Keeping Arrows in the Quiver: Mapping the Contours

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Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion

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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.1

Until one decides that virtue matters – until it becomes a personal mission – no training will produce the commitment needed to pursue or maintain integrity. While in a discipline case conduct is measured against rules and standards, it is more than those regulations.2

I. INTRODUCTION

The prosecutor, by most accounts, is the most powerful person in the courthouse, often making, or at least guiding, all of the important decisions in major criminal cases—what crimes to charge, when to bring the charges, the amount of bail sought, the release conditions proposed, dispositions and sentencing, lenience or its absence, and the extent to which any lenience may be appropriate. In that sense, prosecutors have more “arrows in their quiver” than most attorneys. This power is emboldened by numerous practices that

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protect prosecutors from paying personal consequences for unethical behavior in carrying out prosecutorial duties, including (1) qualified discretionary immunity from section 1983 suits, (2) near-absolute immunity from suits against prosecutors’ personal assets, (3) flexible ethical rules that sweep a good deal of marginally ethical behavior within the bounds of permissible prosecutorial conduct, and (4) attorney discipline schemes that largely seem to avoid sanctions against prosecutors.

In addition to these protections, most of the decision making is a solitary and private venture, only coming to the attention of the public intermittently, usually in high-profile cases. But even then, when decisions in high-profile cases become public, most of the prosecutor’s decision-making process is, like an iceberg beneath the surface, far from peering eyes and inquiring minds.

For instance, the February 26, 2012, shooting death of Trayvon Martin demonstrates the immense pressures—both proper and improper—that weigh on prosecutors’ discretion. In the weeks following Martin’s death, there were racially charged debates scrutinizing Florida’s so called “stand your ground” law,3 circumstances surrounding the shooting itself,4 and the ensuing police investigation.5 There was intense criticism of the local prosecutor’s initial decision not to lay any charges against George Zimmerman, who claimed to have shot Martin in self-defense.6 In the forty-five day period between Martin’s death and Zimmerman’s April 11 arrest,7 not only did a special prosecutor replace the local prosecutor, but the local police chief temporarily stepped down.8 Martin’s family, joined by activist groups, eventually claimed

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that a combination of public pressure, media exposure, and protests somehow played a role in Zimmerman’s arrest.9

Proper prosecutorial decision making takes into account a constellation of appropriate considerations, such as fairness, retribution, remediation, rehabilitation, reward for contrition, likelihood of conviction, likelihood of re-offense, severity of the crime, severity of the harm, and each victim’s wishes. But prosecutors sometimes also consider less appropriate factors, such as the impact each case will have on the next election, popular sentiment, what the public demands rather than what the law allows, expedience, win-loss record, other personal benefits, and so on. When prosecutorial decisions are made within a broad range of what is viewed as reasonable or acceptable, the public scrutiny is minimal. However, secrecy and immunity can blur scrutiny of decision-making practices falling outside this range.

When prosecutorial decision making results in error, almost all of the consequences are systemic and collateral. These consequences include evidence suppression, dismissals of complaints and counts, grants of new trials, and compensation for a very few wrongly-convicted persons. Rarely are these consequences for prosecutorial error directly imposed on the offending prosecutor. In fact, sanctions against a prosecutor’s attorney license, such as disbarment, suspension, or censure, seem to be exceptional. Furthermore, whether the prosecutor serves in an elected or appointed position, one remedy for the public is to remove the prosecutor from office. But even that is rare.

“Good” prosecutorial decision making, therefore, has been largely guided by the internal compasses of those prosecutors as they make those behind-the-scenes decisions; it is also guided in some situations by ethics codes, rules, and guidelines. On one hand, when those internal compasses operate morally and ethically, the result is “good” prosecutorial decision making. On the other hand, when those compasses fail, prosecutorial error and bias arise. When such error and bias occur, at least two issues present themselves for consideration. First, should society continue to rely on prosecutors’ internal compasses? If the internal compasses of prosecutors are deemed to be unreliable, further questions arise about whether a vetting process to formalize public input into the decision-making process is an appropriate and workable alternative. Second, should prosecutors be removed from office when their practices somehow veer off course?

This Article explores decision-making theories in general, and then turns to explore the legal, moral, and ethical constraints on prosecutorial decision making. This Article also examines an assortment of internal and external

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schemes purporting to somehow regulate the exercise of prosecutorial discretion. Finally, this Article assesses, state by state, how prosecutors fare within the current attorney discipline system through the Model Rules, the Model Code, and the extant professional responsibility systems nationwide.

On balance, it appears that extreme cases of unethical prosecutorial behavior are rare, and when those extreme cases are identified, the states’ attorney discipline systems act swiftly and harshly. This Article presents a fifty-state snapshot of prosecutorial sanctions for unethical conduct, exploring the most recent sanctions and the most severe for every state, as well as the District of Columbia. This snapshot indicates that nearly half of all states have disbarred at least one prosecutor for ethical misdeeds in carrying out prosecutorial duties. On the lower end of unethical prosecutorial behavior, the penalties appear to be somewhat rare and usually minimal when the line between unethical behavior and mere prosecutorial error is blurred. Perhaps that is as it should be. In a very real sense, society needs to rely on prosecutors to perform their duties ethically and responsibly. Stated another way, we ought not demand perfection, or at least we ought not punish mere imperfection too severely.

Furthermore, most agree that sanctioning and disciplinary mechanisms place a greater emphasis on protecting the public than punishing prosecutorial misconduct. Thus, severe sanctions against a prosecutor’s license should follow only when necessary to protect the public from future abuses of power by that prosecutor. However, if that prosecutor is not likely to repeat the error, as when it is a minor or an isolated misdeed, there may be no need for license sanctions when evidence suppression and dismissal remedies actually provide a much more valuable benefit for the particular wronged defendant.

Our preliminary assessment suggests that current, albeit imperfect, accountability mechanisms can be used to sanction errant prosecutors.

II. DECISION-MAKING THEORIES

American scholarship has been seriously examining prosecutorial discretion in some form since 1933 when Newman Baker recognized that prosecutors did not simply prosecute “all known criminal conduct” but considered factors such as cost, each proceeding’s impact on the defendant, the defendant’s social standing, political pressures, and the need to protect citizens from criminal activity. Baker published his work only two years

10 In re Winthrop, 848 N.E.2d 961, 981 (Ill. 2006). The attorney discipline system exists “to protect the public, maintain the integrity of the legal profession, and protect the administration of justice from reproach.” Id. “The purpose of the attorney disciplinary system is not to punish the attorney for his or her misconduct.” In re Nadenbush, No. 2011PR00077, 2012 WL 3013852, at *19 (Ill. Atty Registration Disciplinary Com’n July 6, 2012).

after the National Commission on Law Observance and Enforcement—
commonly known as the Wickersham Commission—released its final report
of investigations into complaints about the uneven enforcement of prohibition
laws. While criminal law affords an array of procedural remedies for
defendants who suffer the adverse consequences of misused discretion,
questions remain about existing pathways to securing prosecutorial
accountability through civil actions or disciplinary proceedings.

This Article explores these lingering questions as they relate to the “front
lines” of criminal prosecutions (as opposed to the conduct of lawyers giving
advice to executive branches of government). While it is beyond this
Article’s scope to fully canvass the vast literature exploring this intersection, a
discussion of selected scholarship and relevant law is in order. Our Article
begins with some historical considerations followed by a discussion of
selected literature. 42 U.S.C. § 1983 is discussed before presentation of data
gathered to assess the frequency of disciplinary actions involving prosecutors.
We discuss our findings and conclude with recommendations for further research.

III. HISTORY AND CONTEXT

Whatever external controls purport to govern a prosecutor’s conduct, the
fact remains that much of any prosecutor’s discretionary power is exercised
behind closed doors; thus, this power continues to enjoy judicial, institutional,
and societal protection. The institutional history of this power is tied to the
history of America’s earliest settlers who made important choices about how
laws would be administered in a pre-revolutionary society. In 1997, Joan
Jacoby traced the historical reasons behind the uniquely significant position
American prosecutors now occupy. Two of these are most relevant to this

12. NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE
PROHIBITION LAWS IN THE UNITED STATES, H.R. DOC. NO. 722 (3d Sess. 1931) [hereinafter Wickersham
Report]. Dubbed the Wickersham Commission, this Commission was named after former United States
Attorney General George Wickersham who headed the investigation. See id.

For example, in Young v. United States, 481 U.S. 787, 814 (1987), the U.S. Supreme Court
affirmed the prosecutor’s “power to employ the full machinery of the state in scrutinizing any given
individual.” See also Gregg v. Georgia, 428 U.S. 153, 199 (1976) (prosecutor may select whom to prosecute
for capital offense and may plea bargain; “[n]othing in any of our cases suggests that the decision to
afford . . . mercy violates the Constitution”); Furman v. Georgia, 408 U.S. 238 (1972); Confiscation Cases, 74
U.S. (7 Wall.) 454, 457 (1868); Weisberg v. U.S. Dept of Justice, 489 F.2d 1195 (D.C. Cir. 1973) (en bane,
request); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); United States v. Cox, 342 F.2d 167 (5th

1997, at *33 [hereinafter Jacoby, The American Prosecutor]; Joan E. Jacoby, The Emergence of Local
Prosecutors, The Prosecutor, July–August 1997, at **25–30; see also Rita W. Cooley, Predecessors of the
Federal Attorney General: The Attorney General in England and the American Colonies, 2 AM. J. LEGAL
HIST. 304 (1958); John H. Langbein, The Origins of Public Prosecution at Common Law, 17 AM. J. LEGAL
HIST. 313 (1973); W. Scott Van Alstyne, Jr., The District Attorney—A Historical Puzzle, 1952 Wis. L. REV.
125.
Article. First, early settlers understood crime as public events impacting both the immediate victim and society as a whole. According to this view of crime, the public deserved a representative voice in the administration and enforcement of law itself. Second, there was a distinct move away from private prosecutions that favored wealthier litigants, reflecting the notion that law enforcement should no longer operate differently for privileged classes.

Despite this view of the prosecutor’s role in early American societies, our modern criminal justice system continues to fight widespread perceptions that a defendant’s social standing—based on race, age, gender, immigration status, socio-economic, and other factors—plays a greater role in his or her being held accountable for criminal acts. As a consequence, the prevailing assumption is that defendants accused of similar crimes can expect different treatment and that misused prosecutorial discretion is somehow responsible for these inequities. This tension has flowed through writings that address prosecutorial decision making since the Wickersham Report’s release in 1931.

Characterizing a prosecutor’s “choice” to commence or maintain criminal proceedings as discretionary is a matter of some debate. Kenneth Culp Davis defined discretionary decisions as those “made without application of known principles or laws.” Building on Davis’s argument that administrative law can police discretionary and arbitrary regulation, Charles Bubany and Frank Skillern typify the many scholars who have tried to articulate a basis for a more systematic judicial review of prosecutorial discretion, particularly when exercised around three critical issues: whether to charge; what to charge; and how to proceed after charging. Davis argued that the Administrative Procedure Act (“APA”) could regulate prosecutorial discretion and make it subject to judicial review. This approach was premised on the notion that the Department of Justice (“DOJ”) is an agency and should be subject to administrative law review like any other government agency with law enforcement capacity. However, Congress did not delegate

16. Id.
17. Id. at *38.
18. Id.
22. Davis, supra note 20, at 80–84, 220.
23. Id.
rulemaking powers to the DOJ, which has a different range of mandates compared to those of other government entities that were deliberately conceived to function within an administrative law model, such as the United States Securities and Exchange Commission.

Furthermore, Davis’s argument does not consider the feasibility of standardizing the praxis of prosecutorial decision making. The American Bar Association (“ABA”) first published standards for prosecutors in 1971. The first version of these standards aimed to articulate prosecutors’ ethical, professional, and legal responsibilities. In its current form, ABA Standard 3-3.9 attempts to place parameters around the prosecutor’s decision to institute charges against individuals. Inter alia, the standard provides that prosecutors should not:

- Bring or maintain criminal charges not supported by probable cause or where there are reasonable doubts about the defendant’s guilt;
- Lay charges more serious than can be supported by evidence;
- Lay charges that are out of proportion to the nature of the alleged crime;
- Commence prosecution of individuals where the public interest militates against prosecution; or
- Condition the withdrawal of charges on waiver of an accused’s right to pursue any available civil remedies without judicial approval.

In 2010, the ABA convened another task force to revisit its prosecution standards. The task force proposed modifying the language in Standard 3-3.9 with the addition of Proposed Standards 3-5.5 and 3-5.6. Proposed Standard 3-5.5 focuses on those factors a prosecutor should apply in deciding whether to file and maintain criminal charges. Proposed Standard 3-5.6 lists discretionary factors a prosecutor should consider in making that decision, as well as issues shaping such policy considerations. Bennett Gersman, however, expressed skepticism in his 2011 critique of these proposals, writing that “[i]t is unclear whether these charging Standards purport to establish ethical guidelines for prosecution, or merely guidelines for a prosecutor’s exercise of judgment and policy in the charging function.”

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26. Id.
27. Am. Bar Ass’n, Standards For Criminal Justice: Prosecution Function § 3-1.1(c) (Proposed Revisions 2010).
28. Id.
29. Id.
The 2010 proposed ABA standards are variants of those established by the 1973 National Advisory Commission on Criminal Justice Standards and Goals (“NAC”). Supported by a grant from the Law Enforcement Assistance Administration (“LEAA”), NAC marked the first attempt to create national criminal justice standards and goals for crime reduction and prevention at state and local levels. Many studies and research projects would follow, each with the goal of either monitoring charging standards or systematically developing uniform guidelines. This body of work suggests that the exercise of prosecutorial discretion is not totally devoid of external control.

These are not new conversations, as there is a large body of scholarship examining how to efficiently train prosecutors in the exercise of their discretion as well as other means of supervising and managing prosecutor conduct. For example, some articles consider the role of the Multi-State Professional Responsibility Exam and other mechanisms designed to engender professionalism and ethics. Overlapping with existing labor management literature discussing ethical workplaces, some of this work has also discussed how fostering an office culture informs prosecutors’ understanding of their own ethical obligations.

As Bubany and Skillern observed, most of the existing legal restraints that might sanction prosecutorial misconduct appear to reside within the criminal process after prosecution commences. Thus, there are fewer judicial controls at the pretrial stage when the bulk of discretionary decisions are made, and there are none at all with regard to a prosecutor’s decision not to charge. There are also sources of “informal controls” that bring real or imagined pressures to bear on decision making that cannot be precisely

32. Id.
37. Bubany & Skillern, supra note 19, at 473.
measured. These sources include the media, members of the bar and judiciary, politicians, and senior officials within government or elsewhere.

In discussing the feasibility of using administrative law to regulate prosecutorial discretion, Leland Beck identified tensions between the informal nature of this discretion and the wisdom of trying to curb such informalities. Yet, he also questioned traditional “separation of powers” arguments courts commonly invoked to argue against reviewing prosecutors’ decisions. Beck contended that such deference remained at odds with courts’ practice of reviewing prosecutorial decisions of administrative agencies. However, the legitimate need to preserve the proper use of discretion is mismatched with administrative law’s inflexibility. Beck conceded this point by admitting that the APA and common law notions of reviewability suggest administrative law would not be able to control prosecutorial discretion. Rather, the DOJ, Congress, and the courts must play a role in “depoliticizing appointments within the Department, supervising actions of U.S. Attorneys, reprimanding unauthorized enforcement practices, and developing remedies for putative defendants who are wronged by injudicious enforcement practices.”

Federal law gives citizens a statutory right of action against state actors for harms caused by the violation of constitutional or federal rights. First enacted as part of the Civil Rights Act of 1871, provisions in section 1983 were passed primarily to protect African Americans living in the south from the Ku Klux Klan. Despite minor changes, the statute remains in force. Section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

38. Id. at 488.
40. Id. at 335.
41. Id. at 322 et seq.
42. Id. at 329.
43. Id. at 378.
Although the U.S. Supreme Court has invoked common law principles to establish tort liability for violations of section 1983, this liability has been subject to important limitations.\textsuperscript{45} One such limitation includes absolute immunity for prosecutors performing core prosecutorial functions.\textsuperscript{46}

Under this functional approach, courts must consider “the nature of the function performed, not the identity of the actor who performed it.”\textsuperscript{47} Absolute immunity is available to prosecutors whose challenged conduct is advocative insofar as it involves initiating and pursuing criminal prosecution.\textsuperscript{48} These advocative functions were noted in multiple decisions and include matters such as filing criminal charges,\textsuperscript{49} presenting evidence before a grand jury,\textsuperscript{50} advocating at a preliminary hearing,\textsuperscript{51} retaining trial evidence and exhibits pending appeal,\textsuperscript{52} and accepting plea bargains.\textsuperscript{53}

Absolute immunity, however, is not available to prosecutors whose impugned conduct involves administrative or investigative activities.\textsuperscript{54} Nor does it apply to instances where advocative functions are interwoven with unauthorized conduct, including “acts that are manifestly or palpably beyond [a prosecutor’s] authority” or are “performed in the clear absence of all jurisdiction.”\textsuperscript{55} Consequently, there is a high threshold for bringing a successful civil action under section 1983.\textsuperscript{56} As a result, plaintiffs seeking accountability from errant prosecutors must consider other avenues to attain retribution—avenues that will be the focus of the discussion that follows.

\section*{IV. PROSECUTOR DECISION MAKING}

Prosecutors, in nearly every case, make critical decisions in the midst of ethical dilemmas. With an eye toward fairness, justice, public safety, and victim preferences, the prosecutor must decide:

\begin{itemize}
\item Is additional investigation needed?
\item What evidence is admissible?
\item Is there sufficient admissible evidence to support the charges?
\item Should the suspect be charged with any offense?
\item If so, what charges should be brought?
\end{itemize}

\textsuperscript{46} Imbler v. Pachtman, 424 U.S. 409, 420 (1976).
\textsuperscript{47} Forrester v. White, 484 U.S. 219, 229 (1988).
\textsuperscript{48} Imbler, 424 U.S. at 410.
\textsuperscript{49} Id. at 409; Pinaud v. Cnty. of Suffolk, 52 F.3d 1139, 1147 (2d Cir. 1995); Shmueli v. City of New York, 424 F.3d 231, 236–37 (2d Cir. 2005).
\textsuperscript{50} Hill v. City of New York, 45 F.3d 653, 661–62 (2d Cir. 1995).
\textsuperscript{52} Parkinson v. Cozzolino, 238 F.3d 145, 150 (2d Cir. 2001).
\textsuperscript{53} Taylor v. Kavanagh, 640 F.2d 450, 453 (2d Cir. 1981).
\textsuperscript{55} Schloss v. Bouse, 876 F.2d 287, 291 (2d Cir. 1989) (internal quotations omitted).
\textsuperscript{56} See infra note 7474 and accompanying text (for a discussion of the U.S. Supreme Court decision that increased the threshold for bringing a section 1983 action against a prosecution agency).
• When should the charges be brought?
• What bail and release conditions should be sought?
• What are the discovery obligations?
• What are the victims’ wishes?
• What are the offender’s circumstances and criminal history?
• What has been done in similar cases and similar situations?
• What is the optimal mix of retribution, restitution, and rehabilitation?
• What does “justice” require?

The crush of ethical decisions to be made in nearly every case is exacerbated by prosecutor caseloads bursting at the seams, \(^{57}\) docket overcrowding, \(^{58}\) and underfunding of many state court systems \(^{59}\) and prosecution offices \(^{60}\) that sometimes seem to favor or reward expedience over thoroughness, speed over justice. Consequently, the decisions made in such a cauldron must be leavened by some structure or some guides, such as (1) internal ethical compasses \(^{61}\); (2) office-wide internal policies \(^{62}\); (3) the potential for civil lawsuits against the prosecutor, personally; (4) the potential for civil lawsuits against the prosecutor’s agency; (5) risks that ethical misdeeds will result in evidence suppression, case or charge dismissal, mistrial, or double jeopardy bar \(^{63}\); (6) risks to reputation; (7) risks of loss of public office \(^{64}\); (8) sanctions against the individual prosecutor’s license to practice law \(^{65}\); or (9) some other new or enhanced external risk-reward scheme. \(^{66}\) One or more of these guides appears to be effective for most prosecutors. But how effective is the current external prosecutorial control

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59. Id.
cuts-clog-criminal-justice-system/#.T6gBNOvZCf4.
65. See Beck, supra note 39.
regime, and what external guides should be created or enhanced to optimize ethical prosecutor behavior?

V. REGULATING THE COMPLEX TREATMENT OF RACE: IS IT POSSIBLE?

Observant readers will notice race was omitted from the preceding list of factors that can shape prosecutorial discretion. We reserved this portion of the Article to give the issue of race the careful attention it deserves. Without wading unnecessarily into existing debates about racism’s presence in America’s criminal justice systems, we argue that race inherently complicates any conversation about the merits of regulating prosecutorial discretion. The following scenario is illustrative insofar as it forms the basis for subsequent comment.

Michelle is a 19-year-old African American woman. She has been arrested for selling drugs—her third such arrest in as many years. Michelle lives in a predominantly African American neighborhood plagued with high crime, substandard public housing, few meaningful employment opportunities, and a chronically under-resourced school system. Area residents have long complained about the epidemic of local drug traffickers preying on economically-marginalized youth in the hopes of recruiting them to become street-level drug dealers. In response to pressure from politicians, community activists, and other stakeholders, the police have been working with local neighborhood watch organizations in an attempt to arrest dealers and disrupt the supply chain of illicit drugs. Michelle’s arrest was part of a predawn raid on her apartment complex, which led to a dozen arrests. Having obtained competent legal advice, Michelle has concluded the evidence against her is overwhelming and that a conviction and lengthy jail sentence are likely. Her only hope of avoiding lengthy incarceration is for her lawyer to negotiate some kind of plea bargain or to win approval to enter another diversion program. However, Michelle’s chances of being eligible for a diversion are limited.

Michelle dropped out of high school after becoming pregnant with the first of her two children but before completing the tenth grade. She has been unable to find suitable employment because she is a single mother with limited family support and insufficient access to subsidized daycare. Michelle’s experience with community-based supports—offered by churches, charitable organizations, and state-funded social agencies—has been mixed. While most offer support for high school completion and job training, she is routinely placed in low-wage jobs too far from her home or inaccessible by public transit. Although she is not a drug addict, Michelle was finally able to pay her rent, childcare costs, and other basic living expenses after a high-school friend suggested she start selling drugs. At the time of her most recent arrest, she made $1800 a week as a street-level dealer. When she had worked at jobs accessed through state- or private-sector employment agencies, Michelle never earned more than $375 a week.

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67. Diversion is a pretrial program somewhat akin to probation without a conviction. The diversion option is offered to low-level and (usually) first-time offenders only as a way to avoid a conviction, assuming the offenders abide by the terms and conditions of diversion. Most often, it is a program administered out of the prosecutor’s office and has the salutary effect of reducing formal criminal caseloads for the prosecutors and for the entire court system.
A “law and order” prosecutorial response to this scenario would likely bend to community demands for drug-free neighborhoods while ignoring systemic factors that funnel marginalized populations into illicit commerce. This approach would also place a greater emphasis on Michelle’s personal responsibility without necessarily regarding her as the victim of a systemic disadvantage. Accordingly, it would view alternative measures with disdain, especially those catering to “repeat offenders.”

Yet, the narrative of Michelle and her community is laced with fundamental questions about the proper scope of socially conscious prosecutorial discretion when faced with competing expectations rooted in a common problem. Both Michelle and her community are victims of similar social problems, yet are opponents within the criminal process. Her goal of minimizing the specter of criminal liability diverges with those of her community who seek to wrest control of their environment from the effects of drug-related crime.

While existing scholarship—much of it unabashedly liberal—may contend there are no satisfactory mechanisms to police prosecutorial conduct, this literature does not sufficiently explain how to regulate prosecutors’ discretionary treatment of those wearing Michelle’s shoes in American society. We argue that some of the finest writers in this field appear to have become preoccupied with the most egregious examples of prosecutorial misconduct to the exclusion of more commonplace cases where their thoughtful expertise is most needed. This approach allows exceptional cases of misconduct to improperly control the public policy debate at the risk of causing further harm to marginalized communities already overrepresented in our criminal justice systems. We explore this idea by starting with the following excerpt from a recent New York Times article:

[The charging and plea bargaining decisions are made behind closed doors, and prosecutors are not required to justify or explain these decisions to anyone. If a prosecutor treats two similarly situated defendants differently—charging one but not the other or offering a better plea offer to one—it is almost impossible to challenge such differential treatment. The lack of transparency in the prosecution function also leads to misconduct, like the failure to turn over exculpatory evidence—a common occurrence made famous by the prosecutors in the Duke lacrosse and Senator Ted Stevens cases.

We live in a democracy in which we hold accountable those to whom we grant power, but we have fallen short when it comes to prosecutors. State and local prosecutors are presumably held accountable through the electoral process, but few voters know enough about the prosecution function to make a meaningful decision at the ballot box. When prosecutors run for office, they don’t talk about their charging and plea-bargaining policies (if such policies even exist). With a few notable exceptions, most prosecutors run on a “tough on crime” message, providing little, if any, information about anything else. There is even
less accountability on the federal level where U.S. attorneys are appointed by
the president.68

Such statements are problematic insofar as they either oversimplify or
mischaracterize problems germane to this debate about prosecutorial decision
making. First, there are varying levels of decision-making freedoms between
junior and senior prosecutors working in the same office—two subclasses of
prosecutors with presumably disparate understandings of their professional
autonomy. Second, concerns about “similarly situated” defendants do not
appear to consider the continuum of similarities and differences required to
identify those defendants who, but for their race, are truly similar. For
example, how do we determine when two or more accused are, indeed,
“similar” enough to attract approximately “similar” treatment? Does
“similar” mean partial or substantial parallels in alleged crimes, the
circumstances surrounding their commission, or the defendants’ personal
histories? Third, we must carefully resist the connotation that a prosecutor’s
privileged deliberations will always result in misconduct of the sorts referred

Despite good intentions, requiring prosecutors to publish details of the
decision-making praxis may produce several unintended consequences. Such
disclosures favor a misguided variant of populism that can improperly
influence prosecutors to the point where their desire to “do the right thing”
may sharply diverge from the electorate’s demands. It bears remembering
that criminal law is one of America’s most politicized policy arenas,
intersecting a range of issues—race, immigration, and national security,
among others—of particular concern to minority communities.

Accordingly, policy makers should be wary of attempts to “democratize”
prosecutorial functions in ways that crystallize community expectations into
mandated responses to real or perceived problems. Ironically, mandating
public access to information in the name of institutional accountability may
produce a decision-making environment so rigid that it becomes formulaic,
stripping prosecutors of their discretion to the point where they are unable to
flexibly respond to the tapestry of factual nuances they encounter every day.
Moreover, recent cases declaring the unconstitutionality of limits on political

68. Angela J. Davis, Prosecutors’ Overreaching Goes Unchecked, N.Y. TIMES (Aug. 19, 2012, 7:00
PM), http://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/federal-
prosecutors-have-way-too-much-power. After noting the U.S. Supreme Court’s deference to prosecutors in
race-related cases alleging selective prosecution and non-disclosure of exculpatory evidence, the piece
concludes by calling for better efforts to secure prosecutorial accountability through, inter alia, electoral
processes and professional regulation. Id.

Similar themes flow through this writer’s previously published works. See Angela J. Davis, The People v.
Orenthal James Simpson: Race and Trial Advocacy, in Trial Stories, 283–352 (Michael E. Tigar & Angela J.
Davis, Foundation Press 2008); Angela J. Davis, The Legal Profession's Failure to Discipline Unethical
Prosecutors, 86 Hofstra L. Rev. 275 (2007); Angela J. Davis, Racial Fairness in the Criminal Justice System:
The Role of the Prosecutor, 39 Colum. Hum. Rts. L. Rev. 202 (2007); Angela J. Davis, The American
Prosecutor: Independence, Power, and the Threat of Tyranny, 86 Iowa L. Rev. 393 (2001); Angela J. Davis,
expenditures by corporations and unions could sharpen existing pressures on prosecutors to justify past decisions to well-funded campaigns aimed at unseating them, whether that unseating is for proper or improper reasons.69

Turning to the workaday features of criminal practice, it is worth noting that prosecutors are not the only actors inside the criminal process. Experienced prosecutors and defense attorneys alike actively engage in the myriad trade-offs typically informing a broad range of prosecutorial choices. Prosecutors regularly call upon defense attorneys to advise confidential informants, defendants who testify against their co-accused, witnesses who give evidence in exchange for immunity, and victims of crime who choose not to testify in order to avoid reliving traumatic experiences. As a result, any solutions proposing to address prosecutorial decision making should consider whether criminal law systems would be well-served by forcing prosecutors to disclose every dimension of this quid pro quo, which often forms part of the treatment of witnesses, defendants, confidential informants, illegal immigrants, conversations captured on wiretaps. The impact of full disclosure reaches all participants. For example, would a crime victim be better off if the prosecutor were obliged to disclose when the prosecutor views the victim as an unbelievable witness? Is it possible, let alone useful, to reveal decision-making patterns without divulging lurid details of particular community’s unprosecuted sins?

Although important, prevailing scholarly views on the current state of prosecutorial discretion should not be treated as catechisms to be accepted, holus-bolus, without carefully scrutinizing their underlying assumptions. While we do not question the presence of malfeasant actors among America’s prosecutors, we argue for a more systematic mapping of the status quo to determine the true extent of the problem in order to meaningfully assess what changes, if any, are necessary and feasible. We also argue that any system specially designed to monitor and regulate the exercise of discretion will only be effective if it can account for the daily realities of criminal practice.70

VI. EXTERNAL LIMITS ON PROSECUTORIAL DECISION MAKING

It is at least questionable whether there are any viable options left to limit prosecutorial power from the outside. Indeed, many commentators

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70. We contend that any proposed solutions for regulating the exercise of prosecutorial decision making must consider the following issues. When should prosecutorial discretion be narrowly confined to prosecution with a view to general and specific deterrence? When should it form part of broader strategies aimed at targeting crime’s socio-economic antecedents? What role, if any, should race play in the prosecutor’s decision to proceed against a particular defendant? Realizing the potential harm that insensitive prosecutors can wield in such circumstances, is regulating their discretion feasible? Whether grounded in policy, administrative law, or some other legal framework, how might such regulation be effective without sacrificing the flexibility racially-complex cases often require? Where disclosures are mandated, how can they be regulated so as to prevent information from becoming tabloid fodder or being put to some other and even more sinister use? Existing scholarship has yet to answer these questions.
argue that external restrictions on prosecutorial power are ineffectual; only internal ethical compasses applied by individual prosecutors and individual prosecution managers can yield ethical prosecutions. The Innocence Project and others have earned 301 post-conviction DNA exonerations in thirty-six states since 1989, 234 of those exonerations just since 2000. But there are precious few consequences for the prosecutor, who, through misdeed, created or allowed the wrongful conviction.

Section 1983 actions against a prosecutor or a prosecuting agency for wrongful convictions would work a personal detriment on the prosecutor, but they are exceedingly rare, especially since the U.S. Supreme Court so severely circumscribed them in 2011.

And we read every month of long-term convicts being freed after discovery of unethical behavior or new evidence, sometimes with substantial case awards against the jurisdiction—but not against the prosecutor—but often with little or no compensation for the convict’s wrongful conviction, lost income, and other losses.

Sanctions under the Federal Rules of Criminal Procedure do not work a personal detriment on the prosecutor because most often, when appellate courts find unethical behavior by prosecutors or other prosecutorial error, the remedy is strictly procedural. Those courts, faced with such error or behavior, craft remedies within the case before them in the forms of evidence suppressions, charge or case dismissals, mistrials, and at times, even...
double jeopardy bars. But none of these are a personal penalty for the prosecutor.

Sanctions related to reputation interests, re-election issues for elected prosecutors, and termination potential for appointed prosecutors are usually difficult to measure. Occasionally, a sanctioning body expressly requires the unethical prosecutor to forfeit his prosecutorial office. But much more frequently, an individual prosecutor’s concerns about reputation or career, re-election or reappointment prospects, or advancement to higher public office may impede the ability of that prosecutor to be a minister of justice in every case. Imagine, if you will, the pressures on prosecutors making the charging calls in recent high-profile cases—for example, Trayvon Martin/George Zimmerman, Dominique Strauss-Kahn, and Senator Ted Stephens—to get a sense for the immense reputation impact that hangs in the balance.

VII. EXTERNAL ETHICAL RULES GUIDING THE EXERCISE OF PROSECUTORIAL DISCRETION

Although the majority of prosecutorial decisions are guided by prosecutors’ internal ethical compasses, there are a number of external ethical guides for prosecutors. The most prominent external ethical guides are contained in the Model Rules of Professional Conduct, the ABA Standards for Criminal Justice, and the National District Attorneys Association National Prosecution Standards; each is addressed below, in turn.

A. Model Rules of Professional Conduct, Especially Rule 3.8

The ABA Model Rules of Professional Conduct, or the ABA Model Code of Professional Responsibility, or local variations on these codes, have been used as guides for prosecutors. The most prominent external ethical guides are contained in the Model Rules of Professional Conduct, the ABA Standards for Criminal Justice, and the National District Attorneys Association National Prosecution Standards; each is addressed below, in turn.

81. See Att’y Gen. v. Pelletier, 134 N.E. 407 (Mass. 1922) (prosecutor removed from office for malfeasance, misfeasance, and nonfeasance); In re Jones, PR08-0216 (Mont. 2009) (prosecutor publicly censured, placed on probation for two years, and forced to resign his prosecutorial office for repeated conflicts of interest by appearing simultaneously as both prosecutor and defense attorney).
are perhaps the most familiar external ethical guides for all attorneys. For the most part, all the sections of the codes apply equally to any prosecuting attorney and all other attorneys; however, portions of each code focus specifically on sketching out the acceptable contours of ethical decision making by prosecutors.\textsuperscript{89} The most notable example is probably Rule 3.8 of the Model Rules,\textsuperscript{90} which provides in pertinent part:

- Prosecutors, at all times, are ministers of justice;\textsuperscript{91}
- Prosecutors are not simply advocates for conviction; prosecutors must seek fairness and justice at every turn;\textsuperscript{92}
- Prosecutors must not charge or allow the continued pendency of a charge that is not supported by at least probable cause;\textsuperscript{93}
- Prosecutors must timely disclose all evidence tending toward exculpation or mitigation;\textsuperscript{94}
- Prosecutors must ensure that the opponent receives “procedural justice,” even if the opponent’s attorney does not ensure the same;\textsuperscript{95}
- Prosecutors must prevent and rectify convictions when the opponent should have prevailed;\textsuperscript{96}
- Prosecutors must notify the opponent of new, credible, and material evidence yielding a “reasonable likelihood” the defendant did not commit the offense—whether that was in the prosecutor’s own jurisdiction or in any other jurisdiction;\textsuperscript{97} and
- Prosecutors must “refrain from making extrajudicial [statements] that [pose] a substantial likelihood of heightening public condemnation of the accused.”\textsuperscript{98}

Although these few discrete parts of the ABA Model Rules apply expressively and exclusively to prosecutors, two external codes apply in their entirety to prosecutors: the \textit{ABA Standards for Criminal Justice: Prosecution Function},\textsuperscript{99} and the National Prosecution Standards promulgated by the National District Attorneys Association.\textsuperscript{100} Query whether those codes and their ilk are sufficient to shepherd prosecutors toward the light.\textsuperscript{101}

\begin{itemize}
\item \textsuperscript{87} \textit{Model Code Prof’l Responsibility} (1970).
\item \textsuperscript{89} Paul T. Hayden, \textit{Ethical Lawyering: Legal & Professional Responsibilities in the Practice of Law} 450, n.3 (3d ed. 2012).
\item \textsuperscript{90} Wayne D. Garris, Jr., \textit{Model Rule of Professional Conduct 3.8: The ABA Takes a Stand Against Wrongful Convictions}, 22 Geo. J. Legal Ethics 829 passim (2009).
\item \textsuperscript{91} \textit{Model Rules of Prof’l Conduct R. 3.8 cmt. 1} (2010).
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textit{Id. at R. 3.8(a).}
\item \textsuperscript{94} \textit{Id. at R. 3.8(d).}
\item \textsuperscript{95} \textit{Id. at R. 3.8 cmt. 1.}
\item \textsuperscript{96} \textit{Id. at R. 3.8 cmts. 1, 8.}
\item \textsuperscript{97} \textit{Id. at R. 3.8(g), (h).}
\item \textsuperscript{98} \textit{Id. at R. 3.8(f), cmt. 5.}
\item \textsuperscript{99} Am. Bar Ass’n, Standards For Criminal Justice: Prosecution Function and Defense Function § 3-3.9 (3d ed. 1993).
\item \textsuperscript{100} \textit{National Prosecution Standards, Nat’l District Att’y’s Ass’n} (2009), http://www.ndaa.org/pdf/NDAAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.
\item \textsuperscript{101} See Richard A. Rosen, \textit{Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper
The ABA Standards for Criminal Justice: Prosecution Function is a central source to help prosecutors appreciate the ethical dimensions of their work; many prosecution offices use it as their ethics manual. It addresses in detail organization of the office, investigation, relations with witnesses and victims, relations with bench and bar, discovery, charging discretion, disposition discretion and plea negotiations, trial practice, sentencing, conflicts of interest, and duties to respond to misconduct. As noted in the ABA Standards, “The prosecutor is an administrator of justice . . . . The duty of the prosecutor is to seek justice, not merely to convict.” Unlike the Model Rules of Professional Conduct, some form of which has been adopted by virtually all states, the ABA Standards are advisory only. That notwithstanding, the ABA Standards are quite often cited by state courts when assessing allegations of prosecutorial misconduct, usually in the context of evidentiary suppression or dismissals, but much less frequently in the context of prosecutor discipline.

C. National Prosecution Standards of the National District Attorneys Association

The National District Attorneys Association (“NDAA”) purports to be the oldest association of prosecutors and prosecution agencies, with members at the federal, state, and local levels, and with members in every state. The NDAA intermittently updates its National Prosecution Standards (“NPS”),
which is currently available in the third edition. Despite being more thorough in many ways than the ABA Standards, the NPS is much less frequently cited by courts when addressing prosecutorial misconduct. Nonetheless, the NPS are in accord with Model Rule 3.8 and the ABA Standards in that a prosecutor is a minister of justice and a quasi-judicial officer, who is obliged to seek justice, due process, and fairness, rather than simply victories, notoriety, re-election, or reappointment. The NPS, however, is advisory only and has not been formally adopted in any jurisdiction.

VIII. ACTIONS AFFECTING THE PROSECUTOR’S LICENSE TO PRACTICE LAW—A FIFTY-STATE SNAPSHOT

There has not been a fresh look at the nationwide waterfront of prosecutor license sanctions for unethical behavior in over thirty years. Indeed, that is unfortunate given the critical role prosecutors play in ensuring that due process and justice prevail. But that lack of visibility should not blur the fact that it appears state attorney discipline bodies are standing on guard, at least where the prosecutors’ transgressions are substantial.

Prosecutors are typically the subjects of ethical complaints from criminal defendants who may have felt they were wronged in the prosecution process. A substantial majority of the filed ethical complaints against prosecutors are dismissed as unfounded. Iowa’s recent experience in this regard is typical and enlightening. For the years 2010 and 2011 combined, the Iowa


119. Westlaw ALLSTATES searches conducted on September 30, 2012, revealed that nearly 900 state cases cited the ABA Standards when assessing prosecutorial misconduct (in attorney discipline and in other contexts), but just thirty four cases cited the National District Attorneys Association (“NDAA”) National Prosecution Standards (in the same contexts). That notwithstanding, at least one court has explicitly recognized the importance of the National Prosecution Standards. Massameno v. Statewide Grievance Comm., 663 A.2d 317, 322 (Conn. 1995). Note also that the ABA Standards expressly state, “[These Standards] may or may not be relevant in such judicial [evaluations of alleged prosecutorial misconduct], depending upon all the circumstances.” AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.1.

120 National Prosecution Standards, NAT’L DISTRICT ATT’YS ASS’N (2009), § 1-1.1, http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf. (“The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice . . . .”)

121. Romualdo P. Eclavia, Annotation, Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney, 10 A.L.R. 4th 605 (1981). Even that broad look did not purport to capture the most serious and most recent misconduct in every state, as is accomplished in this Article. See id.

122. For a general discussion of the efficacy of license sanctions in deterring prosecutors’ unethical conduct, see Melissa K. Atwood, Comment, Who Has the Last Word? An Examination of the Authority of State Bar Grievance Committees to Investigate and Discipline Prosecutors for Breaches of Ethics, 22 J. LEGAL PROF. 201 (1998); see also Angela J. Davis, The Legal Profession’s Failure to Discipline Unethical Prosecutors, 36 Hofstra L. Rev. 275, 292 (2007); Joel B. Rudin, The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong, 80 Fordham L. Rev. 537, 552–53 (2011); Walter W. Steele, Jr., Unethical Prosecutors and Inadequate Discipline, 38 Sw. L.J. 965, 981–82 (1984).

123. See attachments to email from Charles L. Harrington, Admin’r, Iowa Supreme Court, Att’y
Disciplinary Board received a total of 1377 ethics complaints, and it dismissed 908, or 66%. Just twenty-five of those ethics complaints alleged prosecutorial misconduct (less than two percent of the total), and all twenty-five were dismissed. Perhaps that is as it should be.

There is in any case, undoubtedly, a large range of ethically acceptable behavior in which a prosecutor can engage, but defendants may feel as if the behavior in their case was improper because it ended with a bad result. Or perhaps, because there are other consequences and remedies available to defendants, such as evidence suppression, appellate review, mistrial, and retrial, an action against an individual prosecutor is not as much of a remedy for the complainant as some of these other options. In any event, it is clear that relatively few ethical complaints are lodged against prosecutors for misconduct in exercising their official duties, and the vast majority of those complaints against prosecutors are dismissed without tangible consequence.

But what of those ethical complaints against prosecutors that are not dismissed? What license sanctions might a prosecutor anticipate?

The authors conducted a study to assess the current state of prosecutorial sanctions across the country. Thirty-one states and the District of Columbia have disbarred one or more prosecutors for unethical behavior in exercising their prosecutorial duties. Thus, only nineteen states have never disbarred a prosecutor for unethical behavior in office. Indeed, four of those nineteen states with no disbarments—mostly smaller jurisdictions: Delaware, Maine, Rhode Island, and Utah—appear to have never imposed any sanction against a prosecutor’s attorney license for any infraction.

When one closely inspects the types of unethical behavior that has led to disbarments, a pattern emerges—in order to impose disbarment,
extraordinarily serious, even criminal, behavior is generally required. For the thirty-two jurisdictions that have disbarred one or more prosecutors, the unethical behavior cited included bribery, extortion, embezzlement, converting public funds for personal use, other felony convictions, substantial obstruction of justice, stealing illegal drugs from an evidence locker, suborning perjury, sexual misconduct, and multiple serious ethical violations.\textsuperscript{132}

Generally, all violations arising from trial tactics and strategy and lesser ethical violations earn much less severe sanctions, like private admonitions or temporary license suspensions.\textsuperscript{133} Those ethical violations result in lesser sanctions, such as conflicts of interest, discovery violations, ex parte communications, improper closing arguments, extrajudicial statements, lack of candor to the tribunal, meting out special favors to friends, sexual improprieties.\textsuperscript{134}

Although most of these lesser violations are tactical and strategic choices, or perhaps inadvertent choices, at least one sanction less severe than disbarment (specifically, a two-year suspension) was handed down when a New Jersey prosecutor staged a fake assassination attempt on his own life in an effort to retain his high profile and position.\textsuperscript{135}

Thus, there is certainly room for disagreement at the margins, but it appears that severe misconduct in office yields severe sanctions against the prosecutor’s license. The question, then, is whether the existing attorney sanction systems in place in the various states effectively and appropriately sanction prosecutors for lesser unethical violations.

\section*{IX. SUMMARY OF FINDINGS AND CONCLUSIONS}

This Article has canvassed some of the literature, guidelines, and law surrounding the exercise of prosecutorial discretion. This discourse acknowledges attempts to regulate prosecutorial discretion as well as competing arguments about the merits of doing so. Against this theoretical backdrop, our data gathering is the first recent attempt to explore accountability mechanisms as a species of regulation that adjudicates complaints alleging prosecutorial misconduct.

The cases captured in our data sets involved disciplinary proceedings against prosecutors for acts carried out in the course of their prosecutorial duties. These prosecutorial acts included complaints arising from two categories of conduct. The first involved tactical or strategic misdeeds, such as improper extrajudicial statements, misleading opening statements and

\begin{itemize}
  \item \textsuperscript{132} See infra Table: Most Severe Sanctions for Prosecutorial Misconduct, by State.
  \item \textsuperscript{133} See infra Table: Most Recent Sanctions for Prosecutorial Misconduct, by State.
  \item \textsuperscript{134} See infra Table: Most Recent Sanctions for Prosecutorial Misconduct, by State.
  \item \textsuperscript{135} In re Asbell, 640 A.2d 837 (N.J. 1994).
\end{itemize}
closing arguments, and the failure to disclose conflicts of interest. The second category involved myriad forms of misconduct, such as attempts to bribe judges, the theft of exhibits, and various forms of financial impropriety. Whereas the former category led to cautions, reprimands, censures, or the temporary suspensions of licensure, relatively few disciplinary proceedings in this subset resulted in disbarment.\textsuperscript{136}

Although our data gathering continues, it is already clear that prosecutors are regularly held personally accountable for misconduct in office, most notably through sanctions against the prosecutors’ licenses to practice law; this is despite the high threshold for securing civil remedies against prosecutors under section 1983. These two options are qualitatively distinct insofar as one involves tort liability and the other involves consequences for breaching professional standards outside the scope of tort law per se. However, we have yet to determine whether the data gathered provides enough nuanced statistical data to determine the extent to which sanctioned incidents of prosecutor misconduct disproportionately impact people of color, religious or sexual minorities, women, or the poor. When combined with more detailed demographic data, a larger sample size of cases covering a longer period of time will help answer many questions. For example, does the small number of sanctions against prosecutors, relative to lawyers as a whole, imply a general satisfaction with the overall management of prosecutor offices in a given state or region? Are there state or regional differences in the kinds of disciplinary mechanisms used to sanction prosecutors? How might these differences impact the likelihood of successful complaints? Are certain kinds of infractions more common among particular classes of prosecutors (acting at federal, state, or local levels)? What proportion of sanctioned prosecutors are appointed or elected? Is there any statistical correlation between their misconduct and their career aspirations?

Prosecutors’ arrows are powerful not merely because of their capacity to advance the public interest, but because of their ability to cause tremendous harm within institutional and legal frameworks that protect the archer. While policing prosecutorial discretion and sanctioning its misuse are complex tasks, they are nonetheless vital to preserve public confidence in the administration of justice. This Article contributes to that discourse by tracking data generated by accountability mechanisms used to discipline errant prosecutors.

Scholars’ preoccupation with controversial or exceptional cases of prosecutorial misconduct is not only insufficient, but it does a disservice to lawyers, defendants, marginalized communities, the general public, and other

\textsuperscript{136} \textit{See infra} Note 157. North Carolina prosecutor Mike Nifong was disbarred after he made numerous extrajudicial statements about the guilt of named players on the Duke University lacrosse team. Charges against those players were later dismissed as unfounded. Disbarment, such as in this case, for improper extrajudicial statements is virtually unprecedented. Indeed, Michael Nifong’s disbarment for this category of misconduct is unusual among the disciplinary matters captured in our research.
affected stakeholders whose interests remain part of this conversation. While academics may dispute their efficacy, mechanisms for sanctioning prosecutorial misconduct do exist. Therefore, it is time to challenge presumptions about the scope of their use, systematically review available data, and more meaningfully inform discussions about how often the archer’s arrow is wrongfully deployed, as well as the appropriate societal responses.
APPENDIX—SURVEY DESIGN

The authors designed a survey to obtain information regarding sanctions received by prosecutors for unethical prosecutorial conduct. The first step was to identify the lead disciplinary counsel in each of the fifty states and the District of Columbia and to denominate each of those fifty-one persons as the “survey respondent” for the respective jurisdiction. The survey had several phases: (1) an initial letter was sent to each jurisdiction’s survey respondent; (2) email and telephone follow-ups were attempted with all first-round non-respondents; (3) if that was unavailing, then email and telephone inquiries were attempted to each state’s statewide prosecutors association, where applicable; (4) if no response had been obtained in phases one, two, or three, then an electronic database search was conducted in Lexis and Westlaw, and, where possible, an electronic search was conducted in the on-line database for each disciplinary body; and (5) with every jurisdiction, Lexis and Westlaw searches were conducted to verify the information received in the previous four phases.

The survey was designed to elicit just two data points from each jurisdiction: (1) the most severe attorney license sanction ever handed down in that jurisdiction against a prosecutor or former prosecutor for actions taken within the ambit of that prosecutor’s official duties and (2) the most recent attorney license sanction handed down in that jurisdiction against a prosecutor or former prosecutor for actions taken within the ambit of that prosecutor’s official duties.

This design allowed the authors to identify those jurisdictions never having sanctioned a prosecutor; those jurisdictions having sanctioned a prosecutor by disbarment, defined as the most severe sanction; those jurisdictions that have not sanctioned a prosecutor for a very long time; and at every turn, the type or types of misconduct that led to each quantum of sanction.

Following this design, the survey allowed the authors to cast a wide net efficiently, to survey the prosecutorial sanction experience in each jurisdiction, and to begin making some preliminary state-by-state assessments of the effectiveness of the current prosecutorial sanction regimes. There is much work to be done in subsequent studies to assess regional and demographic differences (as to the demographics of the prosecutor and the complainants or defendants in the underlying cases) and to arrive eventually at a more robust typology. Hopefully subsequent studies will result in a better understanding of patterns in the types of prosecutorial misconduct that are

137. Initial Letter from Charles MacLean, Assistant Professor of Law, Lincoln Memorial University, Duncan School of Law (on file with the authors). Roughly forty percent of the survey respondents submitted a response during the first phase with no need for follow-up.
likely to lead to each quantum of sanction (from private admonition or caution to disbarment and loss of office).

The primary proceeds of the survey are presented in two heavily annotated tables at the end of this Article. The first table identifies the most severe prosecutor sanctions by jurisdiction. The second table identifies the most recent prosecutor sanctions by jurisdiction. The citations in the footnotes to the charts, for reference purposes, also capture selected additional cases involving prosecutor sanctions.
Most Severe Sanctions for Prosecutorial Misconduct, by State

<table>
<thead>
<tr>
<th>State</th>
<th>Prosecutor</th>
<th>Year</th>
<th>Offense</th>
<th>Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Wayne Seymour Trammell</td>
<td>1983</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Alaska</td>
<td>Edward McNally</td>
<td>1995</td>
<td>Failed to Attend Hearings</td>
<td>Fined $300</td>
</tr>
<tr>
<td>Arizona</td>
<td>Andrew P. Thomas</td>
<td>2011</td>
<td>Multiple Ethical Violations</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Charles Dwain Oliver</td>
<td>2010</td>
<td>Conflicts of Interest</td>
<td>Cautioned</td>
</tr>
<tr>
<td>California</td>
<td>Benjamin Thomas Field</td>
<td>2010</td>
<td>Discovery</td>
<td>Suspended</td>
</tr>
<tr>
<td>Colorado</td>
<td>Myrl Serra</td>
<td>2011</td>
<td>Extortion/Sexual Misconduct</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Mark Harley</td>
<td>2008</td>
<td>Embezzlement</td>
<td>Disbarred</td>
</tr>
</tbody>
</table>

138. Trammell v. Disciplinary Bd. of Ala. State Bar, 431 So. 2d 1168 (Ala. 1983) (prosecutor disbarred for having accepted money to bribe the State Board of Pardons and Paroles). But see [Fred Bryan] Simpson v. Ala. State Bar, 311 So. 2d 307 (Ala. 1975) (a district attorney is not susceptible to a license sanction because the remedy to prosecutorial misconduct lies in the ballot box).


142. In re Field, Nos. 05-O-00815, 06-O-12344 (Cal. State Bar Ct. Feb. 12, 2010) (prosecutor suspended four years for failing to disclose exculpatory evidence and disobeying court orders); see also In re [Martin Joel] Bloom, 561 P.2d 258 (Cal. 1977) (district attorney solicited $150,000 bribe to facilitate granting a land-use permit).

143. In re Serra, No. 11PDJ079, 2011 WL 7797390 (Colo. Office Presiding Disciplinary Judge Dec. 14, 2011) (prosecutor disbarred following convictions for criminal extortion and sexual misconduct arising from sexual impositions on staff members of his district attorney office); see also People ex rel. Colo. Bar Ass’n v. [James P.] Anglim, 78 P. 687 (Colo. 1904) (prosecutor disbarred for accepting bribes to discontinue or refrain from prosecuting a number of cases).

branch can constitutionally discipline Connecticut prosecutors).

145. Delaware has never disciplined a prosecutor or former prosecutor for acts committed in the course of executing prosecutorial duties. Email from Patricia Schwartz, Disciplinary Counsel for the State of Delaware, to Christian Stadler, Research Assistant, Lincoln Memorial University, Duncan School of Law (Apr. 12, 2012, 08:00 EST) (on file with authors).

146. Fla. Bar v. Cox, 794 So. 2d 1278 (Fla. 2001) (prosecutor suspended one year for lack of candor to the tribunal, essentially for allowing a confidential informant to testify under a false name).

147. In re Redding, 501 S.E.2d 499 (Ga. 1998) (prosecutor disbarred after retaining for her personal benefit fees and fines paid by pro se defendants).

148. In re Bevins, 26 Haw. 570 (1922) (prosecutor disbarred after seeking improperly to defeat an indictment brought against his wishes by the state attorney general).


150. In re Baba, No. M.R. 22324 07 SH 74 (Ill. May 19, 2008) (prosecutor disbarred for stealing marijuana from an evidence locker, claiming it was needed in prosecuting a criminal case).

151. In re Riddle, 700 N.E.2d 788 (Ind. 1998) (prosecutor disbarred after setting up sham employment of a deputy prosecutor at state expense to work on cases in the attorney’s private firm).


153. In re Norris, 57 P. 528 (Kan. 1899) (prosecutor disbarred for soliciting and accepting bribes to charge some cases and to dismiss others; see also In re [John Lloyd] Swarts, 30 P.3d 1011 (Kan. 2001) (prosecutor allowed to resign and retire—with pension benefits—after “manufacturing” evidence in criminal cases and other misconduct).

154. Underwood v. Commonwealth, 105 S.W. 151 (Ky. Ct. App. 1907) (prosecutor disbarred for accepting bribe to shield seller of intoxicating liquor from prosecution; see also Ky. Bar Ass’n v. [Lawrence R.] Carmichael, 244 S.W.2d 111 (Ky. 2008) (prosecutor disbarred after his conviction for extortion for seeking $50,000 to $100,000 in exchange for an agreement not to prosecute and other non-prosecution-related misconduct). But see Ky. Bar Ass’n v. [Raymond Brian] Rice, 229 S.W.3d 903 (Ky. 2007) (assistant prosecutor disbarred after conviction for false statement as to identity not arising out of his official duties).

155. In re Bell, 72 So. 3d 825 (La. 2011) (prosecutor disbarred for accepting bribes to “fix” criminal and traffic cases; see also In re [Henry] Dillon, 66 So. 3d 434 (La. 2011) (deputy county attorney disbarred for sexually assaulting two women “under color of state law”); In re [Darryl] Jackson, 27 So. 3d 273 (La. 2010) (prosecutor disbarred for accepting $500 bribe to dismiss intoxicated driving charge); In re [Edwin E.] Burks, 964 So. 2d 296 (La. 2007) (prosecutor disbarred after his conviction for computer fraud for accepting bribes to dismiss tickets); In re [Gerald A.] Rome, 856 So. 2d 1167 (La. 2003) (prosecutor disbarred for converting traffic fine monies received to personal use).
Keeping Arrows in the Quiver

<table>
<thead>
<tr>
<th>State</th>
<th>Attorney Name</th>
<th>Year</th>
<th>Charge</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maryland</td>
<td>Samuel Alexander Green</td>
<td>1976</td>
<td>Perjury, etc.</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Joseph C. Pelletier</td>
<td>1922</td>
<td>Nonfeasance, Malfeasance</td>
<td>Removed</td>
</tr>
<tr>
<td>Michigan</td>
<td>Karen K. Plants</td>
<td>2012</td>
<td>Allowing Perjured Testimony</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Mason M. Forbes</td>
<td>1934</td>
<td>Funds for Personal Use</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Everett Sanders</td>
<td>1985</td>
<td>Conflict of Interest</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>Missouri</td>
<td>George E. Westfall</td>
<td>1991</td>
<td>Public Contempt of Court</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>Montana</td>
<td>H.W. Bunston</td>
<td>1916</td>
<td>Conflicts of Interest</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Nebraska</td>
<td>J. Cedric Conover</td>
<td>1958</td>
<td>Funds for Personal Use</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Nevada</td>
<td>Jeannette Kenick</td>
<td>1984</td>
<td>Helped Prisoner Escape</td>
<td>Disbarred</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Karen E. Huntress</td>
<td>2009</td>
<td>Candor to Tribunal</td>
<td>Reprimanded</td>
</tr>
</tbody>
</table>

156. Maine has never disciplined a prosecutor or former prosecutor for acts committed in the course of executing prosecutorial duties. Email from J. Scott Davis, Disciplinary Counsel for the State of Maine, to Christian Stadler, Research Assistant, Lincoln Memorial University, Duncan School of Law (May 4, 2012, 17:21 EST) (on file with authors). But see Disciplinary Pet., Bd. of Overseers of the Bar v. [Mary N.] Kellett, No. GCF 11-00 (State of Me. Bd. of Overseers of the Bar Apr. 6, 2012) (on file with the authors) (this is a Bar Counsel’s petition, not yet adjudicated, to discipline a prosecutor, alleging that she made improper arguments during a rebuttal closing, argued from facts not in evidence in both her closing and rebuttal closing arguments, improperly shifted the burden of production to the defendant, withheld discovery, interfered with a defendant’s subpoenas, failed to safeguard evidence from destruction or loss, and committed other alleged misconduct—the matter is still pending as of the date of this Article’s publication). – Is this still true?


160. In re Forbes, 257 N.W. 329 (Minn. 1934) (per curiam) (prosecutor disbarred after overbilling government employer for various expenses for personal gain); see also In re [Emanuel A.] Serstock, 432 N.W.2d 179 (Minn. 1988) (en banc) (per curiam) (prosecutor suspended indefinitely for delaying or dismissing tickets for persons indebted to the prosecutor and for other non-official conduct).

161. Sanders v. Miss. State Bar Ass’n, 466 So. 2d 891 (Miss. 1985) (prosecutor publicly reprimanded for representing a school board member in civil case likely to lead to criminal charges).

162. In re Westfall, 808 S.W.2d 829 (Mo. 1991) (en banc) (prosecutor publicly reprimanded for making televised allegations of dishonesty regarding a local judge).

163. In re Bunston, 155 P. 1109 (Mont. 1916) (prosecutor disbarred for bringing criminal prosecutions against persons to compel them to make settlements in civil matters the prosecutor was simultaneously handling).


166. In re Huntress, No. 08-006 (N.H. Sup. Ct. Prof’l Conduct Comm. 2009) (prosecutor publicly reprimanded for lack of candor to the tribunal by failing to disclose or correct material false statements she had made to the court).
<table>
<thead>
<tr>
<th>New Jersey167</th>
<th>L. Gilbert Farr</th>
<th>1989</th>
<th>Drugs from locker</th>
<th>Suspended</th>
</tr>
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<tr>
<td>New Mexico166</td>
<td>Daniel R. Lindsey</td>
<td>1991</td>
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<td>Suspended</td>
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<tr>
<td>New York166</td>
<td>John P. D’Arcy</td>
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<tr>
<td>North Carolina170</td>
<td>Joel H. Brewer</td>
<td>2011</td>
<td>Impersonate officer</td>
<td>Disbarred</td>
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<tr>
<td>North Dakota170</td>
<td>Leslie A. Simpson</td>
<td>1900</td>
<td>Failure to prosecute</td>
<td>Disbarred</td>
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<tr>
<td>Ohio172</td>
<td>Craig William Sanders</td>
<td>2012</td>
<td>Dishonesty</td>
<td>Disbarred</td>
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<td>Oklahoma173</td>
<td>Granville Scanland</td>
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<td>Bribery/Evidence destruction</td>
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<td>Oregon174</td>
<td>Terese M. Gustafson</td>
<td>2002</td>
<td>Candor to Tribunal</td>
<td>Disbarred</td>
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<tr>
<td>Pennsylvania175</td>
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<td>1999</td>
<td>Convicted of Mail Fraud</td>
<td>Suspended</td>
</tr>
</tbody>
</table>

167. *In re* Farr, 557 A.2d 1373 (N.J. 1989) (prosecutor suspended two-and-a-half years for removing drugs from an evidence locker, having social relations with an informant, and providing an informant with exculpatory evidence while prosecuting the case).

168. *In re* Lindsey, No. 19,771 (N.M. May 1991) (per curiam) (prosecutor suspended six months for working in concert with others to mislead the court and the defendant that an essential witness was present to testify). It should be noted that reciprocal New Mexico discipline is pending against G. Paul Howes, an Assistant United States Attorney, who was disbarred in Washington, D.C., in early 2012. Letter from William D. Slease, Chief Disciplinary Counsel, Supreme Court, State of New Mexico, to Professor Chuck MacLean, Lincoln Memorial University, Duncan School of Law (March 2012) (on file with authors); see also *In re* G. Paul Howes, 940 P.2d 159 (N.M. 1997) (previously censured for earlier misconduct).

169. *In re* D’Arcy, 374 N.Y.S.2d 222 (App. Div. 1975) (per curiam) (prosecutor disbarred for forging a lead title examiner in prosecutor’s office disbarred for kickbacks and perjury in title examinations); *In re* [William] Lurie, 34 N.Y.S.2d 247 (App. Div. 1942) (prosecutor disbarred because he either bribed a judge or committed perjury when he testified under oath that he had bribed a judge); cf. *In re* [Anthony J.] Fauci, 834 N.Y.S.2d 223 (App. Div. 2007) (per curiam) (assistant district attorney allowed to resign his office when it was determined he had improperly served in that capacity when he was not licensed).


171. *In re* Simpson, 83 N.W. 541 (N.D. 1900) (prosecutor disbarred for failing to prosecute violations of Prohibition laws and other ethical shortfalls).

172. Greene Cnty. Bar Ass’n v. Saunders, 968 N.E.2d 470 (Ohio 2012) (per curiam) (prosecutor disbarred for failing to file appellate brief in criminal matter, then lying about having filed it—other misconduct was not related to his prosecutorial duties); see also Disciplinary Counsel v. [Aaron L.] Phillips, 843 N.E.2d 775 (Ohio 2006) (per curiam) (prosecutor disbarred for accepting bribes to “fix” criminal cases).

173. State ex rel. Okla. Bar Ass’n v. Scanland, 475 P.2d 373 (Okla. 1970) (assistant district attorney’s license revoked for having offered $200 to a detective to remove evidence from police records so the evidence could be destroyed); see also *In re* [William C.] Page, 754 P.2d 878 (Okla. 1988) (prosecutor was allowed to resign prior to disbarment proceedings after he was convicted in federal court for accepting bribes and conspiring to accept bribes to interfere with pending criminal cases); [Clifford W.] Ferguson v. City of Hooker, 36 P.2d 18 (Okla. 1934) (city prosecutor disbarred after filing condemnation on himself and failing to pay over proceeds); *In re* [Oscar] Simpson, 192 P. 1097 (Okla. 1919) (prosecutor disbarred after accepting bribe to refrain from prosecuting a person who was running a gambling house); *In re* [Virgil R.] Biggers, 104 P. 1083 (Okla. 1909) (prosecutor disbarred after accepting a bribe in a criminal case).

174. *In re* Gustafson, 41 P.3d 1063 (Or. 2002) (prosecutor disbarred for making false statements to the court and for disclosing previously expunged records); see also *In re* [Julie Ann] Leonhardt, 930 P.2d 844 (Or. 1997) (prosecutor disbarred for making false statements to the court and for misusing the grand jury process); State ex rel. McCourt v. [Charles W.] Garland, 150 P. 289 (Or. 1915) (special prosecutor retained for personal use proceeds belonging to the state).

175. Office Disciplinary Counsel v. Preate, 731 A.2d 129 (Pa. 1999) (prosecutor suspended five years
<table>
<thead>
<tr>
<th>State</th>
<th>Prosecutor</th>
<th>Year</th>
<th>Issue</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island</td>
<td>Francis A. Humphries</td>
<td>2003</td>
<td>Discovery Violations</td>
<td>Suspended</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Lance Russell</td>
<td>2011</td>
<td>Public Contempt of Court</td>
<td>Censured</td>
</tr>
<tr>
<td>Tennessee</td>
<td>William E. Gibson</td>
<td>2009</td>
<td>Conflicts of Interest, etc.</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Texas</td>
<td>Scott Tidwell</td>
<td>2012</td>
<td>Retaliation and Oppression</td>
<td>Suspended</td>
</tr>
<tr>
<td>Utah</td>
<td>Joseph C. Jones</td>
<td>1898</td>
<td>Nonfeasance</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Virginia</td>
<td>Zane Bruce Scott</td>
<td>2001</td>
<td>Sexual Misconduct</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Washington</td>
<td>Tyler Moore Morris</td>
<td>2008</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td>West Virginia</td>
<td>G.W. Hays</td>
<td>1908</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Joseph F. Paulus</td>
<td>2004</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Kevin P. Meenan</td>
<td>2004</td>
<td>Official Misconduct</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Washington DC</td>
<td>G. Paul Howes</td>
<td>2012</td>
<td>Financial Improprieties</td>
<td>Disbarred</td>
</tr>
</tbody>
</table>

following conviction for mail fraud for soliciting undisclosed campaign contributions from gambling operations. But see [John P.] McGinley v. Scott, 164 A.2d 424 (Pa. 1960) (constitutional separation of powers concerns preclude the legislature [and perhaps the court] from disciplining individual prosecutors.

176. Rhode Island has never disciplined a prosecutor or former prosecutor for acts committed in the course of executing prosecutorial duties. Letter from David D. Curtin, Chief Disciplinary Counsel, Supreme Court, State of Rhode Island, to Professor Chuck MacLean, Lincoln Memorial University, Duncan School of Law (Mar. 28, 2012) (on file with authors).


178. In re Russell, 797 N.W.2d 77 (S.D. 2011) (prosecutor publicly censured for releasing grand jury transcripts and for issuing a false press release regarding the presiding judge). But see In re [James L.] Jeffries, 488 N.W.2d 674 (S.D. 1992), modified 500 N.W.2d 220 (S.D. 1993) (prosecutor disbarred following his convictions for using marijuana during his term in office, although that was later reduced on rehearing to a three-year suspension).


181. Utah has never disciplined a prosecutor or former prosecutor for acts committed in the course of executing prosecutorial duties. Telephone interview with Jonathan Laguna, Intake Officer for the Utah Office of Disciplinary Counsel (Apr. 11, 2012). Who conducted the interview?

182. In re Jones, 39 A. 1087 (Vt. 1898) (prosecutor disbarred for neglecting prosecutorial duties and for improperly forfeiting debts owed to the state).


186. In re Paulus, 682 N.W.2d 326 (Wis. 2004) (prosecutor disbarred for accepting bribes in exchange for dismissal or reduction of charges and in exchange for return of seized property).


188. In re Howes, 39 A.3d. 1 (D.C. 2012) (prosecutor disbarred for distributing over $42,000 in witness vouchers to ineligible persons).
Most Recent Sanctions for Prosecutorial Misconduct, by State

<table>
<thead>
<tr>
<th>State</th>
<th>Prosecutor</th>
<th>Year</th>
<th>Offense</th>
<th>Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Wayne Seymour Trammell</td>
<td>1983</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Alaska</td>
<td>Edward E. McNally</td>
<td>1995</td>
<td>Failed to Attend Hearings</td>
<td>Fined $300</td>
</tr>
<tr>
<td>Arizona</td>
<td>Andrew P. Thomas</td>
<td>2011</td>
<td>Multiple Ethical Violations</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Charles Dwain Oliver</td>
<td>2010</td>
<td>Conflicts of Interest</td>
<td>Cautioned</td>
</tr>
<tr>
<td>California</td>
<td>Benjamin Thomas Field</td>
<td>2010</td>
<td>Discovery</td>
<td>Suspended</td>
</tr>
</tbody>
</table>

189. Trammell v. Disciplinary Bd. of Ala. State Bar, 431 So. 2d 1168 (Ala. 1983) (prosecutor disbarred for having accepted money to bribe the State Board of Pardons and Paroles). But see [Fred Bryan] Simpson v. Ala. State Bar, 311 So. 2d 307 (Ala. 1975) (a district attorney is not susceptible to a license sanction because the remedy to prosecutorial misconduct lies in the ballot box).


191. In re Thomas, No. PDU-2011-9002 (Ariz. Apr. 10, 2011), available at http://legaltimes.typepad.com/files/thomas-opinion.pdf. (Maricopa County Attorney Andrew P. Thomas and deputy prosecutor Lisa M. Aubuchon both disbarred for multiple ethical violations, including disclosure of client information, filing charges to embarrass or burden, conflicts of interest, lack of candor to the tribunal, conduct prejudicial to the administration of justice, using means with no substantial legitimate purpose—grand jury, filing frivolous lawsuits, incompetent representation, violation of court rules, prosecuting a criminal case against a judge without probable cause, dishonesty, violation of a criminal law, and failure to cooperate with the ethics investigation. The 232-page opinion and fourteen-page concurrence sketch out in some detail a chilling abuse of prosecutorial power; see also In re [Nancy E.] Dean, 129 P.3d 943 (Ariz. 2006) (en banc) (prosecutor suspended six months for engaging in romantic relationship with judge presiding in some of the cases the prosecutor was handling); In re [Thomas J.] Zawada, 92 P.3d 862 (Ariz. 2004) (en banc) (prosecutor suspended six months for securing a murder conviction by attacking psychiatric experts without any supporting evidence; the conviction was overturned with retrial barred by attachment of double jeopardy).


<table>
<thead>
<tr>
<th>State</th>
<th>Name</th>
<th>Year</th>
<th>Offense</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>Myrl Serra</td>
<td>2011</td>
<td>Extortion/Sexual Misconduct</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Mark Hurley</td>
<td>2008</td>
<td>Embezzlement</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Delaware</td>
<td>Michael Lee Von Zamft</td>
<td>2002</td>
<td>Ex parte Communication</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>Florida</td>
<td>Anthony Brett Williams</td>
<td>2008</td>
<td>Funds for Personal Use</td>
<td>Suspended</td>
</tr>
<tr>
<td>Hawai‘i</td>
<td>Elmer Russell Bevins</td>
<td>1922</td>
<td>Obstruction of Justice</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Idaho</td>
<td>S. Criss James</td>
<td>2009</td>
<td>Funds for Personal Use</td>
<td>Reprimanded</td>
</tr>
</tbody>
</table>


196. Delaware has never disciplined a prosecutor or former prosecutor for acts committed in the course of executing prosecutorial duties. E-mail from Patricia Schwartz, Disciplinary Counsel for the State of Delaware, to Christian Stadler, Research Assistant, Lincoln Memorial University, Duncan School of Law (Apr. 12, 2012, 08:00 EST) (on file with authors).

197. Florida Bar v. Von Zamft, 814 So. 2d 385 (Fla. 2002) (prosecutor publicly reprimanded after having engaged in ex parte communication with a judge regarding a continuance in a capital murder case).

198. *In re* Williams, 663 S.E.2d 181 (Ga. 2008) (prosecutor suspended six months for scheming with his supervisor to obtain government funds to which neither was entitled).

199. *In re* Bevins, 26 Haw. 570 (1922) (prosecutor disbarred after improperly seeking to defeat an indictment brought against his wishes by the state attorney general).

<table>
<thead>
<tr>
<th>State</th>
<th>Name</th>
<th>Date</th>
<th>Offense</th>
<th>Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td>Laura J. Morask</td>
<td>2012</td>
<td>Improper Closing Argument</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>Indiana</td>
<td>Carl J. Brizzi</td>
<td>2012</td>
<td>Extrajudicial Statements</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>Iowa</td>
<td>Jeffrey TeKippe</td>
<td>2009</td>
<td>Drugs from Evidence Locker</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Kansas</td>
<td>David J. Harding</td>
<td>2010</td>
<td>Disclosed Privileged Data</td>
<td>Suspended</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Fielding E. Ballard</td>
<td>2011</td>
<td>Conflict of Interest</td>
<td>Suspended</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Tanzanika Qiann Ruffin</td>
<td>2011</td>
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<td>Suspended</td>
</tr>
<tr>
<td>Maine</td>
<td>Douglas F. Gansler</td>
<td>2003</td>
<td>Extrajudicial statements</td>
<td>Reprimanded</td>
</tr>
</tbody>
</table>


206. In re Ruffin, 54 So. 3d 645 (La. 2011) (prosecutor suspended six months for threatening criminal prosecution to help a friend collect on a debt).

207. Maine has never disciplined a prosecutor or former prosecutor for acts committed in the course of executing prosecutorial duties. E-mail from J. Scott Davis, Disciplinary Counsel for the State of Maine, to Christian Stadler, Research Assistant, Lincoln Memorial University, Duncan School of Law (May 4, 2012, 17:21 EST) (on file with authors). But see Disciplinary Pet., Bd. of Overseers of the Bar v. [Mary N.] Kellett, No. GCF 11-00 (State of Me. Bd. of Overseers of the Bar Apr. 6, 2012) (on file with the authors) (this is a Bar Counsel’s petition, not yet adjudicated, to discipline a prosecutor, alleging that she made improper arguments during a rebuttal closing, argued from facts not in evidence in both her closing and rebuttal closing arguments, improperly shifted the burden of production to the defendant, withheld discovery, interfered with a defendant’s subpoenas, failed to safeguard evidence from destruction or loss, and other alleged misconduct—the matter is still pending as of the date of this article’s publication).

### Keeping Arrows in the Quiver

<table>
<thead>
<tr>
<th>State</th>
<th>Name</th>
<th>Year</th>
<th>Offense Description</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Massachusetts</td>
<td>Fawn Balliro</td>
<td>2009</td>
<td>Lied in other jurisdiction</td>
<td>Suspended</td>
</tr>
<tr>
<td>Michigan</td>
<td>Karen K. Plants</td>
<td>2012</td>
<td>Allowing perjured testimony</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Minnesota</td>
<td>James C. Backstrom</td>
<td>2009</td>
<td>“Threatening” public official</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Everett Sanders</td>
<td>1985</td>
<td>Conflict of interest</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>Missouri</td>
<td>George E. Westfall</td>
<td>1991</td>
<td>Public contempt of court</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>Montana</td>
<td>Mark E. Jones</td>
<td>2009</td>
<td>Conflicts of interest</td>
<td>Censured</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Judith L. Owens</td>
<td>2000</td>
<td>Benefits for family member</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>Nevada</td>
<td>Jeanette Kenick</td>
<td>1984</td>
<td>Helped prison escape</td>
<td>Disbarred</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Karen E. Huntress</td>
<td>2009</td>
<td>Candor to tribunal</td>
<td>Reprimanded</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Samuel Asbell</td>
<td>1994</td>
<td>Staged assassination attempt</td>
<td>Suspended</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Karl Gillson</td>
<td>2004</td>
<td>Discovery violations</td>
<td>Reprimanded</td>
</tr>
</tbody>
</table>


211. *In re Backstrom*, 767 N.W.2d 453 (Minn. 2009) (prosecutor publicly reprimanded for threatening to withdraw support for the county’s medical examiner unless the medical examiner barred subordinates from testifying as defense experts in criminal cases in the county); *see also In re File 98-26, 597 N.W.2d 563 (Minn. 1999)* (en banc) (prosecutor was privately, and thus, confidentially, admonished for moving to prohibit an attorney from active involvement in a case based solely on the color of that other attorney’s skin; calling that misconduct isolated and lacking in public harm, the Minnesota Supreme Court interposed the private admonition).

212. Sanders v. Miss. State Bar Ass’n, 466 So. 2d 891 (Miss. 1985) (prosecutor publicly reprimanded for civilly representing a school board member in civil case likely to lead to criminal charges).

213. *In re Westfall*, 808 S.W.2d 829 (Mo. 1991) (en banc) (prosecutor publicly reprimanded for making televised allegations of dishonesty regarding a local judge).

214. *In re Jones*, No. PR08-0216 (Mont. May 19, 2009) (prosecutor publicly censured, placed on probation for two years, and forced to resign his prosecutorial office for repeated conflicts of interest by appearing simultaneously as both prosecutor and defense attorney).

215. *State ex rel. Neb. Bar Ass’n v. Owens*, 615 N.W.2d 489 (Neb. 2000) (prosecutor reduced severity of brother’s speeding ticket); *see also In re [W.] Krepela, 628 N.W.2d 262 (Neb. 2001)* (judge was suspended six months for falsifying a police report when he was serving as a prosecutor and asking the investigating officer to alter the original to match the false entry that had been made by the prosecutor become judge).


217. *In re Huntress*, No. 08-006 (N.H. Sup. Ct. Prof’l Conduct Comm. 2009) (prosecutor publicly reprimanded for lack of candor to the tribunal by failing to disclose or correct material false statements she had made to the court).

218. *In re Asbell*, 640 A.2d 837 (N.J. 1994) (prosecutor suspended two years for staging an assassination attempt on his own life in an effort to secure re-appointment to the prosecutorial position); *see also In re [Frank J.] Hoerst, 638 A.2d 801 (N.J. 1994)* (prosecutor suspended six months for mishandling drug forfeiture proceeds); *In re [Matthew E.] Segal, 617 A.2d 238 (N.J. 1992)* (prosecutor reprimanded after he failed to prepare whatsoever for a traffic court trial against a judge); *In re [George G.] Whitmore*, 569 A.2d 252 (N.J. 1990) (prosecutor reprimanded for failing to notify presiding judge that the prosecutor suspected that a necessary law enforcement witness had ulterior motives for failing to appear for trial testimony); *In re [Robert P.] Weishoff*, 382 A.2d 632 (N.J. 1978) (prosecutor suspended one year for conducting a sham court proceeding during which he had a third person impersonate the defendant).

violations, specifically for failing to disclose relevant evidence in multiple criminal cases).


221. N.C. State Bar v. Brewer, No. 11 CV 001200 (Superior Ct. Wake Cnty. N.C. Jan. 26, 2011) (prosecutor disbarred for impersonating an officer and other acts); see also N.C. State Bar v. [Michael B.] Nifong, No. 06DHC35 (Disciplinary Hearing Comm’n July 24, 2007) (prosecutor disbarred for making improper extrajudicial statements in the Duke lacrosse sexual misconduct case). Between 2005 and 2011, North Carolina received 539 grievances against prosecutors; of those, 76 had no file opened; of those where a file was opened, 364 were dismissed outright, 5 were dismissed with a letter of either warning or caution, 2 resulted in disbarment, 2 resulted in suspension, 2 resulted in reprimand, 2 resulted in admonition, and 70 remained pending as of April 2012. Email plus attachment from Heather Pattle, Administrator, Office of Counsel, North Carolina State Bar, to Research Assistant Christian Stadler, Lincoln Memorial University, Duncan School of Law (Apr. 13, 2012, 13:04 EST) (on file with authors).

222. In re Feland, 820 N.W.2d 672, (N.D. 2012) (prosecutor was admonished for failing to disclose exculpatory item of evidence to defense before trial); see also In re [Thomas B.] Jeffiff, 774 N.W.2d 588 (N.D. 1978) (prosecutor suspended two years for law recordkeeping in seeking and processing restitution and reimbursements for victims).

223. Greene Cnty. Bar Ass’n. v. Saunders, 968 N.E.2d 470 (Ohio 2012) (per curiam) (prosecutor disbarred for failing to file appellate brief in criminal matter, then lying about having filed it—other misconduct was not related to his prosecutorial duties); see also Disciplinary Counsel v. [Christopher D.] Becker, 901 N.E.2d 788 (Ohio 2009) (per curiam) (prosecutor reprimanded for participating in four ex parte discussions with presiding judge about sentencing in the case); Ohio St. Bar Ass’n. v. [Donald Keith] Wick, 877 N.E.2d 660 (Ohio 2007) (per curiam) (prosecutor publicly reprimanded for representing criminal defendants in same court where he was serving as a prosecutor); Disciplinary Counsel v. [James R.] Columbro, 611 N.E.2d 302 (Ohio 1993) (per curiam) (prosecutor indefinitely suspended for repeatedly stealing illegal drugs from the evidence locker for personal use; prosecutor was reinstated in Disciplinary Counsel v. Columbro, 664 N.E.2d 945 (Ohio 1996)); Richland Cnty. Bar Ass’n. v. [James E.] Brightbill, 564 N.E.2d 471 (Ohio 1990) (prosecutor reprimanded for impersonating a police officer along with other misconduct); Disciplinary Counsel v. [Michael John] Smakula, 529 N.E.2d 1376 (Ohio 1988) (per curiam) (prosecutor suspended one year for participating in operation to fix traffic tickets).

224. State ex rel. Okla. Bar Ass’n. v. Maddox, 152 P.3d 204 (Okla. 2006) (prosecutor suspended two years for embezzlement by charging personal gasoline to the state).

225. In re Overton, No. 11-16 (Or. Aug. 25, 2011) (prosecutor suspended two months for making sexual overtures to child support obligees); see also In re [Brian R.] Barnes, 574 P.3d 657 (Or. 1978) (per curiam) (prosecutor reprimanded for failing to inform judge, who was signing search warrant for blood, that a hearing was set before a different judge to determine whether the state had the right to obtain that blood sample).
Keeping Arrows in the Quiver

Rhode Island

<table>
<thead>
<tr>
<th>State</th>
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<th>Year</th>
<th>Charge</th>
<th>Discipline</th>
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<tr>
<td>South Carolina</td>
<td>Donald V. Myers</td>
<td>2003</td>
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<td>South Dakota</td>
<td>Lance Russell</td>
<td>2011</td>
<td>Public Contempt of Court</td>
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<td>Conflicts of Interest, etc.</td>
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<td>Texas</td>
<td>Scott Tidwell</td>
<td>2012</td>
<td>Retaliation and Oppression</td>
<td>Suspended</td>
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<td>Utah</td>
<td>Undisclosed</td>
<td>2008</td>
<td>Discovery Violations</td>
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<td>Vermont</td>
<td>Eric J. Livingston</td>
<td>2010</td>
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227. Rhode Island has never disciplined a prosecutor or former prosecutor for acts committed in the course of executing prosecutorial duties. Letter from David D. Curtin, Chief Disciplinary Counsel, Supreme Court, State of Rhode Island, to Professor Chuck MacLean, Lincoln Memorial University, Duncan School of Law (Mar. 28, 2012) (on file with authors).

228. In re Myers, 584 S.E.2d 357 (S.C. 2003) (per curiam) (lead prosecutor privately reprimanded and given letter of caution after court found that he had failed to ensure that defense counsel be informed that officers and deputy prosecutor had eavesdropped on privileged conversation between defendant and his attorney; see also In re [Francis A.] Humphries, 582 S.E.2d 728 (S.C. 2003) (per curiam) (prosecutor suspended for repeated discovery violations).

229. In re Russell, 797 N.W.2d 77 (S.D. 2011) (prosecutor publicly censured for releasing grand jury transcripts and for issuing a false press release regarding the presiding judge).


232. Utah has never disciplined a prosecutor or former prosecutor for acts committed in the course of executing prosecutorial duties. Telephone interview with Jonathan Laguna, Intake Officer for the Utah Office of Disciplinary Counsel (Apr. 11, 2012).

233. In re Prof’l Responsibility Bd., No. 2007.215 (Ut. Aug. 18, 2008) (prosecutor privately admonished for having misled Court and counsel regarding discovery; see also In re [Frederick W.] Wakefield, 177 A. 319 (Vt. 1935) (prosecutor suspended for, among other misconduct, allowing an uncharged arrestee to remain in custody in lieu of bail for over five months). But see In re [Vincent] Illuzzi, 632 A.2d 346 (Vt. 1993) (although suspension ordered here was not directly related to prosecutorial misconduct, the court, in reaching its decision, expressly noted the respondent’s pattern of prior prosecutorial misconduct, including having his supervisor send a letter to another prosecutor falsely claiming necessity to avoid a speeding ticket and failing to provide exculpatory evidence).

the minor victim many years before); [Joseph D.] Morrissey v. Va. State Bar, 448 S.E.2d 615 (Va. 1994) (prosecutor suspended for concealing from victim and court that defendant had paid substantial sums to various entities as part of plea agreement).

235. In re Golden, No. 1100037 (Disciplinary Bd. of Wash. State Bar Ass’n Sept. 26, 2011) (prosecutor publicly admonished for having a conflict of interest in a pending case, but continuing to have some involvement in the case); see also In re [Charles O.] Bonet, 29 P.3d 1242 (Wash. 2001) (en banc) (prosecutor found to have agreed to dismiss charges against one defendant in exchange for that defendant declining to testify for a co-defendant; the Washington Supreme Court remanded it to the Disciplinary Board to determine the appropriate sanction); see generally WASHINGTON STATE BAR ASS’N, 2009 LAWYER DISCIPLINE SYSTEM ANNUAL REPORT (Randy Beitel ed., 2009).

236. Lawyer Disciplinary Bd. v. Scott, 579 S.E.2d 550 (W. Va. 2003) (prosecutor suspended three years for presiding over a grand jury when his license had been suspended for non-payment of attorney license fee, then lying and post-dating documents about it); see also In re [John G.] Sims, 523 S.E.2d 273 (W. Va. 1999) (per curiam) (prosecutor removed from office for various prosecutorial misconduct); Comm. on Legal Ethics of the W. Va. State Bar v. [Thomas E.] White, 428 S.E.2d 556 (W. Va. 1993) (per curiam) (prosecutor suspended two years after conviction for drug possession unrelated to his official duties).

237. In re Humphrey, 811 N.W.2d 363 (Wis. 2012) (prosecutor suspended one month for discovery violations and for thereafter submitting a misleading affidavit about those violations); see also In re [James W.] Frisch, 784 N.W.2d 670 (Wis. 2010) (prosecutor reprimanded for lack of diligence and discovery lapses); In re [Jeffrey R.] Kohler, 762 N.W.2d 377 (Wis. 2009) (prosecutor reprimanded for failure to comply with discovery demands); In re [Mary P.] Donovan, 564 N.W.2d 772 (Wis. 1997) (prosecutor suspended six months for forging a document and presenting it to a court, for a friend); In re [Annette] Sanders, 494 N.W.2d 430 (Wis. 1993) (prosecutor suspended sixty days for false statements to court and court staff); In re [Jonathan E.] Lindberg, 494 N.W.2d 421 (Wis. 1993) (prosecutor suspended six months for failing to promptly provide juvenile court draft orders and failure to timely notify witnesses); In re [Allen R.] Brey, 490 N.W.2d 15 (Wis. 1992) (prosecutor suspended sixty days for meeting with an inmate defendant without notifying defense counsel and other misconduct); In re [James H.] Dumke, 489 N.W.2d 919 (Wis. 1992) (prosecutor suspended sixty days for communicating with a represented defendant without notice to defense counsel); In re [William J.] Watson, 477 N.W.2d 844 (Wis. 1991) (prosecutor suspended one year for having a staff member falsify a driver’s license document for a friend who had a suspended license); In re [Kenneth N.] Johnson, 477 N.W.2d 54 (Wis. 1991) (prosecutor reprimanded for failing to withdraw from case where his judgment could have been clouded by a desire to avoid an investigation into his office).


<table>
<thead>
<tr>
<th>Washington</th>
<th>Liam Michael Golden</th>
<th>2011</th>
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<td>Washington DC</td>
<td>G. Paul Howes</td>
<td>2012</td>
<td>Financial Improprieties</td>
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