 158, at 348 (discussing the necessity of a causal link between the superior’s failure to create a culture of compliance and the subordinate misconduct in order to impute liability to the superior).

\textsuperscript{179} We are in agreement with Professors Zacharias and Green that “when code drafters reduce broad principles of fairness and reasonableness to specific actions, prosecutors must undertake or avoid, prosecutors are likely to develop rule-centered mindsets . . . with prosecutors interpreting the rules literally and viewing the codes as requiring nothing more than the specified behavior.” See Zacharias and Green, The Duty to Avoid Wrongful Convictions, supra note 102, at 25; see also Fred C. Zacharias, Specificity in Professional Responsibility Codes: Theory, Practice, and the Pragmatism of Prosecutorial Ethics, 69 NOTRE DAME L. REV. 223, 262 (1993) (“A highly specific professional requirement . . . risks stultifying lawyers’ independent evaluation of appropriate responses.”).
of—we advocate imputed responsibility for both immediate superiors as well as the upper echelons of the office. As we explain below, we believe such an approach will create a number of positive incentives to minimize misconduct.

By way of example, let us explain how the doctrine of command responsibility would apply in a large and well-organized district attorney’s office. A large district attorney’s office often has hundreds of prosecutors, the bulk of whom are assigned to dozens of felony, misdemeanor and specialty courts. In a typical felony court, multiple junior prosecutors handle the bulk of the court’s cases and are supervised by a chief prosecutor who, inter alia, monitors their plea bargain offers, sits in on trials, and answers questions. In turn, the chief prosecutor of an individual court reports to a division chief, for instance the chief of the felony division or the misdemeanor division. The division chief, who is overseeing numerous courts, could not possibly be aware of the specifics of most of the cases within her division but should be familiar with high-profile cases and the most serious cases where trial is imminent or ongoing. The division chief may in turn report to another unelected prosecutor, often the head of the trial bureau or possibly the first assistant district attorney. Such high ranking officials would have little day-to-day knowledge of the thousands of cases winding their way through the office, but they should have a good sense of whether their immediate subordinates—the division chiefs—are providing proper guidance. Finally, the elected District Attorney sits at the top of the organizational chart and is immediately responsible for supervising not just the trial lawyers but also other departments such as the appellate or consumer fraud divisions.

With a clear organizational structure in place, it is relatively easy to apply the doctrine of command responsibility. In a typical case—a robbery prosecution,

180 The vast majority of district attorneys’ offices nationwide are located in smaller cities. See BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2005 at 10 (noting that 1,744 of the 2,344 state prosecutors’ offices are in jurisdictions with under 100,000 people). We see no difference in how the doctrine of command responsibility should apply to such offices. If there is only one supervising attorney, she should be responsible for creating a culture of ethical compliance for all subordinate prosecutors. When those line prosecutors commit misconduct, the sole supervisor should also be held liable if she knew or should have known that misconduct would occur.

181 We have based our description loosely on the structure of large district attorney’s offices in Harris County, Texas, Cook County, Illinois, and Dallas County, Texas. See OFFICE OF DISTRICT ATTORNEY, HARRIS COUNTY, CONTACTS (available at http://app.dao.hctx.net/Contacts.aspx); ABOUT THE COOK COUNTY STATE’S ATTORNEY’S OFFICE (available at http://www.statesattorney.org/about_the_office.htm); DALLAS COUNTY DISTRICT ATTORNEY’S OFFICE: LEADERSHIP (available at http://www.dallasda.com/about-leadership.html).

182 See Bibas, Prosecutorial Regulation, supra note 3, at 1006 (explaining that death penalty cases and other “significant but less momentous decisions may require review by the head prosecutor or a designated supervisor or committee”).
for instance—the chief prosecutor supervising a particular felony court should be responsible for the actions of her subordinate. If the junior prosecutor fails to turn over exculpatory evidence to the defense or if that junior prosecutor strikes a series of prospective jurors based on race, we would ask whether the supervising prosecutor of the court knew or should have known about the misconduct. If the answer is yes, that supervising prosecutor should be held responsible under the state’s ethics rules, even though she did not personally commit the misconduct.

Ordinarily, the discipline of the rogue prosecutor and his immediate supervisor would be the end of the matter. We would not expect the upper echelons of a large district attorney’s office to be aware of such day-to-day misbehavior and it would make little sense to hold senior prosecutors liable for unforeseeable rogue misconduct of individual actors far down the chain of command. Yet, there are at least two ways in which might hold the upper management responsible under the command responsibility doctrine as well.

First, if the case were sufficiently high profile or important enough for the division chief or elected district attorney to have some hands-on activity, they could be liable if they should have known about the misconduct. Second, and more importantly, upper management could be held responsible if they knew or should have known that junior prosecutors had not been appropriately trained to avoid the misconduct. If the elected district attorney or her high-level deputies never instituted training for employees on the requirements of the *Brady* doctrine or the impropriety of race-based peremptory strikes, then those high-level employees should have known that misconduct could occur. Put differently, the failure of senior management to provide continuing ethics and misconduct training could (and in many cases, should) leave them liable under the doctrine of command responsibility.183

Second, if the high-ranking prosecutors in the office—including the elected district attorney—created a win at all costs atmosphere by placing too high of a premium on conviction rates, liability for misconduct should be imputed to them as well. There are a number of ways we could discover such a toxic atmosphere. For instance, senior prosecutors could be circulating won/loss percentages or promoting prosecutors based too heavily on trial victories. By creating such an environment, senior prosecutors would know or should know that misconduct would occur and consequently could be held liable.

The importance of following the organizational chart cannot be underestimated. If an elected district attorney fails to institute a clear chain of command, that elected district attorney should be considered the immediate supervisor of all prosecutors in the office. If the immediate supervisor should

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183 See *id.* at 1009 (explaining that senior prosecutors can combat a “notches-on-the-belt conviction mentality by using “[t]raining exercises . . . that underscore[e] common causes of wrongful convictions and appropriate criteria for leniency”).
have known of misconduct, the elected district attorney should be held responsible. The elected district attorney should not be permitted to say that the office has too many cases for her to be responsible for direct supervisory responsibility of all of them. Nor should she be able to claim that responsibility actually belonged to someone else who was informally charged with supervising junior prosecutors, even though that position was not specified on the organizational chart. If the elected district attorney fails to create a clear chain of command, she should face the prospect of imputed liability on all cases. This bright-line rule will encourage prosecutors to create a chain of command and responsibility. In turn, those who are officially placed in positions of responsibility will have a clearer incentive to supervise their charges in order to themselves avoid supervisory liability.

It is important to note that this “chain of command” focused application of the doctrine mirrors its application in the military. It is simply impossible to establish a formula for how high up the chain of command liability can be legitimately imputed. The factual predicates for such imputation mandate case by case assessment. All we are suggesting is that the same presumptions that apply to military commanders apply to supervisory prosecutors. A commander who is attenuated from actual mission execution but who ensures subordinates are properly trained, and is reasonably engaged in the events taking place in his unit is justifiably permitted to presume that subordinates are executing their duties in accordance with the law. The expectation of immediate commanders is quite different. At that level, their situational awareness is obviously substantially increased, and therefore it is appropriate to assume that they are aware of the day to day activities of their subordinates, with the responsibility to cure mistakes that awareness entails.

However, even a second or third level commander could be liable under this doctrine when his actions or omissions created an environment that effectively rebuts the presumption that subordinates will execute their duties in accordance with the law. For example, a General who is routinely dismissive regarding obligations owed to captured enemy soldiers or civilians, or who ignores reports of misconduct by subordinates, is compromising the presumption that his unit will conduct itself in accordance with the law. The same would be true of a District Attorney of a large office who makes public statements that are dismissive of ethical obligations, and ignores minor ethical violations committed by front line trial attorneys. In both cases, investigation might well establish that these supervisors “should have known” that more serious violations were inevitable, and could therefore be held accountable when those violations occur.

B. Objections to Imputed Liability

We must acknowledge that our proposal faces at least three significant obstacles: political opposition, lack of funding, and the prospect of over-
deterring prosecutors and making them overly cautious. We address each in turn.

1. Political Hostility to Imputed Liability

First, and quite obviously, imputed liability for supervisory prosecutors would be a significant change from the current ethics rules governing prosecutors, or any lawyers for that matter. Prosecutorial organizations, which constitute a powerful interest group, would surely oppose it.\textsuperscript{184} As scholars such as Bill Stuntz\textsuperscript{185} and Stephanos Bibas\textsuperscript{186} have observed, legislators and politicians tend not to antagonize prosecutors because they prefer to be seen as prosecutors’ allies in the fight against unpopular criminal defendants.\textsuperscript{187}

Our proposal does not require action by legislatures but, instead, state rules committees or, at minimum, a Model Rules Committee of the American Bar Association. Yet, these audiences are problematic as well. As Professors John Burkoff\textsuperscript{188} and Bruce Green\textsuperscript{189} have recounted, even relatively modest changes to the Model Rules governing prosecutors have met with vigorous opposition from prosecutorial organizations. If, for example, modest\textsuperscript{190} efforts to extend prosecutors’ ethics obligations with respect to grand juries have failed in the past,\textsuperscript{191} there is good reason to believe a rule of imputed liability would face even greater opposition.

Nevertheless, countervailing factors may be building that would support significant change in the rules governing prosecutors. In recent years, there have

\textsuperscript{184} See Stuntz, \textit{Pathological Politics}, supra note 18, at 529 (“For most of criminal law, the effect of private interest groups is small: the most important interest groups are usually other government actors, chiefly police and prosecutors.”).

\textsuperscript{185} See id. at 529-33

\textsuperscript{186} See Bibas, \textit{Prosecutorial Regulation}, supra note 3, at 110 (“Legislatures lack the interest and incentive to check prosecutors vigorously; they would rather be seen as prosecutors’ allies in the fight on crime.”).

\textsuperscript{187} But see Brown, supra note 18, at 225 (arguing that the “ratchet of crime legislation turns both ways”).


\textsuperscript{189} See Green, \textit{Prosecutorial Ethics as Usual}, supra note 74, at 1581-87 (discussing the Ethics 2000 Commission).

\textsuperscript{190} We do not mean to suggest that prosecutorial manipulation of the grand jury process is unimportant. For a discussion of the conventional criticisms of prosecutorial abuse of the grand jury process, see Peter J. Henning, \textit{Prosecutorial Misconduct in Grand Jury Investigations}, 51 S.C. L. Rev. 1, 4-6 (1999).

\textsuperscript{191} See Green, \textit{Prosecutorial Ethics as Usual}, supra note 74, at 1581 (recounting failed effort to require prosecutors to disclose exculpatory evidence to grand juries)
been a number of high-profile instances of prosecutorial misconduct. At the state level, the Duke Lacrosse case has attracted enormous attention and has spurred calls for reform on a host of criminal justice issues. At the federal level, the spectacular failure of the prosecution against Senator Ted Stevens—in which Department of Justice prosecutors repeatedly withheld exculpatory evidence—has likewise sparked outrage and even led the federal judge overseeing the case to take the rare step of ordering an investigation of the prosecutors for possible contempt and obstruction of justice charges. The fallout from the Stevens case was so bad that further investigation led Attorney General Holder to ask the Ninth Circuit to release two convicted Alaska lawmakers because federal prosecutors failed to disclose exculpatory evidence in their cases as well. These cases as well as others may create a groundswell for more ethics regulation.

Notably, the victims of misconduct in all of these cases were high-profile politicians or the children of middle-class white families. While that does not make their suffering worse than the plight of the typical victims of prosecutorial misconduct—poor, young, black men—it does make it more likely that reform will be forthcoming. While legislators typically have little interest in protecting the rights of criminal defendants, they are sometimes moved to impose limits on prosecutors after they have personally been put in the crosshairs of the criminal

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193 See, e.g., Abby L. Dennis, Note, Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power, 57 DUKE L.J. 131 (2007) (proposing enhanced superseder power for governors and attorneys general to remove misbehaving prosecutors).


195 See Nedra Pickler & Matt Apuzzo, With Shoe on the Other Foot, Once-Disgraced Stevens Dances: Judge Dismisses Conviction, Names a Prosecutor to Probe Prosecutors, HOUSS. CHRON., Apr. 8, 2009, at A8.


198 See The Phases and Faces of the Duke Lacrosse Controversy: A Conversation, 19 SETON HALL J. SPORTS & ENT. L. 181, 201 (2009) (quoting Professor Angela Davis as explaining that “most of the people who are victims of misconduct are poor people who are disproportionately poor, black, and latino and who don’t get relief at all”).
For instance, shortly after Representative Joseph McDade was charged and acquitted of federal charges of trading campaign contributions for government contracts, Congress passed the Citizen Protection Act (commonly known as the McDade Amendment) which imposed state ethics rules on federal prosecutors. The question of how to regulate federal prosecutors had been debated among academics, courts and bar associations for over a decade prior to McDade introducing his amendment. Yet, all it took was McDade’s maneuvering in Congress to have the rule enacted within two years of his acquittal. And while numerous scholars question the wisdom of the McDade Amendment, it does demonstrate how unlikely reform measures can be transformed into law when the stars align.

The Duke Lacrosse case, while not involving legislators, also may provoke further regulation of prosecutors because the case resonated with the mainstream middle-class, the very group most likely to support legislation empowering prosecutors. In dismissing the charges against the players, the North Carolina Attorney General went so far as to call for new legislation that would give the North Carolina Supreme Court greater authority to remove prosecutors. The colossal failure of the case also led to the consideration of new legislation and ethics rules in New York and California designed to reign in prosecutors’ power. This is not surprising because, as Marc Mauer has observed, “the

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199 As Professor Craig Lerner has colorfully put it, “if a conservative is a liberal who’s been mugged, then a liberal would seem to be a conservative who’s been indicted. Craig S. Lerner, Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants, 2004 U. ILL. L. REV. 599, 603-04 & n.26 (2004) (attributing the quote to Alan Dershowitz).


201 The back story is well told by Professor Lerner. See Lerner, supra note 199, at 650-55.

202 For a few of the many criticisms, see id. at 655-56 (describing how it has hindered murder and terrorism investigations); Bruce A. Green & Fred C. Zacharias, Regulating Federal Prosecutors’ Ethics, 55 VAND. L. REV. 381 (2002) (rejecting McDade Amendment’s preference for state ethics rules and advocating the adoption of uniform federal ethics rules); Note, Federal Prosecutors, State Ethics, and the McDade Amendment, 113 HARV. L. REV. 2080 (2000) (predicting that the Amendment will hinder federal law enforcement).


204 As Professor Stuntz observes, voters are more concerned with outcomes and symbolic stands than with particular rules. See Stuntz, Pathological Politics, supra note 18, at 530.


conclusion that crime policy has shifted toward a ‘get tough’ strategy needs to be tempered with the recognition that when the perceived offenders are white and/or middle class, policymakers appear to be more receptive to rational policy considerations.”

In the end, while we concede that there are strong forces against a new rule of imputed liability, it is certainly not so radical of a reform as to be outside the realm of possibility.

2. Can the Proposal Work Without Additional Funding for Disciplinary Boards?

Assuming a rule of imputed liability for supervising prosecutors were adopted, we must also acknowledge a second obstacle: funding and staffing to enforce the new rule. As we explained in Part II.C, bar disciplinary bodies are understaffed and overworked. A new rule of ethical conduct that imposes liability on an additional class of lawyers would simply add to the burden on disciplinary boards. To be fully effective, our proposal would therefore require adoption of not only the new rule of imputed liability but also additional funding to enforce it. And given the already under-funded state of disciplinary bodies, it is unlikely that legislatures will be particularly willing to serve up more funding.

Yet, even if (as we fully expect) legislatures fail to provide additional funding, it is still possible that a doctrine of imputed liability could be beneficial. If judges or other lawyers referred cases of imputed liability to disciplinary boards, the boards might be more willing to pay attention to criminal law matters. At present, disciplinary boards rarely turn their attention to cases involving individual prosecutors. Arguably, it would be harder for ethics boards to ignore misconduct claims that involve not just isolated line prosecutors but also supervisors. Indeed, if a misconduct claim implicated a high-ranking

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208 See supra note 84 and accompanying text.
209 See Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice, 44 VAND. L. REV. 45 (1991) (recognizing fiscal constraints that preclude bar disciplinary committees from actively policing generalized “do justice” provisions of the ethics code); Landsberg, supra note 115, at 1403-04 (arguing for additional funding but recognizing the political obstacles).
210 See Gershowitz, Prosecutorial Shaming, supra note 1, at 1096.
211 See supra notes 77-83 and accompanying text.
212 This would seem to be in some tension with scholars’ observations that disciplinary boards tend to focus on solo and small firm practitioners, rather than large law firms which also have numerous supervising lawyers. See Leslie C. Levin, Preliminary Reflections on the Professional Development of Solo and Small Law Firm
supervisor in a large district attorney’s office—for instance, the Cook County State’s Attorney’s Office, which has a history of scandal—bar counsel might be moved to spend more time on the case knowing that the senior prosecutor supervises dozens or even hundreds of lawyers.

Moreover, even if disciplinary boards remain unable to keep up, there still may be a benefit in having supervisors’ names referred to the boards. If other actors in the criminal justice system become aware that supervising prosecutors have been reported for misconduct, it may serve to impact those supervisors’ reputations, even if the boards never impose any discipline. Defense lawyers who interact with those prosecutors may be more wary and judges might be less deferential to them.

The fact of being reported to the Board (and perhaps being the subject of courthouse gossip) may also serve to motivate ethical senior prosecutors who truly intended to do the right thing but failed to vigorously police their subordinates. Just as a driver may reduce his speed after being pulled over by an officer and given a verbal warning rather than a citation, so too may the reporting of senior prosecutors to the bar spur them to more closely supervise their subordinates.

In sum, while we concede that our proposal would be more effective with additional funding for disciplinary boards, we believe it could be fruitful even in the absence of that extra funding.

3. The Danger of Over-Deterring Prosecutors

A third objection to a rule of imputed liability is that it would over-deter supervising prosecutors and lead them to instruct subordinates to be too

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Practitioners, 70 FORDHAM L. REV. 847, 847-48 (1999) (noting that solo and small-firm lawyers receive “substantially more discipline than their big firm colleagues”);
Zacharias, Professional Discipline, supra note 2, at 757 (“Historically, regulatory authorities have imposed discipline primarily on solo or small-firm practitioners . . . When prosecutors have been influenced by venal incentives, the record suggests that the bar has proceeded against them.”).

213 See Armstrong & Possley, The Verdict – Dishonor, supra note 56.

214 The Cook County State’s Attorney’s Office employs more than 900 prosecutors. See COOK COUNTY STATE’S ATTORNEY’S OFFICE: INFORMATION, GUIDES, AND DIRECTORIES (available at http://www.statesattorney.org/).

215 See Gershowitz, Prosecutorial Shaming, supra note 1, at 1101 (discussing scuttlebutt around the courthouse).

216 See Fred C. Zacharias, Effects of Reputation on the Legal Profession, 65 WASH. & LEE L. REV. 173, 180 (2008) (explaining that lawyers and judges “will respond differently to settlement offers and statements made in negotiations, depending on their opponents’ reputations for candor and taking reasonable positions.”).

217 See Gershowitz, Prosecutorial Shaming, supra note 1, at 1102.
cautious. In turn, guilty defendants would go free and the balance of the adversarial system would fall too heavily toward the defendant.\textsuperscript{218}

We recognize this as a valid concern but are unpersuaded by it. While we hope supervisory prosecutors would be concerned about a rule of imputed liability (otherwise our proposal would be pointless) there seems to be little reason for them to be over-concerned. Prosecutors know that disciplinary bodies rarely discipline line prosecutors who commit clear misconduct. Even under a rule of imputed liability, supervisors would still be one step removed from line prosecutors’ misconduct because the disciplinary body would also need to find that the supervisors should have known that the misconduct would occur.

Moreover, prosecutors do not operate in a vacuum where all they consider is the ethics rules. Prosecutors are driven by a personal desire to put the guilty in prison and a professional desire to advance their careers by winning cases.\textsuperscript{219} Thus, while we certainly want supervising prosecutors to take notice of the imputed liability rule and take steps to comply with it, we are extremely doubtful that such a rule would over-deter them.\textsuperscript{220}

Indeed, the same over-deterrence objection fails with respect to the doctrine of command responsibility in the military. Very few commanders since 1945 have been held criminally responsible under the “should have known” standard of command responsibility. It is the potential for imputed liability that incentivizes effective leadership and responsible command, irrespective of the record of application. All commanders know that if subordinates commit violations, their performance will very likely be subject to scrutiny. More importantly, they also know that if they execute their responsibilities effectively, and take the simple steps of ensuring well trained subordinates and prompt and effective responses to reports of misconduct, they will be insulated from imputed liability. We expect the same outcome among supervisory prosecutors.

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In sum, while there are serious obstacles to our proposal—adopting the rule, properly funding the ethics boards, and the risk of over-deterrence—we believe the proposal is not only plausible but worthwhile. At present, there is little pressure beyond individual prosecutors’ own personal ethical codes to deter them from committing misconduct. A proposal—even if it is a long-term approach—that calls on supervisors and leaders to step forward and take

\textsuperscript{218} Cf. Zacharias & Green, The Duty to Avoid Wrongful Convictions, supra note 102, at 39-41 (considering whether a vague competence standard holding prosecutors responsible for wrongful convictions would over-deter).

\textsuperscript{219} See id. at 41.

\textsuperscript{220} For the same reasons, we agree with Professors Zacharias and Green that more aggressive ethics rules will be unlikely to motivate supervisors to participate in a cover-up of subordinates’ misconduct. See id. at 41-42.
responsibility for rooting out misconduct by their subordinates is a positive step forward.

CONCLUSION

The role and power of prosecutors in the American criminal justice system closely resembles the power of soldiers on the battlefield. When it comes to the battlefield, the law of war has long recognized that hands-on leadership by supervisors is essential to helping soldiers to avoid misconduct. For that reason, the doctrine of command responsibility encourages supervisors to create an ethical environment by imputing liability to supervisors for misconduct that they knew or should have known would occur. A similar approach should be adopted in the American criminal justice system to reduce the pervasive problem of prosecutorial misconduct. State ethics codes should therefore be revised to make supervising prosecutors vicariously responsible for the misconduct of their subordinates that they knew or should have known would occur. Such an approach will incentivize senior prosecutors to more closely monitor, train, and lead junior prosecutors. In turn, prosecutorial misconduct – most of which is inadvertent and avoidable – can be dramatically reduced.