April 17, 2015

Stop Blaming the Prosecutors: The Real Causes of Wrongful Convictions and Rightful Exonerations, and What Should Be Done to Fix Them

Adam Lamparello, Indiana Tech Law School
Charles E. MacLean, Indiana Tech Law School
James J. Berles, Indiana Tech Law School
STOP BLAMING THE PROSECUTORS: THE REAL CAUSES OF WRONGFUL CONVICTIONS AND RIGHTFUL EXONERATIONS, AND WHAT SHOULD BE DONE TO FIX THEM

Charles E. MacLean¹ James Berles,² & Adam Lamparello³

“The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth.”⁴

TABLE OF CONTENTS

INTRODUCTION ...............................................................................................................................

I. EXAMINING THE RECORD: WRONGFUL CONVICTIONS AND RIGHTFUL EXONERATIONS ..............................................................................................................................

II. EXAMINING THE RECORD: PROSECUTORS CAUSING WRONGFUL CONVICTIONS ....

III. EXAMINING THE RECORD: PROSECUTORS ALLOWING WRONGFUL CONVICTIONS .....

IV. WHAT IS BEING DONE NOW AND WHAT MORE CAN BE DONE?.................................

A. THE CITIZENS PROTECTION ACT OF 1998 .................................................................

B. THE HYDE AMENDMENT .................................................................................................

C. MORE EFFECTIVE REMEDIES ARE AVAILABLE ...........................................................

  1. DNA GENOTYPING AND PHENOTYPING..............................................................

     A. TRADITIONAL DNA TESTING (GENOTYPING).................................................

     B. DNA PHENOTYPING.........................................................................................

  2. FUNCTIONAL MAGNETIC RESONANCE IMAGING...............................................
3. **FOCUSING ON THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT’S (AEDPA) SECOND PRONG**

4. **MODIFYING STRICKLAND V. WASHINGTON**

5. **INNOCENCE AND HABEAS PROJECTS**

6. **THE PROSECUTOR’S ACCOUNTABILITY**
   A. **UNIFORM APPLICATION OF THE QUALIFIED IMMUNITY DOCTRINE**
   B. **VICARIOUS LIABILITY FOR SUPERVISORY PROSECUTORS TO ENSURE COMPLIANCE WITH ETHICAL OBLIGATIONS**
   C. **CRIMINAL, CIVIL, AND LICENSE SANCTIONS FOR PROSECUTORIAL MISCONDUCT**
   D. **OPEN-FILE DISCOVERY**
   E. **REMOVING PROSECUTORS FROM THE ELECTORAL PROCESS**

D. **EXAMPLES OF MODEL/PROPOSED LEGISLATION**

**CONCLUSIONS**
INTRODUCTION

Wrongfully convicted and rightfully exonerated criminal defendants spent, on average, ten years in prison before exoneration, and the ramifications to the defendants, the criminal justice system, and society are immeasurable.\(^5\) Prosecutorial misconduct, however, is not the primary cause of wrongful convictions. To begin with, although more than twenty million new adult criminal cases are opened in state and federal courts each year throughout the United States,\(^6\) there have been only 1,281 total exoneration over the last twenty-five years.\(^7\) In only six percent of those cases was prosecutorial misconduct the predominant factor resulting in those wrongful convictions. In cases where DNA has resulted in exoneration, the causes of the underlying wrongful convictions most frequently are eyewitness misidentifications, improper forensics, false confessions, and informants.\(^8\) Certainly, one could argue that prosecutorial misconduct is inextricably linked to this problem because prosecutors may knowingly rely on this evidence at trial despite its unreliability. That assertion, however, ignores the fact that judges, not prosecutors, determine whether evidence should be admitted into the record, and

\(^5\) See Stephanie Slifer, How the Wrongfully Convicted Are Compensated for Years Lost, available at http://www.cbsnews.com/news/how-the-wrongfully-convicted-are-compensated/. The average was based on a study of 1,281 exonerations over a twenty-five year period:

Of the 1,281 exonerations recorded by the Registry from 1989 through 2013, almost all the individuals had been in prison for years; half for at least 8 years; more than 75% for at least 3 years. As a group, the defendants had spent nearly 12,500 years in prison for crimes for which they should not have been convicted - an average of 10 years each.

\(^6\) In 2010, 20.4 million new criminal cases were filed in America’s state courts. Richard U. Schauffler, et al, Examining the Work of State Court: An Analysis of 2010 State Court Caseloads, at 20 (Dec. 2010). Another 77,779 new criminal cases were filed in federal district courts in 2010. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, available at http://www.albany.edu/sourcebook/pdf/t5112010.pdf. These data do not include new juvenile and traffic cases filed.

\(^7\) NAT’L REGISTRY OF EXONERATIONS, Basic Patterns, available at https://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx.

amounts to a claim that prosecutors rely on evidence and elicit testimony that they know is false. As discussed below, such a categorical claim of unethical behavior by prosecutors is not supported by the record.

Of course, although prosecutorial misconduct is not the driving force behind wrong convictions, prosecutors can – and should – be part of a comprehensive solution that reduces the likelihood of wrongful convictions. This article proposes the following solutions:

- DNA testing and functional magnetic resonance imaging (fMRI) should be available to defendants who demonstrate a preponderance likelihood that such testing could demonstrate their innocence;

- When DNA samples are too degraded to permit genotyping, investigators should increasingly use DNA phenotyping to create a profile of the likely perpetrator and thereby exclude certain classes of people;

- Appellate courts should focus on the second prong of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which permits reversal of convictions where a district court’s decision constitutes an unreasonable application of clearly established federal law, even if the decision is not contrary to clearly established federal law;

- In applying Strickland v. Washington’s ineffective assistance of counsel standard, courts should focus more heavily on whether defense counsel’s performance fell below an objectively reasonable standard of care; and

- The qualified immunity doctrine should be applied uniformly, and supervisory prosecutors should be vicariously liable for a deputy prosecutor’s unethical behavior

Simply put, lawmakers, courts, and prosecutors have the power and obligation to reduce the number of wrongful convictions by, among other things, ensuring a fair trial and meaningful appellate review.

To be sure, the term “wrongful conviction” should not be limited to the question of whether a defendant is innocent or guilty. Wrongful convictions should include those where the crime with which a defendant is convicted or the resulting sentence does not accurately reflect
the defendant’s culpability. This definition is consistent with the criminal justice system’s commitment to due process and will lead to procedures that enhance the fairness and reliability of a defendant’s sentence. Ultimately, where prosecutors, courts, and legislators exercise their power ethically, justice can be achieved; where that power is exercised in a manner that ignores pervasive flaws in the criminal justice system, justice is compromised.

Part II examines the categories of prosecutorial misconduct, which are primarily evidentiary. Part III discusses the extent to which prosecutors’ conduct is a direct and substantial cause of wrongful convictions, and concludes that this is the case in a startlingly low percentage of cases. Part IV proposes solutions to decrease the likelihood of wrongful convictions, and increase the likelihood that such convictions will be reversed on appeal.

I. EXAMINING THE RECORD: WRONGFUL CONVICTIONS AND RIGHTFUL EXONERATIONS

The National Registry of Exonerations (“Registry”) is a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at the Northwestern University School of Law. Holding itself out as the “most comprehensive collection of exonerations in the United States ever assembled,” the Registry had only cataloged 1245 exonerations through late 2013. The Registry continues to grow by about 200 entries per year as recent exoneration cases are added to the database and as older exonerations are identified and cataloged.

---

9 Id.
10 Id., available at https://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx. At first glance, it would appear that wrongful convictions and exonerations are almost impossibly rare since there are only 1245 exonerations in the Registry database that purports to be the most exhaustive repository of American wrongful convictions every created. After all, there are only 1245 exonerations in a “comprehensive” database covering all American exonerations since 1989. Note that number has grown to 1548 exonerations in the Registry through April 16, 2015. Id.
11 Id.
The picture that emerges from the Registry’s data is sobering. As stated above, the average time an innocent person spends in prison is ten years.\(^{12}\) In addition, although less than 14% of the American population is African-American,\(^{13}\) 46% of those who were wrongfully convicted and later exonerated were African-American.\(^{14}\) This is more than three times the rate of the general population. In fact, that exoneration rate for African-Americans is even higher that the incarceration rate for African-Americans, which was 37.8% in 2011.\(^{15}\) Although many of the exonerations were obtained by post-conviction DNA testing, seventy-five percent of the exonerations did not involve DNA testing.\(^{16}\) The exonerees identified through early 2015 had served a total of over 14,429 years in prison, and sixty-one percent of the exonerees had served at least five years in prison for crimes they had not committed.\(^{17}\)

The Registry has also reviewed each exoneration case to identify the factors that contributed to each wrongful conviction. The table below summarizes the results.

---

\(^{12}\) “[A]n exoneration occurs when a person who has been convicted of a crime is officially cleared based on new evidence of innocence . . . either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action [that is, a pardon, acquittal, or dismissal of charges, and the action] was the result, at least in part, of evidence of innocence that either . . . was not presented at the trial . . . or . . . if the person pled guilty, was not known to the defendant, the defense attorney and the court at the time the plea was entered.” Glossary, NAT’L REGISTRY OF EXONERATIONS, available at https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx.


\(^{14}\) NAT’L REGISTRY OF EXONERATIONS, Basic Patterns, available at https://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx.


\(^{16}\) NAT’L REGISTRY OF EXONERATIONS, Basic Patterns, available at https://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx.

\(^{17}\) Id. Although each wrongful conviction necessitating exoneration is a tragedy, and although it is equally obvious that the Registry has not yet captured all the wrongful convictions in America since 1989, it is equally clear that wrongful convictions appear to be singularly rare. In 2010, state courts alone (thus, excluding federal courts) processed over 20 million newly filed criminal cases. R. LaFontaine, et al, Examining the Word of State Courts: An Analysis of 2010 State Court Caseload, at 20 (Nat’l Ctr. State Courts 2012). That was down a bit from the all-time high of 21.6 million in 2006. Id. Extrapolating a bit, and conservatively assuming just ten million criminal state cases per year since 1989 (the average per year since 2000 was twice that), American prosecutors have handled 250 million cases during those twenty-five years from 1989-2013, inclusive, during which just 1245 wrongful convictions (1200 of which were in state prosecutions) had been cataloged by the Registry. Doing the math, based on those data and assumptions, a wrongful conviction yielding an exoneration occurred in less than .0005% (that is in less than 5 ten-thousandths of one percent) of the criminal state cases in twenty-five years!
TABLE I
CAUSES OF WRONGFUL CONVICTIONS\textsuperscript{18}

<table>
<thead>
<tr>
<th>Cause</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perjury or false accusations</td>
<td>56%</td>
</tr>
<tr>
<td>Mistaken identification</td>
<td>34%</td>
</tr>
<tr>
<td>False or misleading forensic evidence</td>
<td>23%</td>
</tr>
<tr>
<td>False confessions</td>
<td>13%</td>
</tr>
<tr>
<td>“Official Misconduct” (lumped into a single category)</td>
<td>46%</td>
</tr>
</tbody>
</table>

The Registry defines “official misconduct” as having occurred when “[p]olice, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree’s conviction.”\textsuperscript{19} That broad definition unintentionally blurs the roles of the various “officials” whose misconduct is subsumed within that category. In this Article, the authors examine that combined category, “official misconduct,” to better define and quantify the role that prosecutorial misconduct plays in yielding wrongful convictions -- and rightful exonerations.

II. EXAMINING THE RECORD: PROSECUTORS CAUSING WRONGFUL CONVICTIONS

Prosecutors’ power permeates every layer of the criminal justice process, including the power to decide when and against whom charges will be brought (or presented to a grand jury).\textsuperscript{20}

\textsuperscript{18} NAT’L REGISTRY OF EXONERATIONS, Basic Patterns, available at https://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx.

\textsuperscript{19} Glossary, NAT’L REGISTRY OF EXONERATIONS, available at https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx.

\textsuperscript{20} See Robert H. Jackson, United States Attorney General, later Supreme Court Justice, at the Second Annual Conference of United States Attorneys, address on The Federal Prosecutor, at 1, 6 (Apr. 1, 1940) (quoted in Charles E. MacLean & Stephen Wilks, Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion, 52 WASHBURN L.J. 59, 59 (2012).
In addition, prosecutors determine what bail to recommend, what negotiated pleas to pursue and plea deals to accept, which witnesses to call and exhibits to offer, which co-defendants will receive better deals and which will be granted use immunity, and upon conviction, which sentences and conditions to recommend. Likewise, prosecutors decide which suspects will be diverted into pre-trial programming and intervention. In fact, many prosecutors also advise law enforcement investigators and help to shape or even direct criminal investigations. Thus, there is almost no step in the criminal justice process that is not controlled, or at least influenced, by prosecutors.

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. . . . The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.


See Ebbe B. Ebbesen & Vladimir J. Konecni, Decision Making and Information Integration in the Courts: The Setting of Bail, J. PERSONALITY & SOC. PSYCHOL. 805, 820 (1975) (the single most highly correlated factor with the bail actually set by the court was the prosecutor’s recommended bail).

See Prosecutorial Discretion, 35 GEO. L.J. ANN. REV. CRIM. PROC. 203, 204-06 (2006).


See Mary Fan, Street Diversion and Decarceration, 50 AM. CRIM. L. REV. 165, 182 (2013) (“Prosecutors are the central gatekeepers, wielding broad discretion over whether defendants get pretrial diversion”); Note, Pretrial Diversion from the Criminal Process, 83 YALE L.J. 827, 839 (1974) (“Judicial reticence to interfere with the prosecutor’s discretion extends to pretrial diversion.”).

See Mary Fan, Street Diversion and Decarceration, 50 AM. CRIM. L. REV. 165, 182 (2013) (“Prosecutors are the central gatekeepers, wielding broad discretion over whether defendants get pretrial diversion”); Note, Pretrial Diversion from the Criminal Process, 83 YALE L.J. 827, 839 (1974) (“Judicial reticence to interfere with the prosecutor’s discretion extends to pretrial diversion.”).

See United States v. Martinez, 785 F.2d 663, 670 (9th Cir. 1986) (court review of prosecutorial input to investigations is limited by prosecutorial discretion).
Of course, even though prosecutors wield tremendous power, they are required by ethics codes to wield that power as “ministers of justice,” and “quasi-judicial officers.” Examining the Registry database allows one to see the depths to which the unethical and ethically ambivalent will sink. As was mentioned, official misconduct contributed to the wrongful convictions in forty-three percent of the Registry cases. But the authors have examined the facts of every case in that “official misconduct” category to place each case into one of three sub-categories of official misconduct: (1) official misconduct cases where prosecutorial misconduct was the predominant factor leading to the wrongful conviction; (2) official misconduct cases where prosecutorial misconduct was a material, but not the predominant, factor; and (3) official misconduct cases where prosecutorial misconduct was not even a material factor. The authors then computed the role prosecutorial misconduct played as a factor leading to the wrongful convictions in the Registry, as a percent of all exonerations in the Registry. The results are notable:

As percent of ALL Exoneration Cases in the Registry (as of October 2013)

6% - Prosecutorial Misconduct was the Predominant Factor
18% - Prosecutorial Misconduct was a Material, but not the Predominant Factor
76% - Prosecutorial Misconduct was not a Material Factor

The implications are not as clear as they may appear. Although just six percent of all exonerations were predominantly caused by prosecutorial misconduct, that does not mean prosecutors are blameless. First, prosecutorial misconduct was at least a material factor in twenty-four percent of the wrongful convictions in the database. Second, prosecutors are bound

28 Model Rules of Prof’l Cond. 3.8, cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that on an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons”).
30 Prosecutorial misconduct per se was the predominant factor in six percent of the exonerations in the Registry plus prosecutorial misconduct per se was at least a material factor in an additional eighteen percent of the exonerations.
by ethics rules and policies\textsuperscript{31} that should compel prosecutors to engage only in, or at least guide them toward, ethical decision making. Third, as the map below reveals, prosecutorial misconduct falls into some troubling patterns, regionally and categorically.

Regionally, there is stunning inconsistency. Sixty percent of all exonerations arose in just nine states.\textsuperscript{32} This map illustrates exonerations by state 1989-2013 based on the Registry’s data:

Those add up to a total of twenty-four percent of the exonerations wherein prosecutorial misconduct per se was at least a material factor.


\textsuperscript{32} Those nine states, in order of the number of exonerations in each state, are Texas (200), New York (188), California (152), Illinois (151), Michigan (55), Ohio (52), Florida (52), Pennsylvania (51), and Louisiana (45). https://www.law.umich.edu/special/exoneration/Pages/browse.aspx. Although those states accounted for 60% of all
Perhaps more troubling are the individual states that have the highest number of exonerations per 100,000 in the population for each state. Although the average number of exonerations per 100,000 in the population is 0.48, the following four states, in order from high to low, exceeded that national average by two times or greater: District of Columbia (2.45), Illinois (1.17), Louisiana (0.98), and New York (0.97). And a total of fifteen states exceeded the national average exonerations rate.

All of the prosecutor-predominant cases arose in just nineteen states and the federal government, most of which had the death penalty during much or all of the time since 1989:

**Prosecutor-Predominant Exonerations by Jurisdiction**

- Federal (18)
- New York (11)
- Louisiana, Texas (7)
- California (5)
- Illinois (4)
- North Carolina, Pennsylvania (3)
- Iowa, Virginia (2)
- Alabama, Arizona, Georgia, Indiana, Massachusetts, Missouri, Ohio, Oklahoma, Tennessee, Washington State (1)

Although even the total number of prosecutor-predominant cases identified in the Registry is quite small, those jurisdictions near the top of that list should conduct a thorough investigation to determine and mitigate the causes. And that investigation should look not just at the individual cases and prosecutors, but should evaluate the system as a whole to identify those characteristics that can lead to such misconduct.

---

exonerations, they only account for 50% of the total United States population. *Id.*; U.S. Census Bureau, Interim Projections of the Total Population for the United States and States: April 1, 2000 to July 1, 2030 (using state population projections for July 1, 2015).

33 The fifteen states exceeding the national average exonerations rate per 100,000 persons in the state’s population are District of Columbia (2.45), Illinois (1.17), Louisiana (0.98), and New York (0.97), Texas (0.81), Oklahoma (0.78), Wisconsin (0.70), Massachusetts (0.60), Wyoming (0.58), Washington State (0.57), Missouri (0.56), Michigan (0.53), Nebraska (0.51), South Dakota (0.51), and West Virginia (0.49).
Categorically, too, there is a clear pattern. In the prosecutor-predominant exoneration cases, the prosecutorial misconduct fell into just six categories:

**Prosecutor-Predominant Exonerations by Type of Prosecutor Misconduct**

Prosecutor withheld exculpatory evidence (57 exonerations)
Prosecutor affirmatively misled court, jury, or defendant (7 exonerations)
Prosecutor knowingly offered perjured/false testimony (5 exonerations)
Prosecutor coerced statement from defendant or key witness (4 exonerations)
Prosecutor used the criminal charges to retaliate (3 exonerations)
Prosecutor’s jury selection was racially discriminatory (1 exoneration)

Of course, prosecutors may not withhold exculpatory evidence. But those rules did not prevent the fifty-seven prosecutors in the first category above from causing wrongful convictions by withholding all manner of exculpating evidence from the defense. For example, in an Iowa murder case against Terry Harrington, the prosecutor did not disclose to the defense eight police reports that indicated there was an alternative perpetrator, an early suspect in the investigation, who had shown deception when denying involvement in the murder. In California in 2004 the prosecutor withheld critical evidence from the defense in a child sex abuse case, including that a complaining witness had recanted prior to trial but later lied in an attempt to cover up the

---

34 Model Rules Prof’l Cond. 3.8(d) (“The prosecutor . . . shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”); ABA Standards 3-3.11 (“A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused”)
NDAA Standards 2-8.4 (“The prosecutor shall make timely disclosure of exculpatory or mitigating evidence, as required by law and/or applicable rules of ethical conduct”); NDAA Standards 4-9.1 (“A prosecutor should, at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process”); NDAA Standards 4-9.2 (“If at any point in the pretrial or trial proceedings the prosecutor discovers additional witnesses, information, or other material previously requested or ordered which is subject to disclosure or inspection, the prosecutor should promptly notify defense counsel and provide the required information”); NDAA Standards 4-9.3 (“A prosecutor should not impede opposing counsel’s investigation or preparation of the case”); see also Brady v. Maryland, 373 U.S. 83 (1963).

misconduct; the charges were then dismissed, and the prosecutor’s attorney license was suspended for one year.36

Prosecutors’ ethical obligations extend much further than simply the duty to reveal exculpatory evidence. They may not ethically mislead others in the justice system,37 knowingly offer perjured testimony,38 or coerce statements from defendants or witnesses.39 At the extremes, some prosecutors have violated these rules. In Pennsylvania, a state prosecutor offered knowingly misleading phone records in court in a robbery case; the prosecutor held up a stack of phone records to the jury pointing out that the alibi call was nowhere on the phone record printout – the prosecutor knew all the while that the alibi call was a local call, and would not have been included on the phone records printout.40 In 2004, a federal prosecutor offered a knowingly false affidavit, leading United States District Court Judge John Hughes determined that “about two dozen government lawyers” had ultimately participated in a conspiracy to withhold evidence, offer false testimony, or refuse to correct it.41 These accounts are deeply

---

37 ABA STANDARDS 3-2.8(a) (“A prosecutor should not intentionally misrepresent matters of fact or law to the court”); NDAA STANDARDS 1-1.1 (“The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth”); NDAA STANDARDS 6-1.1 (“A prosecutor shall not knowingly make a false statement of fact or law to a court”).  
38 ABA STANDARDS 3-2.8(a) (“A prosecutor should not intentionally misrepresent matters of fact or law to the court”); NDAA STANDARDS 1-1.1 (“The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth”); NDAA STANDARDS 3-1.3 (“A prosecutor is ultimately responsible for evidence that will be used in a criminal case”); NDAA STANDARDS 6-1.3 (“A prosecutor shall not offer evidence that the prosecutor knows to be false. If a prosecutor learns that material evidence previously presented is false, the prosecutor shall take reasonable remedial measures to prevent prejudice caused by the false evidence”).  
39 NDAA STANDARDS 3-1.4 (“A prosecutor should not knowingly obtain evidence through illegal means, nor should the prosecutor instruct or encourage others to obtain evidence through illegal means”); accord ABA Standards 3-3.1(c).  
40 See Bill Moushey, New Castle man released from prison after judge tosses out 2003 robbery conviction, PITTSBURGH POST-GAZETTE (Aug. 13, 2005) (the district court judge, who vacated Justin Kirkwood’s robbery conviction, was quoted in the article saying the prosecutor had created a “ruse designed to confuse” the jurors).  
41 United States v. Wilson, 289 F. Supp. 2d 801, 802, 807-08, 811 (S.D. Tex. 2003) (in obvious frustration, Judge Hughes declared in the opinion, “This opinion refers only to the part of the record that the government has reluctantly agreed may be made public. It does not attempt to recount even that limited range of data in its entirety;
troubling and should never be tolerated in the criminal justice system. At the same time, they are largely anomalous and not consistent with customary practices among prosecutors throughout the United States.\textsuperscript{42}

With their power and ability to control almost all aspects of a criminal case, prosecutors can and must meaningfully address misconduct by all players in the criminal justice system. Put differently, prosecutors should be responsible both for their own misconduct and for the misconduct of others over whom they exercise supervisory authority. The next section discusses examples of misconduct where prosecutors were not directly involved but were in a position to prevent such misconduct.

III. EXAMINING THE RECORD: PROSECUTORS ALLOWING WRONGFUL CONVICTIONS

The prosecutor is “ultimately responsible for evidence that will be used in a criminal case,”\textsuperscript{43} including providing advice to law enforcement officials,\textsuperscript{44} and counseling forensic lab technicians, lay witnesses, and expert witnesses in advance of trial. In so doing, prosecutors have the opportunity to discover weaknesses in the evidence and to implement safeguards that minimize the likelihood of a wrongful conviction. In situations where prosecutors fail to responsibly discharge this duty, there should be legal consequences. For example, in Illinois, officers beat, kicked, and suffocated a suspect until he blacked out, all to coerce a confession out of him.\textsuperscript{45} The prosecutors either knew or should have known, or could have found out with the governmental deceit mentioned here is illustrative—not exhaustive . . . due process [] requires personal and institutional integrity.”).

\textsuperscript{42} See Charles E. MacLean, Anecdote as Stereotype: One Prosecutor’s Response to Professor Monroe Freedman’s Article “The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors’ Offices,” 52 WASHBURN L.J. 23 (2012) (discussing a recent piece of prosecutorial ethics scholarship that presented a few egregious prosecutorial misconduct anecdotes as somehow reflective of the behavior and ethics of all prosecutors).

\textsuperscript{43} NDAA STANDARDS 3-1.3.

\textsuperscript{44} NDAA STANDARDS 2-5.6.

\textsuperscript{45} People v. Hobley, 696 N.E.2d 313, 323 (Ill. 1998) (the Illinois Supreme Court found Defendants “placed defendant in an interview room, handcuffed him to a wall ring, . . . began to physically abuse and racially harass him . . . When defendant denied setting the fire, Garrity kicked him. . . . Detectives . . . escorted defendant to another
minimal effort.\textsuperscript{46} This was officer misconduct \textit{ab initio}, but the prosecutor became complicit by failing to intervene. Similarly, in West Virginia, a forensic lab technician falsely testified as to a genetic marker match with the defendant; that testimony, as well as testimony that same technician had provided in many other cases in as many as twelve other states, was eventually found to be inaccurate.\textsuperscript{47} Although DNA science is complicated, a prosecutor who intends to offer such evidence must become acquainted with the details of the science. Otherwise, the prosecutor will not be in a position to identify flaws in the evidence and therefore consider its admissibility at the criminal trial. When prosecutors fail to carefully scrutinize lay witness testimony and forensic evidence, they become the catalyst for a trial that is less reliable, less fair, and less just. For that reason alone, prosecutors have an ethical and moral obligation to uncover the defects in their cases, even if it comes at the expense of obtaining a conviction, or if it requires the prosecutor to bring less serious charges against a defendant. The next section examines what prosecutors can and should do to ensure the fairness of the criminal trial process.

IV.\textbf{ WHAT IS BEING DONE NOW AND WHAT MORE CAN BE DONE?}

There have been many attempts through courts and legislation to adopt remedies – both prophylactic and remedial – to address prosecutorial misconduct. Such attempts, however, must be tailored to individual jurisdictions, as policies that would be effective in curbing misconduct in one jurisdiction might be inapplicable or ineffective in another. Notwithstanding these differences, there can be little doubt that more needs to be done. In fact, on two occasions Congress has attempted to reduce instances of prosecutorial misconduct at the federal level.\textsuperscript{48}

\begin{flushright}
\textsuperscript{46} Id.
\textsuperscript{47} See B.J. Reyes, \textit{DNA Tests Free Convicted Rapist: Justice: William Harris, 28, served seven years in prison for a crime he didn’t commit}, \textit{L.A. TIMES} (Oct. 8, 1995).
\textsuperscript{48} See, e.g., United States v. Shaygan, 676 F.3d 1237, 1251 (11th Cir. 2012) (Martin, J., dissenting) (“In passing the Hyde Amendment Congress sought to respond to patterns of prosecutorial misconduct, including instances where
A. THE CITIZENS PROTECTION ACT OF 1998

The Citizens Protection Act of 1998 ("CPA") was a legislative attempt to protect against prosecutorial misconduct on the part of federal prosecutors. The CPA mandates that federal prosecutors abide by the same state laws and rules that apply to all attorneys practicing in the jurisdictions in which those federal prosecutors practice. This means federal prosecutors are subject to, inter alia, state ethics rules, which in some instances forbid some long-accepted federal prosecution practices.

The CPA came about as a result of the failed prosecution of former U.S. Representative Joseph M. McDade (R.-PA), who was indicted in 1992 and charged with “accepting illegal gratuities, conspiracy, and racketeering.” McDade was acquitted of the charges following a jury trial. McDade had not surrendered his seat in the House of Representatives and following his acquittal he introduced and championed legislation that eventually became the CPA.

49 The majority of exoneration cases involve prosecutorial misconduct on the part of state, not federal, prosecutors, which of course stands to reason given the vastly larger population of the former.

50 28 U.S.C. § 530B; 28 C.F.R. § 77.1 et seq. The CPA provides in relevant part:

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.


52 One court suggested that the CPA “should be called ‘McDade’s Revenge,’ because there can be no doubt that Congressman McDade’s personal contempt for Department of Justice prosecutors . . . led to his efforts to pass the Act.” United States v. Tapp, No. CR107-108, 2008 WL 2371422 (S.D. Ga. June 4, 2008).

For victims of prosecutorial misconduct, the CPA offers very little protection to very few citizens. For one thing, it “does not mandate the payment of money damages.”54 Also, the CPA does not “create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, including criminal defendants . . . and shall not be a basis for dismissing criminal or civil charges or proceedings. . . .”55

Only a few courts have even issued rulings regarding the CPA. In United States v. Lowery,56 the Eleventh Circuit held that a violation of state ethics rules was not a valid basis for suppressing evidence in federal court.57 The court explained that “[a]ssuming for present purposes that the [Florida ethics] rule is violated when a prosecutor promises a witness some consideration regarding charges or sentencing in return for testimony, a state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible.”58 In United States v. Syling, the defendant argued that federal prosecutors violated state ethics rules in Hawaii by not presenting exculpatory evidence to the grand jury that had indicted her; the district court ruled that the CPA “does not override the law governing presentation of evidence in federal grand jury proceedings.”59

54 Cox v. United States, 105 Fed. Cl. 213, 219 (2012) (pro se plaintiffs filed suit against United States in U.S. Court of Federal Claims seeking damages pursuant to several statutes including the CPA).
56 166 F.3d 1119 (11th Cir.), cert. denied, 528 U.S. 889 (1999).
57 Defendant Lowery contended that federal prosecutors violated a Florida state ethics rule by offering witnesses certain benefits in exchange for their testimony in the case.
58 166 F.3d at 1124-25. (The Eleventh Circuit further stated that “[f]ederal law, not state law, determines the admissibility of evidence in federal court. ‘Although there is an important state interest in the regulation of attorneys practicing within its borders, there is a competing federal interest in the enforcement of federal criminal law.’” Id. (quoting United States v. Cantor, 897 F. Supp. 110, 115 (S.D.N.Y. 1995)).
a state ethics rule mandating the same, “impermissibly interferes with federal grand jury practice and transcends district court rulemaking authority, [and] section 530B cannot salvage it.”

Although some courts have relied on the provisions of the CPA to remedy certain misconduct by federal prosecutors, section 530B clearly does not offer much of anything in the way of real reform that addresses the overarching issue of prosecutorial misconduct. This is especially true, because the CPA has no direct effect on those state court cases.

B. THE HYDE AMENDMENT

The Hyde Amendment was enacted as part of the Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1998. It is named for U.S. Representative Henry Hyde (R.-Ill.) and was conceived and enacted in part as a result of political empathy or sympathy for Rep. McDade and his ordeal. The Eleventh Circuit summarized this aspect of the legislative history of the amendment as follows:

In response to the prosecution of Joseph McDade, who after a lengthy investigation was tried and acquitted in 1996 of federal bribery and racketeering

60 214 F.3d 4, 20 (1st Cir. 2000); but see United States v. Colorado Sup. Ct., 189 F.3d 1281 (10th Cir. 1999) (holding that a Colorado state ethics rule restricting the ability of prosecutors to issue subpoenas to defense attorneys to compel evidence about a past or present client in criminal proceedings, which rule was adopted by the District of Colorado, could be enforced against federal prosecutors in that jurisdiction pursuant to § 530B).


62 One reason the CPA does not have a broader impact is because “regulations promulgated by the Department of Justice pursuant to § 530B(b) confirm that § 530B(a) ‘should not be construed in any way to alter federal substantive, procedural, or evidentiary law.’” United States v. Lopez-Avila, 678 F.3d 955, 963 (9th Cir. 2012) (quoting 28 C.F.R. § 77.1(b)). Accordingly, the provisions of the CPA are very narrow in scope. As one court put it, the provisions of the CPA are but a “humble command” that federal prosecutors abide by the state ethics laws and rules of the state in which the prosecutor’s federal district resides. United States v. Grass, 239 F. Supp. 2d 535, 545 (M.D. Pa. 2003).

63 Pub. L. No. 105-119, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes); see United States v. Gilbert, 198 F.3d 1293, 1299-1303 (11th Cir. 1999) (discussing the Hyde Amendment’s legislative history). The Hyde Amendment is actually a rider that Congress attaches to each year’s appropriations legislation. Most recently it has become synonymous with the mandate that federal funds (including Medicaid funds) may not be used to pay for abortions except in cases of danger to the life of the mother, rape, or incest. See Consolidated Appropriations Act, 2012 Pub. L. No. 112–74, §§ 613–14, 125 Stat. 786, 925–96 (2011). See also Planned Parenthood Ariz., Inc. v. Betlach, 727 F.3d 960, 964 (9th Cir. 2013). It is the 1998 version of the Amendment, obviously, that is relevant to our discussion here.

64 See United States v. Schneider, 395 F.3d 78, 85 (2d Cir. 2005).
charged Representative John Murtha offered an amendment to an appropriations bill which would have provided reimbursement to members of Congress and their staffs who successfully defend themselves against a federal criminal prosecution. . . Representative Henry Hyde, Chairman of the House Judiciary Committee, was sympathetic to the Murtha's proposal, and apparently shared much of his motivation, because in discussing the measure on the floor of the House, Hyde referred to “someone we all know who went through hell, if I may use the term, for many years of being accused and finally prevailed at enormous expense.” Hyde, however, thought that Murtha's proposal was too narrow, because it was limited to members of Congress and their staff. He pointed to the case of former Secretary of Labor Ray Donovan, “who was prosecuted and again and again and again and won every time.” Acknowledging that it might be impossible for someone in that situation ever to regain their reputation, Hyde declared “at least, if the Government tries to bankrupt someone because of attorney fees, they ought to pay that.”

The Hyde Amendment provides that a court may award “reasonable attorney’s fee and other litigation expenses” to a defendant who prevails in a criminal case “where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust.” This remedy, however, is difficult to obtain because the Hyde Amendment “provides a high standard for an award of attorney’s fees and costs against the United States in a criminal case.” As the Eleventh Circuit recognized, “[a]n acquittal, without more, will not lead to a successful Hyde Amendment claim, as it was Congress’s intent to limit Hyde Amendment awards to cases of affirmative prosecutorial misconduct rather than simply any prosecution which failed.” As a result, the Hyde Amendment has proved ineffective, largely because of the obstacles plaintiffs face when

---

65 United States v. Gilbert, 198 F.3d 1293, 1299-1300 (11th Cir. 1999) (internal citations omitted). Rep. Hyde’s comments were made during debate on a version of the legislation that was rejected. A kinder, gentler version was drafted to appease opponents of the law, including many in Hyde’s own party who worried that the proposed bill would make it too easy for federal criminal defendants to sue the government. Id. at 1301-05. See also Shaygan, 652 F.3d 1297.
67 Shaygan, 652 F.3d at 1311-12.
68 Schneider, 395 F.3d at 88 (internal quotation marks omitted).
claiming that they were the victims of a vexatious federal prosecution.\textsuperscript{69} In fact, the Hyde Amendment has been used very rarely as a remedial measure for prosecutorial misconduct and only in instances when the misconduct was extremely egregious.\textsuperscript{70}

C. MORE EFFECTIVE REMEDIES ARE AVAILABLE

The Hyde Amendment and the CPA have done very little to curb prosecutorial misconduct, especially given that they do not apply to state prosecutors. More effective and innovative approaches must be conceived, debated, and implemented. Such approaches should include the following.

1. DNA GENOTYPING AND PHENOTYPING

A. TRADITIONAL DNA TESTING (GENOTYPING)

The relationship between DNA genotyping and exonerations is staggering.\textsuperscript{71} Over the past twenty-five years, 329 criminal defendants have been exonerated based on DNA testing at

\textsuperscript{69} Shaygan, 652 F.3d at 1311-12 (“The initial proposed version of the Hyde Amendment would have allowed a prevailing defendant to recover attorney’s fees and costs unless the government could establish that its position was ‘substantially justified’ . . . but that version was criticized on the ground that it made recovery for a prevailing defendant too easy. See [United States v.] Gilbert, 198 F.3d [1293 (11th Cir. 1999)] at 1299–1303 (explaining the legislative history of the Hyde Amendment). ‘[I]n response to concern that the initial version of the Hyde Amendment swept too broadly, the scope of the provision was curtailed significantly’ by Congress in two ways. Id. at 1302. First, instead of the ‘substantially justified’ standard from the Equal Access to Justice Act, the Hyde Amendment imposed a standard more favorable to the government: a prosecution must be ‘vexatious, frivolous, or in bad faith.’ Second, unlike the Equal Access to Justice Act, the Hyde Amendment placed the burden of satisfying that standard on the defendant, not on the government. We explained in Gilbert the ‘daunting obstacle,’ id. at 1302, a defendant must overcome—at a minimum, satisfying an objective standard that the legal position of the United States amounts to prosecutorial misconduct—for an award of attorney’s fees and costs under the Hyde Amendment: ‘From the plain meaning of the language Congress used, it is obvious that a lot more is required under the Hyde Amendment than a showing that the defendant prevailed at the pre-trial, trial, or appellate stages of the prosecution. A defendant must show that the government’s position underlying the prosecution amounts to prosecutorial misconduct—a prosecution brought vexatiously, in bad faith, or so utterly without foundation in law or fact as to be frivolous.’ Id. at 1299; see also Lorraine Morey, Keeping the Dragon Slayers in Check: Reining in Prosecutorial Misconduct, 5 PHOENIX L. REV. 617, 634 (2012) (“Because the Hyde Amendment sets such a high standard and was drafted with such vague and ambiguous language, the Amendment is virtually no help to wronged individuals.”).

\textsuperscript{70} See, e.g., United States v. Aisenberg, 247 F. Supp. 2d 1272 (M.D. Fla. 2003) (awarding nearly $2.7 million in fees and costs under Hyde Amendment where government conceded liability for vexatious prosecution (reduced to $1.5 million following appeal, 358 F.3d 1327 (11th Cir. 2004))) (authors’ note: U.S. District Judge Steven Douglas Merryday’s 85-page order setting out the facts of the case and explaining his reasons for granting the award makes for a fascinating and entertaining read).

the post-conviction phase. In 161 of those cases, DNA was used to identify the actual perpetrator (or suspect), and “in more than 25 percent of cases in a National Institute of Justice study, suspects were excluded once DNA testing was conducted during the criminal investigation.” One of the most startling facts is that thirty-one of the exonerees pled guilty, thus accepting punishments for crimes they did not commit, and on average spent fourteen years in prison before being exonerated.

The role DNA has played in exposing wrongful convictions – often years after a defendant has been imprisoned – counsels in favor of state-funded DNA testing at the trial level for indigent defendants who make a threshold showing by a preponderance of the evidence that a DNA test will tend to prove innocence. The fact that DNA testing plays such a vital role in exonerations makes its use at a criminal trial – where a defendant makes the requisite threshold showing – essential to ensuring a full and fair search for truth. At the very least, indigent defendants should be entitled to a DNA expert that can observe and testify regarding the procedures used by the state’s testing lab, and to perform DNA testing on unused samples. And surely, where there is an objective preponderance showing that post-conviction DNA genotyping could demonstrate innocence, it should be deemed actionable misconduct when the responsible prosecutor refuses to permit that testing.

B. DNA PHENOTYPING

In cases where a DNA sample is so degraded that genotyping is impractical, defense counsel may be able to use DNA phenotyping to indirectly uncover evidence tending to prove

---

73 Id. (emphasis added).
74 Id.
76 Id. at 399.
innocence. Specifically, DNA phenotyping can to a high degree of probability predict a suspect’s externally visible characteristics such as sex, age, eye color, hair color, and skin color. In the near future, DNA phenotyping will also be able to predict, among other things, a suspect’s height, face morphology, hair structure, dominant handedness, basic fingerprint patterns, skin tone, ethnicity, and age. Up to this point, DNA phenotyping has allowed investigators to generate a physical likeness of a missing person based only on DNA from skeletal remains and generate a “Wanted” Poster using DNA shed by an offender at a crime scene. Thus, DNA phenotyping can be used to create a profile of a suspect based on immutable characteristics such as sex, height, and ethnicity. As such, in those cases where a DNA sample is so degraded that DNA genotyping cannot be performed, phenotyping can still be used to exclude certain groups of people as suspects and therefore support a showing of innocence at the trial level.

2. FUNCTIONAL MAGNETIC RESONANCE IMAGING

Neuroscience researchers have used functional magnetic resonance imaging (fMRI) and other techniques to show that a significant number of criminal defendants suffer from brain injuries that impact their ability to form the mental states required for particular violent crimes. Specifically, defendants with frontal lobe disorder and damage to the limbic system (the neural circuit connecting the amygdala and pre-frontal cortex) are more likely to “lose control over their

77 See generally Charles E. MacLean, Creating a Wanted Poster from a Drop of Blood: Using DNA Phenotyping to Generate an Artist’s Rendering of an Offender Based Only on DNA Shed at the Crime Scene, 35 HAMLINE L. REV. 357-86 (2012); see also Kayser M, di Knijff P, Improving Human Forensics through Advances in Genetics, Genomics and Molecular Biology, 12 NAT. REV. GENET. 179-92 (2011); Arora A. Singh, et al., Short Syndrome – An Expanding Phenotype, IND. PEDIATRICIAN at 50 (2013).

78 See id.


behavior . . . [and] are predisposed to engage in aggressive behavior, rage attacks, and sudden bursts of anger—precisely the type of behavior we classify as criminal.”  

In fact, research has shown that “[m]ore often than not, defendants charged with homicide have been exposed to various risk factors in their environment that generate cognitive, neuropsychological, and organic brain impairment.”

The recent execution of Cecil Clayton in Missouri underscores the relationship between brain injuries and culpability. Clayton was known as an intelligent and friendly person before being injured in an accident at a sawmill where he worked. Due to the extent of his injuries, doctors removed twenty percent of Clayton’s frontal lobe, the area of the brain responsible for higher-level cognitive functions, including reasoning and impulse control. In the days and months following his surgery Clayton “began drinking alcohol and became impatient, unable to work and more prone to violent outbursts.” This behavior continued for years and culminated in the shooting of a sheriff’s deputy, for which Clayton received the death penalty. In a petition to the Supreme Court seeking a stay of execution, Clayton’s attorneys argued that the accident and resulting brain injury mitigated Clayton’s culpability:

“The effects of his 1972 accident left him blameless for the 1996 murder,” read a petition filed by his defense, asking for a stay of execution from the U.S. Supreme Court. It was accompanied by an image of his brain scan, which shows a sizeable chunk of his brain missing from the right-hand side.

81 Id. at 481-82.
82 Id. at 505 (quoting John Matthew Fabian, Forensic Neuropsychological Assessment and Death Penalty Litigation, THE CHAMPION 25 (Apr. 2009)).
84 Id.
85 Id.
86 Id.
87 Id.
The Supreme Court denied the petition and Clayton was executed. Increasingly, however, defense attorneys have used brain scans to demonstrate that a defendant’s rational decision-making was sufficiently impaired to justify a lesser sentence. For example, a defendant who shot and killed two people after escaping from an Arizona prison was sentenced to life without parole because brain scans showed structural abnormalities that impaired the defendant’s ability to reason.\textsuperscript{88} One commentator explains the role that the brain scan played in sparing the defendant the death penalty:

In the sentencing phase of the trial, McCluskey’s lawyers argued that, as a result of his brain abnormalities — as well as a slew of other unfortunate circumstances ranging from a breech birth, to abuse as a child, to drug and alcohol addiction — he was incapable of “a level of intent sufficient to allow consideration of the death penalty.” Essentially, they argued that his acts were impulsive, that he would have been incapable of planning such things . . . . The defense presented evidence of damage to the cerebellum, a region at the back of the brain best known for its role in balance and coordinating movement . . . and the defense argued that [the defendant’s] damage, likely caused by a stroke, was indicative of something called cerebellar cognitive affective syndrome, which can cause problems with planning and controlling behavior.\textsuperscript{89}

The result in this case underscores the relationship between fair processes and wrongful convictions. If defendants, particularly those who are indigent and represented by public defenders, do not have access to testing procedures such as DNA genotyping and brain imaging, then jury verdicts and sentences will, at least in some cases, be less reliable. Most would agree, for example, that a defendant with traumatic brain injuries—or one missing twenty percent of a region in the brain responsible for higher cognitive thinking—is less culpable than the average individual with normal brain-function.

In essence, the term “wrongful convictions” should not simply refer to defendants who are factually innocent but found guilty. It should include instances where the procedures used to


\textsuperscript{89} Id. (brackets added).
convict a defendant are fundamentally unfair and therefore undermine reliability in the defendant’s culpability and resulting sentence. This is particularly true in the death penalty context, as “the death penalty is reserved for the worst criminals and it cannot be upheld as a punishment for individuals with diminished culpability.”\(^\text{90}\) Indeed, a conviction is wrongful not only because substantial doubts exist about the defendant’s innocence, but because the sentence a defendant receives may not be reflective of the actual culpability of the defendant. Thus, the state should permit – or courts should order – brain imaging and DNA testing should upon a threshold showing that: (1) the defendant suffers from a brain abnormality that is relevant to his culpability for the charged crime; and (2) the test or scan is a reliable method by which to reveal the abnormality. Otherwise, the sentencing phase of criminal trials will, at least for some defendants, fail to include critical evidence that relates directly to culpability.

3. FOCUSING ON THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT’S (AEDPA) SECOND PRONG

The AEDPA makes it nearly impossible for defendants convicted at the federal level to obtain habeas relief.\(^\text{91}\) The defendant must show either that the lower courts’ rulings were contrary to or involved an unreasonable application of clearly established federal law.\(^\text{92}\) The problem with this standard is that even a “strong case for relief does not mean that the state court’s contrary conclusion [of law] was unreasonable.”\(^\text{93}\) As the Eleventh Circuit has held, the federal courts’ role is to guard against “extreme malfunctions in the state criminal justice systems,”\(^\text{94}\) and not act as a “means of error correction.”\(^\text{95}\)


\(^{92}\) *Id.*

\(^{93}\) Hill v. Humphrey, 662 F.3d 1335, 1343 (11th Cir. 2011).

\(^{94}\) *Id.* at 1347.

\(^{95}\) *Id.*
This approach has led the federal courts to give undue deference to the findings of lower courts. In so doing, it has become difficult, if not impossible, for defendants to obtain habeas relief, even where errors affecting the defendant’s constitutional rights occurred at the trial or on direct appeal. For example, Georgia death row inmate Warren Hill was executed despite a finding by a state court to a preponderance of the evidence that Hill was mentally retarded. The Eleventh Circuit affirmed the Georgia Supreme Court’s reversal of these decisions on the grounds that Georgia’s statute required defendants to provide mental retardation beyond a reasonable doubt. The court held Georgia’s high standard did not violate the Supreme Court’s prohibition on executing the mentally retarded, stating that “it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the] Court.” In so holding, the Eleventh Circuit explained that, under AEDPA, it must be “highly deferential to the state courts,” and that the “procedure for determining mental retardation was distinct from the Eighth Amendment issues decided in Atkins.”

AEDPA has had an extraordinarily harmful effect on wrongfully-convicted defendants because it essentially precludes meaningful appellate review and permits significant violations of a defendant’s constitutional rights to go unremedied. Furthermore, the federal courts have made the problem worse by focusing too heavily on whether a lower court’s decision was contrary to clearly established federal law, rather than on whether the court’s decision involved an unreasonable application of that law. The distinction is significant because the phrase “contrary

96 Id.
97 Id. at 1360.
98 Id. at 1338.
99 Id. at 1343 (quoting Payne v. Allen, 539 F.3d 1297, 1312 (11th Cir. 2008)).
100 Id. at 1352 (referring to Atkins v. Virginia, 536 U.S. 304 (2002) (holding that execution of mentally retarded defendants was cruel and unusual punishment in violation of the Eighth Amendment)).
to clearly established federal law” is, for all intents and purposes, undefinable. Whether a federal law is “clearly established” depends on, among other things, the scope of a particular law, whether all or parts of that law have been called into question, and whether the law is sufficiently ambiguous to permit different applications. Likewise, the term “contrary” is largely subjective, particularly where a law is broad or subject to different interpretations.

4. MODIFYING STRICKLAND V. WASHINGTON

The United States Supreme Court’s decision in Strickland v. Washington101 has resulted in the convictions of criminal defendants being affirmed despite egregious violations of the Sixth Amendment’s right to counsel.102 In Strickland, the Court held that counsel’s performance violates the Sixth Amendment if it falls below a reasonable standard of care and affected the outcome of the trial.103 Thus, a convicted defendant must show that counsel acted negligently, and that, “but for counsel's errors, his performance would be material or favorable in foreseeing whether a result at trial would have been different.”104

Unfortunately, the Strickland standard has “proved virtually impossible for defendants to meet, and instead of raising the bar for effective counsel, the Court created a bar to nearly all assertions of attorney inadequacy.”105 Indeed, courts have upheld convictions despite grossly negligent representation by counsel, often deferring to “strategic” decisions made by counsel, even where those decisions are highly questionable. “Even in capital cases, where life and death literally hung in the balance, courts often deferred to incomprehensible ‘strategic’ decisions

---

103 466 U.S. at 687, 691.
105 Lamparello, supra note 127, at 115.
provided by trial counsel rationalizing their slothful representation.”

This includes attorneys with substance abuse problems and ethics violations that led to their disbarment:

Lawyers have been found to be drunk or drugged, mentally ill, or asleep while representing a defendant. In addition, several recent studies of capital trials reveal that lawyers who represented death row inmates at trial were subsequently disbarred, suspended, or otherwise disciplined at a rate three to forty-six times the average for the relevant states. . . . For those attorneys whose clients were executed, the rate of disciplinary sanctions was almost forty times that of the bar as a whole. 107

In fact, “during the sixteen years after Strickland, in which ‘the Supreme Court itself failed to find a single instance of constitutionally inadequate representation’ nearly all representation was found to be within Strickland’s ‘wide range of professionally competent assistance.’” 108 Even where courts have found that counsel’s representation fell below a reasonable standard of care, they have nonetheless upheld convictions on the grounds that the attorney’s performance did not affect the outcome of the trial. One commentator states:

The prejudice prong is pure fiction with its genesis in the effort to protect jury verdicts. Nothing more, nothing less. It is an effort to be able to say we still believe in the sacred nature of the right to counsel and the right to effective counsel, while only rarely having to set aside a verdict. It is a rule that is now thirty years old and meaningless, creating a vast amount of litigation that only on rare occasions finds relief. 109

The problem with Strickland’s prejudice prong is that it is “hard to tell if a convicted person ‘would have fared better if his lawyer had been competent.’” 110 In addition, the purpose

107 Id.
108 Id. at 114-15.
109 Metze, supra note 104, at 218.
110 Id. (quoting Strickland, 466 U.S. at 710) (Marshall, J., dissenting).
of the Sixth Amendment “is not so much to ensure the innocent are not convicted but to guarantee ‘convictions are obtained only through fundamentally fair procedures.’”\textsuperscript{111}

The Court’s use of the \textit{Strickland} standard and its overall approach to Sixth Amendment jurisprudence fails to recognize that convictions can be wrongful if the processes by which the conviction was obtained were tainted. Furthermore, wrongful convictions result in part because counsel’s performance was deficient, and the “prejudice” prong makes it more, not less, difficult to identify flaws that, regardless of their effect on the trial’s outcome, deprived the defendant of due process of law.

5. \textbf{HABEAS AND INNOCENCE PROJECTS}

Forty-six states and the District of Columbia currently have innocence projects that are members of the non-profit Innocence Network, often sponsored by area law schools,\textsuperscript{112} and which are designed to obtain justice for wrongfully convicted citizens and propose relevant state legislation.\textsuperscript{113} The West Virginia University Innocence Project, for example, is currently lobbying the state legislature to enact a law mandating the audio and video recording of all investigative interviews and interrogations of felony suspects.\textsuperscript{114}

The valuable work done by innocence commissions and projects can hardly be overstated. They are the absolute last resort of wrongfully convicted citizens. The tremendous

\textsuperscript{111} \textit{Id.}
\textsuperscript{113} See http://innocencenetwork.org (last visited Feb. 9, 2014). The Innocence Network was founded by the Innocence Project and the latter is a member of the former. The organization bills itself as “an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions.” \textit{Id.}
\textsuperscript{114} See http://wvinnocenceproject.wvu.edu (last visited Feb. 9, 2014).
work they do is evidenced by the fact that over 1500 individuals have been exonerated in the United States since 1989.\footnote{NAT'L REGISTRY OF EXONERATIONS, available at http://www.law.umich.edu/special/exoneration/Pages/about.aspx.}

6. **THE PROSECUTOR’S ACCOUNTABILITY**

   A. **UNIFORM APPLICATION OF THE QUALIFIED IMMUNITY DOCTRINE**

   The doctrine of absolute immunity for prosecutors is well entrenched in American jurisprudence. In the seminal case of Imbler v. Pachtman,\footnote{424 U.S. 409 (1976).} the Supreme Court emphasized that “the common-law rule of immunity [for public officials] is . . . well settled.”\footnote{Id. at 424 (citations omitted).} The Court held in *Imbler* that prosecutors enjoy absolute immunity from suits under 42 U.S.C. § 1983 for actions taken in connection with their prosecutorial responsibilities.\footnote{Id. (“the threat of § 1983 suits would undermine performance of [the prosecutor’s] duties no less than would the threat of common-law suits for malicious prosecution[.]”).} But *Imbler* did not give birth to the doctrine of prosecutorial immunity; rather, the common-law rule was first judicially recognized eighty years before *Imbler*.\footnote{Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 510 n.11 (2011) (citing Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896)). The court in *Griffith* held that “[t]he prosecuting attorney, therefore, is a judicial officer, but in the sense of a judge of a court. The rule applicable to such an officer is thus stated by an eminent author: ‘Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.’ Townsh. Sland. & L. (3d Ed.) § 227, pp. 395, 396.” *Griffith*, 44 N.E. at 1002.)} The doctrine has aged well and the extraordinary level of protection it affords prosecutors has been recently reaffirmed and, arguably, fortified.\footnote{See Van de Kamp v. Goldstein, 555 U.S. 335, 344 (2009) (extending doctrine of absolute immunity to prosecutor’s administrative actions when such actions are “directly connected to the conduct of a trial.”); Connick v. Thompson, 131 S. Ct. 1350 (2011) (finding that a municipality was not liable under §1983 on failure to train claim following prosecutor’s admitted failure to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963)).}
If Lord Acton was correct that “power tends to corrupt, and absolute power corrupts absolutely,”\(^{121}\) then the fittingly named doctrine of absolute immunity arguably invites prosecutorial misconduct to the extent prosecutors are overly comforted by the knowledge that they will be shielded from liability for virtually any action they take—even actions offensive on their face—so long as those actions are related to furthering a criminal proceeding.\(^{122}\)

The absolute immunity doctrine is intended to ensure the integrity of the prosecutorial process by preventing “a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.”\(^{123}\) And while few would deny that “[t]he overwhelming majority of prosecutors are decent, ethical, honorable lawyers who understand the awesome power they wield, and the responsibility that goes with it,”\(^{124}\) it is equally undeniable, as the facts and statistics presented in this article demonstrate, that incidents of prosecutorial misconduct—sometimes egregious misconduct—occur with disconcerting frequency.

\(^{121}\) John Emerich Edward Dalberg Acton (1834-1902), usually referred to simply as Lord Acton, expressed his oft-quoted opinion in a letter to Bishop Mandell Creighton, Bishop of the Church of England, in 1887. See GERTRUDE HIMMELFARB, ED., ACTON: ESSAYS ON FREEDOM AND POWER 364 (Ludwig von Mises Institute 2010).

\(^{122}\) See Gordon v. Devine, No. 08 C 377, 2008 WL 4594354, at *10 (N.D. Ill. Oct. 14, 2008) (“courts have held that prosecutors are functioning in a ‘quasi-judicial’ role and are protected by absolute immunity in light of the following allegations: knowingly using false testimony at trial and purposefully suppressing exculpatory evidence, see [Burns v. Reed, 500 U.S. 478, 486 (1991)] (citing Imbler, 424 U.S. at 430-431); participating in a probable cause hearing, id. at 489-90, 111 S.Ct. at 1941 (noting that prosecutors ‘were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings . . ., and also for eliciting false and defamatory testimony from witnesses’); willfully suppressing exculpatory evidence at grand jury proceedings, id. at 490; knowingly using perjured testimony, Briscoe v. La Hue, 663 F.2d 713, 721-22 (7th Cir. 1981), aff’d, 460 U.S. 325 (1983); providing false and misleading arguments to the court, Lawrence v. Conlon, No. 92 C 2922, 1995 WL 153273, at *4 (N.D. Ill. Apr. 6, 1995); destroying and falsifying line-up reports, Heidelberg v. Hammer, 577 F.2d 429, 432 (7th Cir. 1978); ‘initiat[ing] charges maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence,’ Henry v. Farmer City State Bank, 808 F.2d 1228, 1238 (7th Cir. 1986); and misrepresenting facts during plea negotiations, Taylor v. Kavanagh, 640 F.2d 450, 453 (2d Cir. 1981), cited with approval in Mendenhall v. Goldsmith, 59 F.3d 685, 691 (7th Cir. 1995).


\(^{124}\) United States v. Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993).
In *United States v. Wilson*, the court, after acknowledging misconduct on the part of the federal prosecutor, affirmed the defendant’s conviction in almost lamenting fashion, stating that “[w]e thus find ourselves in a situation with which we are all too familiar: a prosecutor has engaged in misconduct at trial, but no reversible error has been shown.” Indeed, many courts have expressed dismay with both incidents of prosecutorial misconduct and the constraints the immunity doctrine places on courts’ ability to effectively sanction that misconduct.

Prosecutors are also protected by qualified immunity, that is, “good-faith immunity.” “An official is entitled to qualified immunity for conduct that ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” In the most general sense, prosecutors, whether state or federal, enjoy absolute immunity for virtually all actions they take, “so long as the action is part of the judicial process,” but they are protected only by the doctrine of qualified immunity for actions taken in their official capacity but which are not deemed directly related to the judicial process. Put

---

125 149 F.3d 1298 (11th Cir. 1998).
126 Id.; see also *United States v. Boyd*, 131 F.3d 951, 955 (11th Cir. 1997); *United States v. Eason*, 920 F.2d 731, 736 (11th Cir. 1990) (citing cases in which the court has affirmed convictions despite prosecutorial misconduct); *United States v. Butera*, 677 F.2d 1376, 1383 (11th Cir. 1982); *United States v. Modica*, 663 F.2d 1173, 1182 (2d Cir. 1981).
127 See *Kojayan*, 8 F.3d at1324-25 (“The prosecutorial misconduct in this case deprived the defendants of due process of law. It contaminated their trial, and we cannot say it was harmless. . . . In a situation like this, the judiciary—especially the court before which the primary misbehavior took place—may exercise its supervisory power to make it clear that the misconduct was serious, that the government’s unwillingness to own up to it was more serious still and that steps must be taken to avoid a recurrence of this chain of events.”) (internal citations omitted); *United States v. Eason*, 920 F.2d 731, 737 (11th Cir. 1990) (“That we find an error not to be reversible does not transmute that error into a virtue. The error is still an error. Urging the error upon the trial court still violates the United States Attorney’s obligation to the court and to the public.”); *Boyd*, 131 F.3d at 955 (“The fact that we do not reverse the convictions in these cases does not mean that we condone [improper] remarks of this kind.”); *United States v. Auch*, 187 F.3d 125, 133 (1st Cir. 1999) (“Although we find the prosecutor’s various transgressions and missteps in the conduct of this trial both disturbing and exasperating, we discern no reversible error. . . . Accordingly, we heed the Supreme Court’s admonition against letting the guilty go free to punish prosecutorial misconduct. *See* United States v. Hastings, 461 U.S. 499, 506–07 (1983).”)
128 *Harlow*, 457 U.S. at 807.
another way, prosecutors’ actions are protected by the shield of absolute immunity if those actions are related to prosecutors’ decisions whether to bring charges against an individual and their actions to prosecute those charges in court, but are entitled to the lesser protection of qualified immunity for actions taken while investigating potential crimes prior to filing charges.\textsuperscript{131} The Supreme Court held in \textit{Buckley} that “[t]he actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor . . . so when a prosecutor ‘functions as an administrator rather than as an officer of the court’ he is entitled only to qualified immunity.”\textsuperscript{132}

Accordingly, the Court explained, “[a] prosecutor’s administrative duties and those investigatory functions that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.”\textsuperscript{133} This distinction may seem clear on its face, but in practice the line separating absolute from qualified immunity has become virtually invisible. In the context of prosecutorial misconduct, one could argue that the doctrine of qualified immunity serves much the same purpose as an umbrella insurance policy, acting as a complement to the doctrine of absolute immunity and affording additional protection to prosecutors for actions they take that are deemed not to fall within the “primary coverage” of absolute immunity.

Subsequent decisions addressing the issue of qualified immunity have applied the rule broadly, thereby expanding the doctrine and blurring the line between actions protected by absolute immunity and those protected only by qualified immunity (again assuming that any bright-line distinction ever existed in the first place). For example, in Van de Kamp v.

\textsuperscript{131} \textit{Buckley v. Fitzsimmons}, 509 U.S. 259 (1993).
\textsuperscript{132} \textit{Id.} at 273 (quoting \textit{Imbler}, 424 U.S. at 431 n.33).
\textsuperscript{133} \textit{Id.} (citing Burns v. Reed, 500 U.S. 478, 494-96 (1991)).
Goldstein, defendant Goldstein was released after serving twenty-four years in prison following a successful habeas petition in which he argued that his murder conviction had been based, in large part, on the testimony of a jailhouse informant. Goldstein complained that the prosecutor failed to turn over to the defense information concerning benefits the informant received in exchange for his testimony and that the prosecutor failed to properly supervise members of his prosecutorial team by ensuring that a system was in place by which prosecutors shared potential impeachment evidence concerning such informants.

The district court granted Goldstein’s petition and he subsequently brought his civil rights action against the prosecutors pursuant to 42 U.S.C. § 1983. The district court refused to grant a motion to dismiss filed by the prosecutors, who maintained they were entitled to absolute immunity for their actions, and the Ninth Circuit affirmed, ruling that the failure of prosecutors to turn over the impeachment evidence and to implement an in-house procedure to ensure that such information was released to the defense, violated the prosecutor’s constitutional obligations as set forth in Giglio v. United States. The Supreme Court, however, reversed and remanded, holding that the prosecutors were, in fact, entitled to absolute immunity and reasoning

---

135 Ironically, the jailhouse informant who testified against Goldstein had the last name of “Fink.” Goldstein, 555 U.S. at 339.
136 Id. at 338-39.
137 Goldstein v. Long Beach, 481 F.3d 1170 (9th Cir. 2007).
138 405 U.S. 150 (1972). In Giglio, the Court explained that “[a]s long ago as Mooney v. Holohan, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’ This was reaffirmed in Pyle v. Kansas, 317 U.S. 213 (1942). In Napue v. Illinois, 360 U.S. 264 (1959), we said, ‘(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.’. . . Thereafter Brady v. Maryland . . . held that suppression of material evidence justifies a new trial ‘irrespective of the good faith or bad faith of the prosecution.’ See ABA Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule. . . . We do not, however, automatically require a new trial whenever ‘a combing of the prosecutors’ files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .’ United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968). A finding of materiality of the evidence is required under Brady . . . A new trial is required if ‘the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .’” Id. at 153-54 (internal citations omitted).
that the actions of prosecutors were not administrative in nature but rather were “intimately associated with the judicial phase of the criminal process.”\textsuperscript{139} The Court reasoned as follows:

Here, unlike with other claims related to administrative decisions, an individual prosecutor’s error in the plaintiff’s specific criminal trial constitutes an essential element of the plaintiff’s claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which Goldstein’s claims focus necessarily require legal knowledge and the exercise of related discretion, e.g., in determining what information should be included in the training or the supervision or the information-system management. And in that sense also Goldstein’s claims are unlike claims of, say, unlawful discrimination in hiring employees. Given these features of the case before us, we believe absolute immunity must follow.\textsuperscript{140}

In a more recent case, a divided Supreme Court held that a chief state prosecutor was not subject to suit under section 1983 when assistant prosecutors under his supervision knowingly failed to disclose exculpatory evidence in the form of a police crime lab report.\textsuperscript{141} In 1985, John Thompson was charged with the murder of a man in New Orleans.\textsuperscript{142} The publicity surrounding the murder charge apparently inspired victims of an attempted armed robbery to identify Thompson as the perpetrator of that crime.\textsuperscript{143} He was convicted on the attempted armed robbery charge.\textsuperscript{144} Just weeks later he was tried and convicted on the murder charge and sentenced to death.\textsuperscript{145} Thompson chose not to testify on his own behalf at the murder trial since he had just recently been convicted of armed robbery.\textsuperscript{146} He spent eighteen years in prison, fourteen of those on death row.\textsuperscript{147} Merely a month before he was scheduled to be executed, an investigator working on Thompson’s behalf discovered a report from a crime lab that contained exculpatory

\textsuperscript{139} \textit{Van de Kamp}, 555 U.S. at 335 (quoting \textit{Imbler}, 424 U.S. at 430).
\textsuperscript{140} \textit{Id.} at 344.
\textsuperscript{142} \textit{Id.} at 1356.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.} at 1355.
evidence—specifically, a blood test on a swatch of clothing from one of the robbery victims, which contained some of the robber’s blood, revealed that that blood type did not match Thompson.\footnote{State v. Thompson, 825 So. 2d 552, 555-56 (La. Ct. App. 2002).} Based on this newly discovered evidence, the Louisiana Court of Appeals reversed Thompson’s murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial.\footnote{131 S. Ct. at 1357.} Thompson was found not guilty of the murder following a retrial.\footnote{Id.}

Following this exoneration, Thompson filed suit in federal court against the Orleans Parish District Attorney’s Office under 42 U.S.C. § 1983, alleging that the prosecutor’s failure to disclose the exculpatory crime lab report, and the prosecutor’s failure to train other prosecutors in his office to prevent the withholding of exculpatory evidence, constituted deliberate indifference to his constitutional rights.\footnote{Id.} A jury found in favor of Thompson and awarded him $14 million in compensation.\footnote{Id.} A sharply divided Fifth Circuit affirmed\footnote{Thompson v. Connick, 578 F.3d 293 (5th Cir. 2009).} and certiorari was granted.\footnote{Connick v. Thompson, 559 U.S. 1004 (2010).}

The Supreme Court, divided along ideological lines, reversed.\footnote{131 S. Ct. 1350 (2011) (Justice Thomas wrote the majority opinion, in which Chief Justice Roberts and Justices Scalia, Kennedy and Alito joined; Justice Scalia filed a concurring opinion which Justice Alito joined; and Justice Ginsburg filed a dissenting opinion in which Justices Breyer, Sotomayor and Kagan joined.)} The Court acknowledged that the Orleans Parish District Attorney’s Office had conceded that by withholding the crime lab report, the prosecutor had violated Brady v. Maryland,\footnote{373 U.S. 83 (1963).} but
nonetheless concluded that a prosecutor’s office cannot be held liable under section 1983 on a failure to train claim based on a single Brady violation.\footnote{157} The Court reasoned:

It does not follow that, because Brady has gray areas and some Brady decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to ‘a decision by the [governmental entity] itself to violate the Constitution.’ . . . To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was ‘highly predictable’ that the prosecutors in his office would be confounded by those gray areas and make incorrect Brady decisions as a result. In fact, Thompson had to show that it was so predictable that failing to train the prosecutors amounted to conscious disregard for defendants’ Brady rights. . . . He did not do so.”\footnote{158}

The Court’s opinion in \textit{Connick} makes no mention of absolute or qualified immunity. The Court concluded that Thompson’s claims were barred by \textit{Monell v. Dept. of Soc. Servs. of New York}\footnote{159} due to his failure to prove the presence of a pattern or practice of unconstitutional procedures in the New Orleans District Attorney’s Office or deliberate indifference to such constitutional violations on the part of Connick. But if it walks like a duck and quacks like a duck, it’s immunity. As one author put it, “two lines of immunity . . . prosecutorial immunity under Imbler and municipal liability under Monell . . . converged in Connick v. Thompson to bar recovery where a prosecutor committed clear constitutional violations.”\footnote{160} The Court in \textit{Connick} expanded (many would say greatly expanded) the doctrine of prosecutorial immunity even without discussing it, and its holding presents yet another obstacle to preventing prosecutorial misconduct.\footnote{161}
In light of the seemingly impenetrable fortress of absolute and qualified immunity, a vigorous discussion and debate of potential remedies for prosecutorial misconduct must persist. This would be true even if John Thompson were the only man (or woman) forced to spend years in prison as a result of prosecutorial misconduct. But as the statistics presented and discussed at the beginning of this article indicate, prosecutorial misconduct occurs; it occurs with a frequency that should give us pause, it is detrimental to the public perception of the criminal justice system, it undermines the fair administration of justice, and, in far too many real cases, it ruins lives.

Professor Margaret Johns, for example, contends that “despite layers of corrective procedures, our current criminal and civil justice process is ineffective in deterring or remedying prosecutorial misconduct.” She proposes abolishing the absolute immunity doctrine in favor of procedures, the Connick Court substantially narrowed one of the few remaining avenues for deterring prosecutorial misconduct.”). available at http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/the-myth-of-prosecutorial-accountability-after-connick-v.-thompson:-why-existing-professional-responsibility-measures-cannot-protect-against-prosecutorial-misconduct/; Susan A. Bandes, The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson, 80 FORDHAM L. REV. 715 (2011) (“In Connick v. Thompson, the U.S. Supreme Court blocked one of the last remaining paths to prosecutorial accountability for the violation of constitutionally mandated discovery obligations under Brady v. Maryland. . . . The decision . . . bodes ill for prosecutorial accountability more generally, and for failure to train liability across the board.”). 

162 Several years after his exoneration Thompson started an organization called Resurrection After Exoneration, “an education and outreach program that helps exonerated and formerly incarcerated inmates rebuild their lives.” See Emmanuella Grinburg, Life after death row: Helping break the “jailhouse mentality,” (available at http://edition.cnn.com/2014/04/04/us/death-row-stories-thompson/index.html?hpt=hp_c2). Thompson is quoted in the article explaining that exonerated inmates “come home and the system has nothing in place to help them put their lives back together. They need to be reprogrammed because the survival tactics they learned in prison don’t work in the outside world.” Id.

163 On March 29, 2011, the day the Supreme Court issued its opinion in Connick, John Thompson, joined by numerous other individuals who were victims of prosecutorial misconduct, wrote a letter to Attorney General Eric Holder, Jr., in which they stated that “We, the undersigned and our families, have suffered profound harm at the hands of careless, overzealous and unethical prosecutors. Unfortunately, today’s ruling only threatens to further embolden those prosecutors who are willing to abandon their responsibility to seek justice in their zeal to win convictions.” Kennedy Brewer, et al., Letter to the Hon. Eric H. Holder, Jr., March 29, 2011 (available at http://www.innocenceproject.org/Content/Wrongfully_Convicted_Urge_Action_in_Wake_of_Supreme_Court_Decision_Expanding_Immmunity_for_Prosecutors.php).

a “uniform application of qualified immunity” for prosecutors. In the conclusion to her article discussing this approach, Johns argues as follows:

In place of absolute immunity, qualified immunity should be uniformly applied. Qualified immunity would protect honest prosecutors from unwarranted litigation while affording victims of deliberate prosecutorial misconduct a remedy for the willful violation of their civil rights. Qualified immunity would be consistent with the common law as it existed in 1871 and with the purposes underlying the adoption of § 1983—providing a federal civil rights remedy for malicious prosecutions. And the uniform application of qualified immunity would simplify and streamline the law by providing an objective standard that could be applied in the early stages of litigation to protect prosecutors not only from liability, but also from the burden of litigation.

Professor Johns maintains that the Supreme Court’s “historical justification for recognizing absolute prosecutorial immunity is just plain wrong.” Furthermore, argues Johns, “[u]nder the current doctrine, drawing the line between conduct entitled to absolute immunity and conduct entitled to qualified immunity is a complicated question that has generated multiple conflicting decisions.” Johns states as follows:

The simplest solution is to apply qualified immunity in all cases; regardless of whether the prosecutor was acting as an investigator or advocate, did the prosecutor violate clearly established law of which a reasonable prosecutor would have known? If not, qualified immunity protects the prosecutor from liability. If so, the prosecutor should be held liable for violating the accused’s well-established constitutional rights.

---

165 Id.
166 Ms. Johns’ theory is based on her premise that “[t]he common law as of 1871 did not confer absolute immunity for prosecutorial misconduct[,]” id. at 521, and that when Congress enacted § 1983 that year it “could not have intended to retain a common law rule that did not yet exist. . . . And it certainly did not intend to insulate prosecutors from liability for malicious prosecutions, since that was one of the tactics of southern defiance to Reconstruction that the Ku Klux Klan Act was intended to remedy. To the extent that the doctrine of absolute prosecutorial immunity purportedly rests on historical understandings, it is insupportable.” Id. at 526-27.
167 Id. at 527.
168 Id. at 521.
169 Id. at 527.
170 Id. at 534.
Indeed, qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.”  

B. VICAIRIOUS LIABILITY FOR SUPERVISORY PROSECUTORS TO ENSURE COMPLIANCE WITH ETHICAL OBLIGATIONS

Another interesting proposal to curb prosecutorial misconduct has the added advantage of allowing prosecutors’ offices to be self-policing. Professors Geoffrey S. Corn and Adam M. Gershowitz propose “that the time has come to apply the lessons of the battlefield to the criminal justice process.”  

They suggest “that state rules committees adopt a rule of imputed ethical responsibility for supervisory prosecutors. Like the doctrine of [military] command responsibility, this rule would 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 authors are quick to point out that “[t]he purpose of the rule is not to spark a witch hunt every time an ethical violation occurs. Instead, as with the law of war, the purpose is to incentivize supervisory prosecutors to embrace their responsibility to develop a culture of ethical compliance within their organizations.”  

The idea, as Corn and Gershowitz see it, is for prosecutors’ offices to implement a supervisory structure and office culture modeled on the military command responsibility doctrine. As Corn and Gershowitz explain:

In the realm of war, it has long been understood that the most significant influence on subordinate conduct is the atmosphere toward compliance with codes of conduct created by the superior. Because of this, the doctrine of command responsibility imposes criminal responsibility on military commanders, not only for the misconduct of subordinates ordered by the commander, but also for misconduct the commander should have known would occur. The “should have known” standard subjects commanders to criminal responsibility when their own

---

171 Id. at 534 (quoting Burns v. Reed, 509 U.S. 478, 495 (1991)).
173 Id.
174 Id.
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 subordinate deviation from legal standards, and to maintain “situational awareness” of subordinate conduct.175

The authors posit that if supervisory prosecutors are subject to vicarious liability for the misconduct of their subordinates, and thereby subject to various forms of penalties or sanctions as a result of that misconduct, those supervisors are incentivized in the following ways:

To establish what is referred to within the U.S. armed forces as a ‘positive command climate.’ . . . In the U.S. military, all leaders are taught that they may ultimately be held accountable for the dereliction of their subordinates. Perhaps more importantly, they are also taught that their professional and personal credibility will, in large measure, turn on the professionalism of the forces they lead. Accordingly, discharging this ‘command responsibility’ is the ultimate bellwether of competence.176

Corn and Gershowitz acknowledge that “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 convictions, judicial shaming, or serious in-house discipline. More creative proposals set forth by scholars have likewise failed to foster change.”177 Accordingly, we suggest a more dramatic incentive drawn from the law of war: the prospect of imputed liability.”178

175 Id.
176 Id. at 426.
177 Corn and Gershowitz maintain that “[s]cholars have proposed thoughtful alternative ways to deal with prosecutorial misconduct, yet none have been successfully implemented.” Id. As examples, the authors reference, inter alia, alternative theories “advocating prosecutorial review boards, changes to ethics rules, and other approaches . . . proposing sentence reductions . . . proposing bar disciplinary committees be required to review judicial decisions and institute disciplinary proceedings in egregious cases . . . advocating a prosecutorial review board to handle specific complaints, and to conduct random reviews of routine cases . . . [and] proposing financial rewards for ethical conduct . . . .” Id. (citations omitted).
178 Id. at 413.
C. CRIMINAL, CIVIL, AND LICENSE SANCTIONS FOR PROSECUTORIAL MISCONDUCT

The imposition of civil or criminal sanctions against prosecutors found to have committed misconduct is, quite obviously, a drastic remedy. While such remedies are available, they are rarely imposed. That said, recent cases demonstrate that such remedies are available, at least in certain circumstances. In Texas, a former state prosecutor (and former state judge) entered a plea of no contest to a charge of contempt of court and agreed to surrender his law license after being accused of withholding exculpatory evidence and making a material misrepresentation to the court in the murder case that sent Michael Morton to prison for twenty-five years for allegedly beating his wife to death.\textsuperscript{179} Morton was cleared when DNA evidence later proved he was not the killer.\textsuperscript{180} During Morton’s trial, Anderson was reportedly specifically asked by the judge overseeing Morton’s murder trial whether he knew of any exculpatory evidence in the case.\textsuperscript{181} Anderson replied that there was no such evidence.\textsuperscript{182} However, Morton’s attorneys discovered that material exculpatory evidence did in fact exist and was withheld from the defense.\textsuperscript{183} This evidence included “statements from Morton’s then-3-year-old son, who witnessed the killing and said his father wasn’t responsible.”\textsuperscript{184} In addition, Anderson hid the fact that several of Morton’s neighbors reported seeing another man near the Morton residence shortly before the murder.\textsuperscript{185} Anderson’s plea agreement called for a ten-day prison sentence, disbarment, and the imposition of “500 hours of community service.”\textsuperscript{186} While some might argue

\begin{itemize}
  \item \textsuperscript{180} Morton was exonerated with the help of The Innocence Project, which provides a summary of his case on its website. \textit{See} http://www.innocenceproject.org/Content/Michael_Morton.php (last visited March 27, 2014).
  \item \textsuperscript{181} \textit{Id.}
  \item \textsuperscript{182} \textit{Id.}
  \item \textsuperscript{183} \textit{Id.}
  \item \textsuperscript{184} \textit{AUSTIN AMERICAN-STATESMAN}, \textit{supra} note 173.
  \item \textsuperscript{185} \textit{Id.}
  \item \textsuperscript{186} \textit{Id.}
\end{itemize}
that such a sentence is far too lenient given the ramifications of Anderson’s misconduct, the point remains that trial courts already have the authority to mete out such sanctions when prosecutorial misconduct is discovered.

Even more recently, the Seventh Circuit issued an important opinion that appears to pierce the protective veil of absolute and qualified immunity and pave the way, albeit in limited circumstances, for wrongfully convicted individuals to recover damages from the prosecutor(s) whose misconduct facilitated that wrongful conviction. In Fields v. Wharrie, Nathson Fields was convicted of double murder in Illinois and served seventeen years in prison before he was granted a second trial, at which he was acquitted. He filed suit against Lawrence Wharrie and David Kelley, the two state prosecutors who had prosecuted him during his first trial in 1986 and his second trial in 1998. Fields brought suit pursuant to section 1983, asserting a Fourteenth Amendment due process claim and state law claims of “malicious prosecution, intentional infliction of emotional distress, and conspiracy . . . .” Fields alleged that Wharrie and Kelley fabricated evidence by coercing witnesses to implicate him in the murders. More specifically, Fields “accuses Wharrie of two separate acts (one in 1985, the other in 1998) of coercing false testimony from witnesses, and Kelley of similar coercion in 1998.” In 1985, during the

---

187 Id. (According to the American-Statesman article, Anderson faced up to ten years in prison for his crimes. However, prosecutors concluded that statute of limitations problems would have made it difficult to obtain a conviction.).
188 740 F.3d 1107 (7th Cir. 2014).
189 Fields was able to obtain a second trial not because of the prosecutorial misconduct in his first trial, but because the judge in that first trial later admitted taking a bribe to acquit Fields’ co-defendant, Earl Hawkins—a fact that prompted the Washington Post to refer to this case as “a gory mess of injustice[.]” See “7th Circuit pokes a hole in prosecutorial immunity,” WASH. POST (Jan. 30, 2014), available at: http://www.washingtonpost.com/news/opinions/wp/2014/01/30/7th-circuit-pokes-a-hole-in-prosecutorial-immunity/ (last visited Apr. 17, 2015).
190 Fields, 740 F.3d 1109-10.
191 Id.
192 Id.
193 Id.
investigatory stage of the case against Fields, Wharrie allegedly coerced witnesses to give false testimony against Fields and that testimony was presented at trial.  

Fields claimed that Kelley did the same thing in 1998 in advance of Fields’ second trial. The two prosecutors filed motions to dismiss in the trial court, arguing that they were entitled to absolute immunity for their actions. The district court denied both motions. The Seventh Circuit affirmed the denial of Wharrie’s motion but reversed the denial of Kelley’s. The court noted that Kelley’s alleged misconduct took place in 1998, after Fields’ first trial and “in preparation for Fields’ second trial and therefore in the midst of his prosecution.” The court concluded, then, that Kelley was entitled to absolute immunity for his actions because “[o]nce prosecution begins, bifurcating a prosecutor’s role between investigation and prosecution is no longer feasible.” Accordingly, Fields could not pursue his claims against Kelley since “[p]resenting evidence at trial is a core prosecutorial function, protected by absolute immunity and therefore an insuperable bar to an award of damages in a suit for malicious prosecution against the prosecutor.” The case against Wharrie, however, presents another wrinkle—one that is slightly more complicated and immensely more interesting, especially as it pertains to remedies for prosecutorial misconduct.

Wharrie’s actions in procuring false testimony from potential witnesses took place about a year before Fields’s first trial. Even though the case was in the investigatory stage at that point, Wharrie argued that he was shielded by absolute immunity for his alleged misconduct in

---

194 Id. at 1110.
195 Id. at 1115.
196 Id. at 1109.
197 Id. at 1109-10.
198 Id. at 1116.
199 Id. at 1115.
200 Id.
201 Id. at 1111.
202 Id.
1985 because his actions in fabricating testimony did not cause any harm to Fields, let alone constitutional harm, until that fabricated evidence was introduced at trial and used to obtain a conviction against him, at which point Wharrie was clearly entitled to absolute immunity.\textsuperscript{203} Put another way, Fields had no cause of action against Wharrie until he suffered direct harm from Wharrie’s alleged misconduct; when his cause of action did arise (when the allegedly fabricated testimony was used to convict him), Wharrie argued he was shielded from any liability by absolute immunity.

The court strongly rejected Wharrie’s theory, holding as follows:

Wharrie is asking us to bless a breathtaking injustice. Prosecutor, acting pre-prosecution as an investigator, fabricates evidence and introduces the fabricated evidence at trial. The innocent victim of the fabrication is prosecuted and convicted and sent to prison for 17 years. On Wharrie’s interpretation of our decision in Buckley\textsuperscript{}\textsuperscript{[v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994)]}, the prosecutor is insulated from liability because his fabrication did not cause the defendant’s conviction, and by the time that same prosecutor got around to violating the defendant’s right he was absolutely immunized. So: grave misconduct by the government’s lawyer at a time where he was not shielded by absolute immunity; no remedy whatsoever for the hapless victim.\textsuperscript{204}

The court explained:

A prosecutor cannot retroactively immunize himself from conduct by perfecting his wrongdoing through introducing the fabricated evidence at trial and arguing that the tort was not completed until a time at which he has acquired absolute immunity. That would create a ‘license to lawless conduct,’ which the Supreme Court has said that qualified immunity is not to do.\textsuperscript{205}

In Texas recently, a former state prosecutor, Armando R. Villalobos, was sentenced in the U.S. District Court for the Southern District of Texas to thirteen years in federal prison after he was convicted in 2013 on multiple counts of violating the Racketeer Influenced and Corrupt

\textsuperscript{203} Id.
\textsuperscript{204} Id. at 1113.
\textsuperscript{205} Id. at 1114 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).
Organizations Act (“RICO”), extortion, and conspiracy. Villalobos was involved in a scheme with other lawyers as well as a former Texas state judge, Abel Limas (who was also convicted on charges stemming from the scheme), in which the men used the power of their offices to offer favorable treatment to criminal defendants in exchange for money. One of their schemes involved a convicted murderer named Amit Livingston. Villalobos and Limas (who was a sitting judge at the time) ensured that Livingston was not taken into custody immediately. Livingston became a fugitive after failing to report to serve his sentence. A $500,000 cash bond posted for Livingston was therefore forfeited and the money was split between Villalobos, Limas, and the family of Livingston’s victim, Hermila Hernandez. As part of his sentence, the district court ordered Villalobos to pay $339,000 in restitution and a $30,000 fine. Included in the restitution amount was $200,000 to be paid to Hermilia Hernandez’s children.

Immediately following Villalobos’ sentencing, Robert Pitman, the U.S. Attorney for the Western District of Texas, issued the following statement:

The most important component of an effective justice system is the public’s ability to trust those who are responsible for enforcing the law. But even when there is a breach of that trust, as in this case, the public should take some comfort

---

210 Id.
211 Id.
212 Id. (The victim’s family, “who speak very little English, didn’t understand the plea deal would allow [Hermila’s] killer to become a fugitive . . .”).
213 Id. (The victim’s family, “who speak very little English, didn’t understand the plea deal would allow [Hermila’s] killer to become a fugitive . . .”).
214 Brownsville Herald, supra note 206.
in knowing that there is a mechanism for detecting, rooting out, and punishing those who would corrupt the process[.]

Pittman’s words are reassuring to a certain extent, at least in the context of the Villalobos case, although it is fair to question the extent to which there really is a “mechanism” to remedy prosecutorial conduct in light of the statistics and discussion in this article. And again, the imposition of civil damages or criminal sanctions is mostly remedial rather than prophylactic (except, of course, to the extent that such proceedings have the desired deterrent effect). Such remedies suture the wound but do not heal it. Not only that, but by the time offending prosecutors are punished for their transgressions, the harm they caused to individuals and to the entire criminal justice system has already been done. In fact, Greg Surovic, an Assistant U.S. Attorney and one of the lawyers who prosecuted Villalobos, stated after the sentencing that Villalobos, through his actions, “has done incalculable damage” to the criminal justice system and that citizens may question the integrity of that system for many years. These cases are but a few examples demonstrating that both civil and criminal remedies are available to victims of prosecutorial misconduct, at least in specific circumstances. Still, as stated earlier, courts are as a rule reluctant to levy sanctions against prosecutors and often settle for issuing an admonishment. And the holding in Fields is much narrower than meets the eye, as the majority’s reasoning was founded on a very specific factual scenario.

---

216 Neil, supra note 203.
217 Judge Posner, writing for the majority, took great pains to distinguish the scenario in Fields from those presented in Buckley and Whitlock v. Brueggemann, 682 F.3d 567 (7th Cir. 2012). The majority’s reasoning did not persuade Judge Sykes, who wrote a partial dissent in which she concurred with the majority’s conclusion regarding the dismissal of Fields’ case against Kelley but dissented from its conclusion regarding Wharrie, who she believed was also entitled to absolute immunity, notwithstanding his alleged pre-prosecution misconduct. “Absolute immunity can sometimes produce harsh results, but it has long been thought necessary to encourage and protect the vigorous performance of the prosecutorial function.” Fields, 740 F.3d at 1120 (Sykes, J., concurring in part and dissenting in part). Judge Sykes was not unsympathetic to Fields’ plight, but her conclusion was based on a different conceptualization of the court’s previous holdings in Buckley and Whitlock (the latter of which she believes was wrongly decided, id. at 1124 ). But this point is proper fodder for its own article.
The need for active court participation, especially from the trial courts,\textsuperscript{218} is crucial in preventing and remediing prosecutorial misconduct. In this way, court-imposed sanctions will have, one would hope, a powerful deterrent effect. The Eleventh Circuit recognized this and wrote:

[D]istrict courts must also consider “more direct sanctions to deter prosecutorial misconduct.” [United States v.]Butera, 677 F.2d [1376] at 1383 (citing [United States v.]Modica, 663 F.2d [1173] at 1182-86). The district courts have many potential remedies available: (1) contempt citations; (2) fines; (3) reprimands; (4) suspension from the court’s bar; (5) removal or disqualification from office; and (6) recommendations to bar associations to take disciplinary action. \textit{See generally} Bennett L. Gershman, \textit{Prosecutorial Misconduct} Ch. 13 (1997). “We encourage the district courts in this circuit to remain vigilant . . . and consider more [fully these sanctions] in cases of persistent or flagrant misconduct.” Butera, 677 F.2d at 1383.\textsuperscript{219}

Judicial remedies, like all judge-made law, will have to develop over time. And why should trial courts not be reluctant to be more proactive on this issue, given the clearly stated position of the Supreme Court that the justice system has the tools to deal with the problem and prosecutors’ autonomy should be accorded great deference?\textsuperscript{220}

\textsuperscript{218} \textit{See} United States v. Wilson, 149 F.3d 1298, 1303-04 (11th Cir. 1998) (“On the matter of professional misconduct of prosecutors, the realities require that we defer to our colleagues on the district courts to take the lead. District courts are in a better position to ensure that a prosecutor properly fulfills the duties and obligations of his office.”).

\textsuperscript{219} \textit{Id.}

\textsuperscript{220} \textit{See} Butz v. Economou, 438 U.S. 478, 512 (1978) (“the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges.”) Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. . . . Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.”); \textit{United States v. Armstrong}, 517 U.S. 456, 464 (1996) (observing that a “‘presumption of regularity supports’” prosecutors’ decisions and “‘in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.’”) (quoting \textit{United States v. Chemical Foundation, Inc.}, 272 U.S. 1 (1926)); \textit{Wayte v. United States}, 470 U.S. 598, 607 (1985) (“[T]he decision to prosecute is particularly ill-suited to judicial review.”).
D. **Open-File Discovery**

One approach to designing and implementing an effective self-policing plan to combat prosecutorial misconduct would be for prosecutors’ offices to adopt and adhere to an open-discovery policy. Such a policy would do much to prevent the statistically most common form of prosecutorial misconduct—intentionally or unintentionally withholding exculpatory evidence.\(^{221}\)

Also, such a policy would benefit prosecutors, who would see far fewer allegations levied against them for allegedly withholding material evidence if all the evidence in the prosecutor’s file, incriminating and exculpatory, was timely, willingly, and automatically handed over to the defense in every case.

Open-discovery policies are not a novel idea and have already been implemented in some jurisdictions.\(^{222}\) In 2004, North Carolina became the first state to enact a statute mandating open-discovery in criminal cases.\(^{223}\) Ohio amended its criminal procedure rules in 2010 to mandate open discovery.\(^{224}\) The rule requires prosecutors to make available to defense counsel, inter alia, “written or recorded statement[s] by the defendant or a co-defendant,” police reports, “grand jury testimony by either the defendant or a co-defendant,” the defendant’s criminal history records,

---

\(^{221}\) See *supra* pp. 8-9.

\(^{222}\) See Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution’s Files*, 37-MAY CHAMPION 26, 27 (2013) (“In 2004, North Carolina became the first state to enact legislation requiring prosecutors to provide full open-file discovery, which requires automatic disclosure of all nonprivileged information in the prosecution’s entire file.”).

\(^{223}\) N.C. GEN. STAT. § 15A-903.

\(^{224}\) Rule 16 of the Ohio Rules of Criminal Procedure reads in relevant part as follows:

> Upon receipt of a written demand for discovery by the defendant . . . the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, . . . items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule[.]

relevant laboratory reports, “results of physical or mental examinations, experiments or scientific
tests,” and “[a]ny evidence favorable to the defendant and material to guilt or punishment[.]”

The requirements contained in Rule 16(B) are subject to certain limitations. For example, prosecutors “may designate any material subject to disclosure under this rule as ‘counsel only’ . . . [and] ‘counsel only’ material may not be shown to the defendant or any other person . . . [although] [d]efense counsel may orally communicate the content of the ‘counsel only’ material to the defendant.” Certain additional restrictions apply in sexual assault cases. The Ohio rule, however, cuts both ways in that it imposes a duty of disclosure on defense counsel as well as the prosecutor.

More recently, in 2013, the Texas legislature enacted what is known as the Michael Morton Act, a law aimed at ensuring open discovery in criminal cases. Michael Morton spent almost twenty-five years in prison before DNA evidence proved his innocence. Morton’s case, more details of which are presented below, served as a catalyst for the enactment of Texas Senate Bill 1611, also known as the “Michael Morton Act,” which significantly amended Article 39.14 of the Texas Code of Criminal Procedure. The new Texas statute, which took effect on January 1, 2014, mandates open-file discovery in Texas criminal prosecutions.

---

225 OHIO CRIM. R. 16(B)(1)-(6).
226 Id. at 16(C).
227 See id. at 16(E)(1) and (2).
228 Id. at 16(A) (“All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal.”).
231 Jessica A. Caird, Significant Changes to the Texas Criminal Discovery Statute, 51 FEB. HOUS. LAW. 10 (2014).
232 TEX. CRIM. PROC. CODE ANN., art. 39.14. The statute states, in relevant part: “. . . as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers . . . [.]” Id.
The topic of open-file discovery laws is a hot button issue in the debate about how best to curb prosecutorial misconduct, and boasts a rapidly growing advocate base. This is because such laws would go a long way toward preventing incidents of prosecutorial misconduct by making it much more difficult for prosecutors to hide exculpatory evidence.

E. REMOVING PROSECUTORS FROM THE ELECTORAL PROCESS

In many states, counties, and cities, prosecutors (and also judges) are elected officials. Removing prosecutors from the political process, while a controversial proposal since it involves taking away citizens’ power to elect their local prosecutors and judges, is another option in attempting to curb prosecutorial misconduct. Recall that the petitioner in Buckley v. Fitzsimmons alleged, inter alia, that the respondent prosecutor, Fitzsimmons, made false statements about the case during a press conference that was held less than two weeks before a primary election contest in which Fitzsimmons was running. And North Carolina prosecutor Mick Nifong made his infamous and improper extrajudicial statements in the Duke lacrosse rape cases while he was enmeshed in a very close election contest in his bid to continue serving as lead prosecutor in that jurisdiction.

---

233 See, e.g., Klinkosum, “Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution’s Files,” supra note 222 (“As a result of the problem of prosecutorial misconduct involving the nondisclosure of favorable, material evidence, the time has arrived for criminal defense attorneys in every jurisdiction to demand full and total access to the prosecution's file in order to effectively and zealously advocate on behalf of their clients. Requiring full disclosure of the prosecution's file and requiring law enforcement and prosecutorial agencies to turn over their files for review would not only protect the defendants' rights to effective assistance of counsel, confrontation and cross-examination, and due process, but would also help to advance the ultimate endeavors of the criminal justice system—the protection of the innocent, the punishment of the guilty, and the revelation of the truth.”).

234 Buckley v. Fitzsimmons, 509 U.S. 259, 262 (1993) (“The theory of petitioner’s case is that in order to obtain an indictment in a case that had engendered ‘extensive publicity’ and ‘intense emotions in the community,’ the prosecutors fabricated false evidence, and that in order to gain votes, Fitzsimmons made false statements about petitioner in a press conference announcing his arrest and indictment 12 days before the primary election. Petitioner claims that respondents’ misconduct created a ‘highly prejudicial and inflamed atmosphere’ that seriously impaired the fairness of the judicial proceedings against an innocent man and caused him to suffer a serious loss of freedom, mental anguish, and humiliation.”).

Recently, U.S. Supreme Court Justice Sonia Sotomayor, in her dissent in a death penalty case out of Alabama, denounced the prevalent system of electing state court judges.\textsuperscript{236} The issue involved the power of Alabama judges to override a jury’s sentencing recommendation in death penalty cases.\textsuperscript{237} Petitioner Mario Dion Woodward was convicted of the murder of a Montgomery, Alabama, police officer.\textsuperscript{238} The jury that convicted him determined that he should be spared the death penalty.\textsuperscript{239} The presiding judge held a sentencing hearing subsequent to the jury verdict and sentencing recommendation, overrode the jury’s recommendation, and imposed the death penalty.\textsuperscript{240} Dissenting from the Court’s denial of certiorari, Justice Sotomayor (joined by Justice Breyer) wrote:

What could explain Alabama judges’ distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.\textsuperscript{241}

In the debate about solutions to the problem of prosecutorial misconduct, it is important to question the efficacy of electing judges and prosecutors. Reform aimed at insulating prosecutors and judges from the partisan political process, thereby removing the “electoral pressures” Justice Sotomayor referred to, is yet another approach to preventing prosecutorial misconduct and one that deserves careful consideration.

\begin{itemize}
\item \textsuperscript{236} Woodward v. Alabama, 134 S. Ct. 405 (2013).
\item \textsuperscript{237} Id. at 406.
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} Id.
\item \textsuperscript{241} Id. at 408.
\end{itemize}
D. EXAMPLES OF MODEL/PROPOSED LEGISLATION

A legislative approach\textsuperscript{242} to curbing prosecutorial misconduct is always an avenue whenever there are those willing to advocate and lobby for it. Many proponents of justice system reform, like the Innocence Project,\textsuperscript{243} draft proposed legislation and rules they maintain would help prevent prosecutorial misconduct.\textsuperscript{244}

A group “of lawyers, law professors, law students and policy advocates who are concerned about prosecutorial misconduct” formed “The Open File,” a website that they describe as an attempt to “examine the nature of prosecutorial misconduct, the systems that incentivize such behavior, and the processes and institutions which might hold prosecutors accountable when misconduct occurs.”\textsuperscript{245} The individuals behind the website state that they were inspired to examine and address the topic of prosecutorial misconduct as a result of the Supreme Court’s decision in Connick v. Thompson.\textsuperscript{246} As part of its efforts, The Open File website includes model legislation that its members feel would be effective in preventing or remedying prosecutorial misconduct. This includes, for example, a proposed open-file discovery bill.\textsuperscript{247} This proposed model is similar to open-file statutes that have been enacted in some jurisdictions such as Ohio and North Carolina. It reads, in relevant part, as follows:

\begin{quote}
We use the word “legislative” to include rulemaking.
\end{quote}

\textsuperscript{242} We use the word “legislative” to include rulemaking.
\textsuperscript{243} www.innocenceproject.org. According to its website, “[t]he Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice.” The Project is associated with the Benjamin N. Cardozo School of Law at Yeshiva University and was founded in 1992 by Barry Scheck and Peter Neufeld, who currently serve as co-directors of the Project. \textit{id.}
\textsuperscript{244} For example, the Project has drafted model legislation that states could implement that would mandate compensation for victims of wrongful convictions. http://www.innocenceproject.org/docs/model/Compensation_Model_Bill.pdf. The Project has also drafted model legislation regarding post-conviction DNA testing, preservation of evidence, eyewitness identification reform, crime lab oversight, and the formation of state criminal justice reform commissions. http://www.innocenceproject.org/fix/Model-Legislation.php.
\textsuperscript{245} “The Open File: A website about prosecutorial misconduct and accountability” (available at http://www.prosecutorialaccountability.com).
\textsuperscript{246} \textit{id.}
\textsuperscript{247} \textit{id.}
Concerning the prosecution’s obligation to disclose relevant or material evidence under Brady v. Maryland, Kyles v. Whitley, and Smith v. Cain, and the efforts to prevent wrongful convictions and/or death sentences based upon undisclosed exculpatory evidence.

Be it enacted by the State of [State Name]:

Section (X). Code of Criminal Procedure Article (x.x) is hereby enacted to read as follows:

Art. (x.x) Disclosure of information favorable to the defendant

A) Upon motion of the defendant, the court shall order the district attorney to provide to the defendant all information and at no cost, permit or authorize the defendant to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, data photographs, tangible objects, buildings, places, or copies or portions thereof, that—

(i) may reasonably appear to be favorable to the defendant with respect to the determination of guilt, or of any preliminary matter, or of the sentence to be imposed; and

(ii) are within the possession, custody or control of the prosecution or others acting on the government’s behalf in the case . . . [.]

The Innocence Project and The Open File are but two examples of many groups and organizations that advocate legislative reform to curb prosecutorial misconduct, so there is no shortage of such proposed legislation that can serve as fodder for debate about the issue of legislative reforms to prevent and remedy prosecutorial misconduct. Of course, advancing such legislation, whether in the U.S. Congress or state legislatures, is no simple task. A bipartisan group of U.S. legislators introduced the Fairness in Disclosure of Evidence Act of 2012, but the bill died in committee and was never enacted.

---

248 Id. (The authors of this model bill contend that it would serve to “remove[] the materiality prong of Brady.”).
250 The Fairness in Disclosure of Evidence Act was sponsored by Sen. Lisa Murkowski (R-AK), with cosponsors including Daniel Akaka (D-HI), Mark Begich (D-AK), Kay Bailey Hutchison (R-TX), Daniel Inouye, (D-HI), and
CONCLUSION

The proposals above are an important part of reducing the frequency and number of wrongful convictions. Ultimately, however, there is one remedy that would directly and immediately serve the victims of prosecutorial misconduct while the scholarly debate about how to prevent misconduct continues to stew in the pages of law journals. That remedy involves the enactment of compensation statutes.

John Thompson spent eighteen years in prison, fourteen of them on death row; Thompson’s conviction resulted directly from prosecutorial misconduct. Following his exoneration he was awarded $14 million in compensation for his years of wrongful incarceration. The U.S. Supreme Court’s reversal of that award was the second major blow to Thompson’s efforts to rebuild his life after his wrongful incarceration. “By 2005, he had a brand new home, a car and a dog. He and his wife were running their own sandwich shop in a hotel in downtown New Orleans. ‘I was almost getting to feel the American dream,’ said Thompson[.] . . . Then, Hurricane Katrina hit and wiped out his home, his business and the life he'd been struggling to build after nearly two decades locked up.” These events, which could have crushed the spirit of most men, instead motivated Thompson to found his Resurrection

Michael Enzi (R-WY), and was introduced as a result of the disastrous prosecution of Sen. Ted Stevens (available at https://www.govtrack.us/congress/bills/112/s2197).

251 Connick v. Thompson, 131 S. Ct. 1350, 1355 (2011); see supra § ___.

252 Id. at 1357.


254 Grinburg, Life after death row: Helping break the “jailhouse mentality” (supra note 162).
After Exoneration foundation.\textsuperscript{255} But Thompson was left to rebuild his life without the compensation he had been awarded years earlier.

Just over half of the states in America have enacted compensation statutes to provide an avenue for exonerated individuals to seek compensation for their wrongful incarceration. In a report issued in 2009, the Innocence Project noted that at that time, “a staggering 23 states in the nation do not offer any compensation to the exonerated.”\textsuperscript{256} In 2013, California became the twenty-eighth state to enact a compensation statute when it passed Senate Bill 618, which provides a mechanism for wrongfully incarcerated people to apply for compensation following their release from custody.\textsuperscript{257} The amounts of compensation available to wrongfully convicted individuals under such statutes vary widely, even dramatically. Under the new California law, victims of unlawful incarceration are entitled to a maximum of $100 per day for each day they were wrongfully imprisoned.\textsuperscript{258} Florida’s statute provides for compensation up to $50,000 for each year of incarceration up to a maximum of $2 million.\textsuperscript{259} New Hampshire’s compensation statute provides for an arguably paltry maximum award of $20,000, regardless of how long the victim was incarcerated.\textsuperscript{260}

Not only do the amounts of money available vary widely, but a woefully small number of states offer social services to complement monetary awards.\textsuperscript{261} Louisiana, for example, offers one year of job training, three years of medical and counseling services, and college tuition

\textsuperscript{255} Id.
\textsuperscript{257} A copy of the statute, along with its legislative history and other information, is available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB618.
\textsuperscript{258} Innocence Project Report, supra note 256, App. A.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Id.
assistance.\textsuperscript{262} Connecticut offers job training, counseling services, tuition assistance, “and any other services needed to facilitate reintegration into the community.”\textsuperscript{263} Sadly, however, only ten states provide for social services in their compensation statutes.\textsuperscript{264} Exonerees in many states would receive more benefit from a membership in AARP than they do from the state that wrongfully incarcerated them.

The enactment of statutes that provide remedies for victims of prosecutorial misconduct is not a process that is sweeping the nation. Obviously, political and fiscal issues come into play and by their nature severely complicate efforts to enact such legislation. Providing fair compensation – fair meaning monetary compensation as well as social services – to victims of prosecutorial misconduct, and indeed to anyone who is wrongfully imprisoned for whatever reason, is a moral imperative.\textsuperscript{265} And again, providing compensation and social services to citizens who suffer the profound, even incomprehensible, injustice of being wrongfully deprived of their freedom, be it for a day or for decades, must be the primary and most immediate remedy offered to exonerees while the discussion and debate continues about how best to prevent such tragedies.

In sum, although prosecutors are not the problem, that is, they are not the predominant cause of wrongful convictions that lead to rightful exonerations, prosecutors must be an important part of the solution. Ethical prosecutors have the power, the perspective, and the moral imperative to ensure that the criminal justice system yields just results.\textsuperscript{266}

\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Id. at 16.
\textsuperscript{265} The Innocence Project Report also contains a model compensation statute. See id., App. B.
\textsuperscript{266} Prosecutors, in increasing numbers, are heeding that call. As recently noted in the Registry: “2014 saw a substantial increase in the number of Conviction Integrity Units (CIUs) - units in prosecutors’ offices that review and investigate post-conviction claims of innocence - from 9 CIUs in 2013, to 15 in 2014. CIUs played a role in 49 exonerations in 2014. In all previous years combined, CIUs were responsible for only 41 exonerations.” Registry, Recent Findings, available at: https://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx. Things are looking up.