A Tale of Two Countries: Examining the Regulation of Prosecutorial Discretion and Misconduct in Canada and the United States

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Stephen Wilks and Charles E. MacLean*

[Decisions taken by a Crown attorney pursuant to his or her
prosecutorial discretion are generally immune from judicial review
under principles of public law, subject only to the strict application of
the doctrine of abuse of process ... The independence of the Attorney
General is so fundamental to the integrity and efficiency of the criminal
justice system that it is constitutionally entrenched. The principle
of independence requires that the Attorney General act independently
of political pressures from government and sets the Crown’s exercise of
prosecutorial discretion beyond the reach of judicial review ... [The]
fundamental importance [of prosecutorial independence] lies, not in
protecting the interests of individual Crown attorneys, but in advancing
the public interest by enabling prosecutors to make discretionary
decisions in fulfillment of their professional obligations without fear of
judicial or political interference, thus fulfilling their quasi-judicial role
as "ministers of justice."1

A prosecutor has the responsibility of a minister of justice and not
simply that of an advocate. This responsibility carries with it specific
obligations to see that the defendant is accorded procedural justice, that
guilt is decided upon the basis of sufficient evidence, and that special

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precautions are taken to prevent and to rectify the conviction of innocent persons.\(^2\)

The role of an American prosecutor is to see that justice is done … “It is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” … Prosecutors have a special “duty to seek justice, not merely to convict.” … An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.\(^3\)

I. INTRODUCTION

Born of a common British legal history but having since evolved in contrasting directions, decision-making systems by appointed Crown Attorneys in Canada and by elected prosecuting attorneys in the United States are set on differing foundations with some different ground rules. Their divergent evolutionary paths can help explain the differences we now see between the two nations in prosecutorial decision-making guides, the centralization of prosecutorial decision-making, external controls on those making the decisions, and the frequency and severity of individualized punishments for prosecutors in Canada and the United States who are unethical decision-makers. This paper describes the two nations’ systems and, more briefly, the respective histories of those two systems, and then addresses the impact of those histories on current methods for guiding prosecutorial decision-making and punishing those prosecutors who stray.

Prosecutors are the most powerful persons in the courthouse. They often make, or at least guide, most of the important decisions in major criminal cases. Their decisions impact much of a case’s procedural trajectory. Prosecutors offer legal advice to police during criminal investigations; determine whether charges should be laid; decide what, when and whom to charge; maintain carriage of trial and appellate matters; and participate in diversion programs or other forms of early resolution

\(^2\) American Bar Association, Model Rules of Professional Conduct (Washington, DC: American Bar Association, 2010), r. 3.8, commentary [hereinafter “Model Rules”].

\(^3\) Connick v. Thompson, 131 S. Ct. 1350, at 1362-63, 1365 (2011) (citing Model Rules, id.; other internal citations omitted) (Thomas J. authoring the majority opinion of the United States Supreme Court).
(that may or may not include pleas of guilt) in exchange for some kind of leniency. Both Canadian and American prosecutorial systems recognize the role of prosecutorial independence across these functions; preserve decision-making discretion as a vital ingredient of such independence; articulate mechanisms for guarding against egregious misuses of this independence; and carefully circumscribe plaintiffs’ access to tort remedies in cases alleging abuse of discretion. Put differently, we presume both countries’ legal systems attempt to strike a balance between protecting the purview and imprimatur of prosecutors while providing narrow grounds to hold prosecutors personally accountable for their misconduct. This paper aims to compare Canadian and American expressions of these concepts, and to make two claims: First, Canadian prosecutors are also civil servants who operate within a centralized, institutional framework that administratively polices the exercise of their discretion. Second, while similar institutional features may exist among federal prosecutors in the U.S., this analogy breaks down at the state level where American prosecutors are elected and therefore subject to populist expectations.

We discuss the Canadian and American systems in turn; the discussion of the American system focuses primarily on American prosecutors at the state and local levels. Finally, this paper proposes that each country experiment with the other country’s approaches to addressing and sanctioning prosecutorial misconduct. This would include approaches for assessing and sanctioning prosecutor misconduct; continuing the focus on public sanctions for individual prosecutors; and addressing and

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4 Although the judge formally hands down a sentence, the prosecutor often controls the parameters of that sentence through various means, including decisions to dismiss entire complaints or indictments; dismiss individual counts; enter plea agreements that specify charges or permit pleas to lesser included offences; enter plea agreements that specify a specific sentence; permit the offender to enter extrajudicial diversion programs rather than proceeding to court; enter into conditional continuances for dismissal to allow the offender, during the pendency, to complete treatment, counselling or other programming; trade testimony or intelligence for accommodations in the case, and so on.

5 As of 2007, the last published census of American prosecutors in state courts that handled felony cases, there were 2,330 separate prosecutors’ offices — nearly 2,000 of those offices were full-time prosecution offices — employing nearly 78,000 prosecutors and related professionals. Those prosecutors, in a single year, closed 2.9 million felony cases, nearly 100 felony cases per prosecutor on staff. U.S. Department of Justice, Bureau of Justice Statistics, Prosecutors in State Courts, 2007 — Statistical Tables, at 1-2, 4-5 (2011), online: Bureau of Justice Statistics <http://www.bjs.gov>.

6 Those individualized sanctions include removals from office, disbarments, indefinite suspensions, term-limited suspensions, public admonitions and the like.
remedying the systemic effects of misconduct on a case-specific basis by combining public inquiries and innocence commissions.

At the outset of our analysis, we address two accountability mechanisms on a broad continuum. The continuum includes administrative controls, procedural remedies available in criminal court, professional regulation and civil remedies. We focus on the last two of these mechanisms — professional regulation and civil actions — that place pecuniary and licensure consequences directly on prosecutors. We surmise that successful tort actions offer claimants a remedy that is qualitatively different from bureaucratic sanctions, such as the denial of a promotion or administrative reassignment. The same might be said of criminal law remedies such as stays for non-disclosure or the exclusion of evidence (resulting in dismissal). These albeit important remedies lie within the realm of public law and primarily constrain the exercise of government power manifested in the prosecutor’s office. Similar considerations attend using the Canadian Charter of Rights and Freedoms to stay proceedings for abuse of prosecutorial discretion. While prosecutors may also face career advancement consequences for these outcomes, they are not akin to private law remedies such as tort liability, professional sanctioning through a regulatory body, or disbarment. Our discussion focuses on tort law and professional licence sanctions because these mechanisms have a personal impact distinguishing them from “institutional” remedies that exist to constrain state authority. Tort liability for prosecutorial misconduct reflects a specific kind of commentary on a prosecutor’s personal misjudgment as distinct from the office he or she holds. Similarly, losing one’s licence to practise law cloaks an offending lawyer’s behaviour with a kind of seriousness that transcends the particular field of practice and formally signals unsuitability for continued membership within the wider legal profession.

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7 In Canada, federal and provincial statutes establish authority to create policy directives that help to inform prosecutorial behaviour. Their language underscores the prerogative available to institute a broad spectrum of administrative mechanisms in response to a particular prosecutor’s conduct. For example, see Director of Public Prosecutions Act, S.C. 2006, c. 9, s. 12; Crown Counsel Act, R.S.B.C. 1996, c. 87; Crown Attorneys Act, C.C.S.M. c. C330; Crown Attorneys Act, R.S.O. 1990, c. C.49.


II. THE CANADIAN PROSECUTION SYSTEM’S EXPOSURE TO TORT LIABILITY

Crown Attorneys enjoyed absolute immunity until the 1950s, when federal and provincial governments began enacting Crown liability statutes. As Charron J. wrote in Miazga v. Kvello Estate, these legislative developments spawned disagreement among courts on the question of whether the long-standing tradition of immunity from tort action should continue. Judicial positions ranged from absolute immunity to providing exceptions for bad faith or malice.

The Supreme Court of Canada settled this question in Nelles v. Ontario, a seminal 1989 decision that provided a narrow exception to immunity on the grounds of malicious prosecution. This exception was narrow in that it remains the sole grounds for civil actions against the Crown, and because courts would remain sensitive to public policy concerns that historically justified the immunity enjoyed by Crown prosecutors. When Nelles reached the Ontario Court of Appeal, that Court relied on the leading U.S. case, Imbler v. Pachtman, to articulate three particular policy concerns justifying immunity worth restating here.

First, preserving immunity benefits the public as much as individual prosecutors by encouraging trust in the fairness and impartiality of prosecutorial functions. Second, there is potential for tort liability to undermine the exercise of

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10 For example, see the federal Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 3; Saskatchewan’s Proceedings against the Crown Act, R.S.S. 1978, c. P-27, s. 5; Quebec’s Code of Civil Procedure, CQLR c. C-25; and Nova Scotia’s Proceedings Against the Crown Act, R.S.N.S. 1989, c. 360.
11 Miazga, supra, note 1, at para. 43.
14 Miazga, supra, note 1, at para. 43.
prosecutorial discretion among Crown Attorneys wary of litigation. Third, permitting civil suits against the Crown could prompt enough tort litigation to distract prosecutors from their core duties.\textsuperscript{16}

When \textit{Nelles} reached the Supreme Court of Canada, Lamer J. departed from the “absolute immunity” standard, creating a four-part test for establishing proof of malicious prosecution. To establish the tort of malicious prosecution, a plaintiff would have to prove: (1) that the defendant initiated or proceeded with the prosecution; (2) that the prosecution ended in the plaintiff’s favour by means of an acquittal or stay or withdrawal of the charges; (3) that there was no reasonable and probable cause to continue the prosecution; and (4) that the Crown was actuated by malice.\textsuperscript{17} This evidentiary threshold required proof of “deliberate and malicious use of the office for ends that are improper and inconsistent with the traditional prosecutorial function”.\textsuperscript{18} In \textit{Miazga}, Charron J. described the \textit{Nelles} test as striking a balance between offering remedies to “wrongly and maliciously prosecuted” individuals and the need to “ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of important public duties”.\textsuperscript{19} In other words, the threshold for civil liability requires more than a lack of reasonable and probable grounds, incompetence, inexperience, poor judgment, a lack of professionalism, laziness, recklessness, negligence, or even gross negligence.\textsuperscript{20}

1. The Supreme Court of Canada’s Treatment of American Precedent

As a comparative observation, it is also noteworthy that the Supreme Court of Canada in \textit{Nelles} shied away from the so-called “functional” American approach articulated in \textit{Imbler v. Pachtman}. The following quote is instructive as it explains the point of departure in the ways Canadian and American jurisprudence articulate limits to prosecutorial immunity:

The American position, in any of its forms, demonstrates the impracticality of the functional approach to prosecutorial immunity. In my view, the functional approach leads to arbitrary line drawing between prosecutorial functions. This line drawing exercise is made

\begin{itemize}
\item \textsuperscript{16} \textit{Nelles} CA, \textit{id}.
\item \textsuperscript{17} \textit{Nelles} SCC, \textit{supra}, note 13, at para. 42.
\item \textsuperscript{18} \textit{Id.}, at para. 51.
\item \textsuperscript{19} \textit{Miazga}, \textit{supra}, note 1, at para. 81.
\item \textsuperscript{20} \textit{Id.}
\end{itemize}
nearly impossible by the reality that many prosecutorial functions are multi-faceted and cannot be neatly categorized. Further, it must be noted that however one categorizes a prosecutor’s function it is still that of the prosecutor. If it can be demonstrated that a prosecutor has acted without reasonable cause and has acted with malice then does it really matter which functions he was carrying out? In my view to decide the scope of immunity on the basis of categorization of functions is an unprincipled approach that obscures the central issue, namely whether the prosecutor has acted maliciously. If immunity is to be qualified it should be done in a manner other than by the drawing of lines between quasi-judicial and other prosecutorial functions.\textsuperscript{21}

Whereas U.S. law remains focused on the function of the impugned prosecutor’s conduct, Canadian courts take the position that the presence of malice is more relevant than whether the conduct was carried out in an administrative or adjudicative context.

2. Professional Regulation of Crown Attorneys

The Supreme Court eschewed a functional approach to setting a standard for malicious prosecution claims. Yet it had no trouble embracing this approach in \textit{Krieger v. Law Society of Alberta}, where the Court determined whether Crown Attorneys were subject to the discipline process of provincial law societies.\textsuperscript{22} This is an important observation for three reasons. First, disciplinary proceedings offer a pathway to holding prosecutors accountable other than through civil actions or remedies rooted in criminal procedure. Second, while they are not civil remedies, \textit{per se}, such proceedings are regulatory insofar as findings of misconduct can result in a range of penalties up to and including disbarment. Third, these disciplinary venues also capture and report data through the “naming and shaming” of sanctioned lawyers in material published and circulated among their peers in the province where the sanctions occur. Returning to our initial preference for focusing on the interaction between civil liability and professional regulation, one can also see how they form two discrete pathways to accountability that need not be mutually exclusive or contradictory.

\textit{Krieger} demonstrates how administrative and regulatory mechanisms are marshalled in response to allegations of prosecutorial misconduct.

\textsuperscript{21} Nelless SCC, supra, note 13, at para. 23.
without interfering with the civil immunity standards articulated in *Nelles*. The case involved the delayed disclosure of exculpatory DNA and biological test results. The Crown Attorney had the test results for 10 days before informing defence counsel they would not be available in time for the preliminary inquiry. After learning of the test results at the preliminary hearing, defence counsel filed a complaint with the Deputy Attorney General alleging lack of timely and adequate disclosure. The Crown Attorney was reprimanded and removed from the case after a finding that the delay was unjustified. The accused subsequently complained about the particular Crown Attorney’s conduct to the Law Society of Alberta. The Crown Attorney unsuccessfully challenged the Law Society of Alberta’s jurisdiction to review the delayed disclosure as a form of professional misconduct.

Apparently mindful of the *Nelles* test as affirmed in *Miazga*, the Court carefully navigated a tension between three important legal concepts: the first is the preservation of civil immunity for conduct failing to meet the *Nelles* test; the second is the provinces’ power to regulate the legal profession by virtue of their exclusive jurisdiction over property and civil rights in the province under section 92(13) of the *Constitution Act, 1867*, and the third is the recognition that disclosure of relevant evidence is not a matter of prosecutorial discretion but a legal duty subject to disciplinary oversight. This interplay begat the Court’s conclusion that disciplinary oversight would apply to matters that lay outside the realm of prosecutorial discretion. Crown Attorneys will be subject to civil liability for malicious prosecution where their conduct meets the four-part test set out in *Nelles*. However, acts of bad faith and other forms of conduct may be subject to disciplinary oversight when they overstep legal or other duties required as a condition of being licensed to practice law.


The foregoing discussion outlines the narrow scope for civil claims against prosecutors in Canada and the U.S. It also explains Canadian law’s willingness to recognize prosecutorial conduct as a form of behaviour

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subject to professional regulation. Yet, these remedies may not necessarily produce system-wide review of prosecutors’ behaviour or the actions of judges, defence lawyers, police, civilian witnesses, experts and other operatives within the criminal process. This section turns to the question of whether ad hoc commissions of inquiry and Innocence Commissions meet this need. Our preliminary conclusion is that such administrative law bodies have already established themselves as viable accountability mechanisms and should be expanded to include Innocence Commissions, which would operate on a permanent basis as a complement to issue-specific commissions of inquiry.

Canadian public inquiries are descendants of a British system of government in which monarchs had the royal prerogative to order investigations. Today, commissions of inquiry continue to occupy a special place in Canadian law.25 They have played a central role in formulating public policy since first being introduced to Canada in 1846.26 Their fact-finding and procedural features are quasi-judicial, yet free of evidentiary and other strictures of courtroom litigation, thereby allowing for a much broader, contextualized scrutiny of issues before them. In theory, they should also be non-partisan bodies distinct from legislative branches of government where much policy-making is inherently politicized.

The decision to call an inquiry rests solely within the discretion of the federal or provincial cabinet. Once the government decides to call a public inquiry, the process is straightforward. The cabinet provides it with Terms of Reference. These guidelines govern the inquiry’s basic operation, name the person in charge of the inquiry itself, articulate the inquiry’s purpose, and limit the scope of what will be examined. (Significantly, Terms of Reference may also include an end date, which can be problematic if the government wishes to shut down the inquiry before the disclosure of politically embarrassing information.) While not


26 *An Act to Empower Commissions for Inquiring into Matters Connected with the Public Business, to Take Evidence under Oath, Prov. C. 1846, 9 Vict., c. 38.*
purely “judicial”, inquiries also enjoy the benefit of investigatory powers needed to fulfil the fact-finding dimensions of their mandates. For example, they can make findings of misconduct, compel witnesses and order the production of evidence.

In the criminal justice context, commissions of inquiry can cast a light on the problematic aspects of prosecutorial functions in ways that civil actions or professional misconduct proceedings cannot. With the proper Terms of Reference, their holistic, systems-oriented review of institutional failures offers a chance to uncover important narratives at individual and organizational levels while offering recommendations for lasting improvement. There have been several high-profile public inquiries in Canada in which commissioners have scrutinized some dimension of prosecutorial conduct. Alas, the legal sources of their formation also ensure that public inquiries will remain somewhat politicized. Executive branches of government retain complete control over the Terms of Reference and, therefore, the fundamental direction inquiries may take. Governments can also resist calling such inquiries where they perceive limited public pressure to do so. Proceedings can be long


28 See, e.g., Patrick LeSage, The Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (Winnipeg: Manitoba Justice, 2007), at 108, online: Commission of Inquiry Into Certain Aspects of the Trial and Conviction of James Driskell <http://www.driskellinquiry.ca> (final report of a Judicial Inquiry wherein LeSage J. concluded that the prosecution’s failure to disclose critical information to the defence, though not deliberate, amounted to “careless indifference”); Royal Commission on the Donald Marshall Jr. Prosecution (Halifax: Province of Nova Scotia, 1989), online: Nova Scotia Department of Justice <http://novascotia.ca/just/marshall_inquiry/> (final report of a judicial inquiry wherein commissioners led by Hickman C.J. laid much of the blame for Donald Marshall’s wrongful conviction on both the prosecutor and defence counsel, who were found not to have properly discharged their professional obligations); Edward P. MacCallum, Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard (Saskatoon: Government of Saskatchewan, 2008), at 304, online: Saskatchewan Department of Justice <http://www.justice.gov.sk.ca> (final report of a judicial inquiry wherein MacCallum J. concluded that “disclosure met the standards of the day, due account being taken of the prosecutor’s discretion in deciding what evidence tended to show the accused’s innocence. Arguably, some evidence which might have been useful to the defence was not disclosed, but the prosecutor exercised his discretion in good faith”); Fred Kaufman, Report of the Kaufman Commission on Proceedings Involving Gary Paul Morin (Toronto: Queen’s Printer, 1998), at 14, online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca> (the Commission of Inquiry lauded changes to the provincial prosecutors’ policy manual resulting from systemic problems associated with using evidence obtained from so-called “jailhouse informants”).

29 Supra, note 27.
and expensive. There may not be any assurance of systemic reform since the government of the day controls the process’s Terms of Reference and as a result recommendations may be non-binding. This appears consistent with federal or provincial statutes authorizing inquiries, which do not require such processes to produce binding recommendations.\footnote{For example, see Inquiries Act, R.S.C. 1985, c. I-11; Inquiries Act, R.S.N.B. 2011, c. 173; Public Inquiry Act, S.B.C. 2007, c. 9; Public Inquiries Act, R.S.N.S. 1989, c. 372; Public Inquiries Act, R.S.P.E.I. 1988, c. P-31; and Public Inquiries Act, 2006, S.N.L. 2006, c. P-38.1.}

In the face of these problems, here we introduce the American adoption of the so-called “innocence commissions”. Unlike \textit{ad hoc} commissions of inquiry, the function of innocence commissions is less politicized in that they are not created at the sole discretion of cabinet. They are permanent institutional structures established to address specific complaints of misconduct that have resulted in wrongful convictions or other forms of harm to a particular complainant. They purport to address alleged errors in connection with specific cases as opposed to inquiries, which aim to facilitate more systemic reforms. However, important substantive differences lie in the mandates given to these respective bodies. Innocence commissions are permanent structures formed to review discrete cases attracting concerns about perceived miscarriages of justice. While there are no innocence commissions in Canada, those operating elsewhere appear to be modelled on the Criminal Cases Review Commission (“CCRC”) created for England, Wales and Northern Ireland in the \textit{Criminal Appeal Act 1995}.\footnote{Created in the aftermath of wrongful convictions in terrorism cases in the late 1980s, the CCRC was the result of the Royal Commission on Criminal Justice (also known as the Runciman Commission), which called for an independent statutory body to investigate and refer cases of wrongful convictions to the Court of Appeal. Since its inception in 1997, the CCRC has received 15,710 conviction review applications; it has referred 466 to the Court of Appeal and 328 convictions have been quashed.\footnote{Ministry of Justice, Criminal Case Review Commission Case Statistics, online: Ministry of Justice <http://www.justice.gov.uk>.} North Carolina was the first North American jurisdiction to adopt the CCRC model. Created by the North Carolina General Assembly in 2007, the North Carolina Innocence Inquiry Commission (“NCIIC”) has reviewed 1,245 convictions resulting in four exonerations.\footnote{Created pursuant to North Carolina General Statutes § 15A-1560 - § 15A-1475. North Carolina Innocence Inquiry Commission, Case Statistics, online: North Carolina Innocence Inquiry Commission <http://www.innocencecommission-nc.gov>.
}
However, commissions of inquiry are not the only accountability alternatives to civil litigation in American law. Born of the post-Watergate era, and signed into law by President Jimmy Carter on October 26, 1978, the Ethics in Government Act created a Special Prosecutor office to investigate current or past public office holders in the federal government and in national presidential election campaign organizations.\(^{34}\) Later renamed the Independent Counsel, this prosecutor had the power and unlimited budget to investigate allegations of misconduct. This function remains most infamously associated with Kenneth Starr’s inquiry into President Bill Clinton’s relationship with White House intern Monica Lewinsky. With the goal of preserving impartiality, this model was designed to remain insulated from political interference insomuch as it limited the Attorney General’s power to dismiss Independent Counsel. (Similarly, the president could not interfere with Independent Counsel’s investigations.) The U.S. Supreme Court has upheld the constitutionality of this model despite criticisms that it appeared to create a “fourth branch” of government.\(^{35}\)

A post-Watergate contemporary of Independent Counsel legislation, the Inspector General Act of 1978, created offices to detect fraud, abuse and waste, and to audit government departments.\(^{36}\) Like the Independent Counsel, the Inspector General could conduct investigations, but the Inspector General’s offices were permanent fixtures and not created for specific investigations. The Inspector General was also subject to congressional oversight and budgetary controls. Whereas the Independent Counsel’s function included investigations that could lead to criminal prosecutions, the Inspector General’s role was to uncover why something happened.\(^{37}\)

In the context of prosecutorial accountability, why might commissions of inquiry be necessary additions to existing American mechanisms such as those already described? The answer may lie in what these mechanisms have failed to do. Lawyers and other activists working with the Innocence Project have helped 306 people obtain formal exonerations.


after having been wrongly convicted of crimes they did not commit.\textsuperscript{38} Some of these names form part of the much larger National Registry of Exoneration, which currently lists more than 1,000 names.\textsuperscript{39} The sheer volume of exonerees and the variety of circumstances surrounding their respective cases reveals problems that remain unaddressed. Barry Scheck and Peter J. Neufeld express the problem in stark terms:

The American criminal justice system … has no institutional mechanism to evaluate its equivalent of a catastrophic plane crash, the conviction of an innocent person … Instead, the exculpatory DNA results are received, an order vacating the conviction (or a gubernatorial pardon) is issued, and, in a few cases, the judge or the governor offers an apology … To confound matters further, many, but by no means all, of the public officials who should be most concerned about the underlying causes of such wrongful convictions blithely proclaim that the “system has worked” and assiduously avoid the suggestion there is anything further to investigate. Those officials who want to get to the root of these problems do not have an independent body to which they can turn for further investigation or policy recommendations.\textsuperscript{40}

Whether existing Independent Counsel and Inspector General mechanisms are appropriate responses to prosecutorial malfeasance is a question this paper will leave for other writings to consider. However, they seem to have remained unused to scrutinizing prosecutors’ treatment of defendants who are ultimately not guilty.

\textbf{III. THE AMERICAN PROSECUTION SYSTEM’S EXPOSURE TO TORT LIABILITY}

The notably decentralized prosecution system in America appears to be a symptom of America’s roots in the English law tradition, leavened by America’s federalist structure, its frontier tradition and, to a lesser extent, its vigilantante posse past. That decentralized, federalized structure, with American prosecutors emboldened by nearly absolute immunity, has created a patchwork of prosecutorial styles, policies, practices and agendas that has yielded a very interesting array of prosecutorial errors and

\textsuperscript{38} See Innocence Project, online: <http://www.innocenceproject.org>.
\textsuperscript{39} See National Registry of Exoneration, online: University of Michigan Law School <http://www.law.umich.edu>.
misconduct. An equally patchwork American lawyer discipline system, allegedly guided by national-level prosecution guides and standards, struggles mightily to rein in this misconduct.

1. A Brief History of America’s Prosecution Systems

In early Anglo-Saxon times, crime was a personal matter to be dealt with through private vengeance. ... Later in the Middle Ages, kings and tribal leaders placed restrictions on private vengeance to alleviate the disruption caused ... [but even] in Anglo-Saxon times, crime was perceived in twofold light [a private matter to be resolved by personal vengeance, and] an offense against the peace of the state. 41

Against this early backdrop of hybrid, but largely private vengeance, the American prosecution system has certainly taken its own direction toward public prosecution. That direction was largely grounded on the American preference to replace private vengeance with decentralized but public prosecution at the local scale, sensitive to local needs and local voters. “[C]olonial practice diverged from the custom in England, where private prosecutors handled all but the most important cases.” 42 The public prosecution approach has been seen as a particularly American institution, “virtually unknown to the English system”, and “largely an American invention”. 43

During the earliest years of the United States, the American prosecution system was exclusively appointive, driven by the appointed United States Attorney General, who, in turn, appointed local deputy attorneys general. At that time, American prosecutorial decision-making was largely centralized at the national scale, driven and controlled by that appointive power. 44 Of course, from the late 1800s through the mid-1900s, there was a good bit of private vengeance taking place in America,

as evidenced by lynchings, particularly, though not exclusively, of Black males in the South.45

But it was the evolution of the American prosecution system from appointive to elective over the years 1776-1860 that yielded the most decentralization and regional variations.46 Through a series of eras characterized by crime control, prohibition, gang warfare, drug wars and the like since 1860, the American system of elected state and local prosecutors has left in its wake at least isolated, but chronic, examples of prosecutorial misconduct and unethical behaviour.47

Elected American prosecutors sometimes have an internalized system of incentives that diverge from the “minister of justice” ethical quest in which all prosecutors are supposed to be engaged. As elected officials, those prosecutors may be swayed by re-election prospects, win-loss records or public outrage in response to a heinous crime. Each of those self-interest considerations could serve as an incentive for the elected American prosecutor to abandon or downplay the obligation to ensure the defendant’s due process, to charge or overcharge a
weak case or to forego investigation that may yield exculpating evidence. An elected prosecutor may be swayed to cut corners on discovery obligations, to make stirring extrajudicial statements that compromise the defendant’s right to a fair trial, or to make inappropriate and overreaching summations to the jury. In an attempt to rein in those errant prosecutors, the American Bar Association and others have propounded a series of external ethical codes and rules that purport to guide ethical prosecutorial decision-making.

2. External Guides in the American Prosecution System

In the face of such a hopelessly decentralized American prosecution system, it seems almost unimaginable that any externally imposed policies, requirements, codes, rules or principles could successfully guide the millions of decisions made each day by American prosecutors. But, of course, they exist, and have an impact to varying degrees in assorted American jurisdictions.

(a) American Bar Association Model Rules of Professional Conduct

The American Bar Association (“ABA”) Model Rules of Professional Conduct, or the ABA Model Code of Professional Responsibility, or local variations on these codes are perhaps the most familiar external ethical guides for all American attorneys. For the most part, all the sections of those codes apply equally to any American prosecuting attorney and all

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other American attorneys. These ABA codes provide guidelines for conflicts of interest, candour, fee arrangements, publicity, confidentiality, loyalty and the like. However, portions of each ABA code focus specifically on sketching out the acceptable contours of ethical decision-making by American prosecutors. Indeed, rule 3.8 of the ABA Model Rules exclusively applies to American prosecutors, and sets out the following requirements:

- American prosecutors must, at all times, act as ministers of justice.  
- American prosecutors must not simply advocate for convictions; American prosecutors must seek fairness and justice in every decision in every case.  
- American prosecutors must never charge any crime that is not supported by at least probable cause, and must in a timely manner dismiss any charge or complaint that is no longer supported by at least probable cause.  
- American prosecutors must disclose all evidence tending to exculpate or mitigate, and must make such disclosures in a timely manner.  
- American prosecutors not only must ensure that each defendant receives some measure of substantive justice, but must ensure that each defendant receives “procedural justice”, even if that defendant’s own attorney does not do so.  
- American prosecutors must prevent convictions in cases where the defendant should have prevailed, and even after the conviction is final, must take steps to seek reversal or review of cases where the defendant should have prevailed.

58 Model Rules, supra, note 2, r. 3.8, commentary.  
59 Id.  
60 Id., r. 3.8(a).  
61 Id., r. 3.8(d).  
62 Id.  
63 Id., commentary.
American prosecutors must notify the defence of all new, credible and material evidence yielding a “reasonable likelihood” the defendant did not commit the offence — whether that was in the prosecutor’s own jurisdiction or in any other jurisdiction, and whether it occurs before or after conviction. 64

American prosecutors must refrain from making public statements outside of court that could pose a “substantial likelihood of heightening public condemnation of the accused”. 65

These rule 3.8 requirements only apply to American prosecutors and not to other American attorneys, and the much higher obligations embodied in rule 3.8 are an expression of the crucial role American prosecutors play in the American system of criminal justice.

Although just these few discrete parts of the ABA codes apply expressly and exclusively to American prosecutors, two other external national codes apply in their entirety to all American prosecutors, federal, state and local: the ABA Standards for Criminal Justice: Prosecution Function, 66 and the National Prosecution Standards promulgated by the National District Attorneys Association. 67, 68

(b) American Bar Association Standards for Criminal Justice: Prosecution Function

The ABA Standards, 69 is a detailed, specific, specialized source intended to guide American prosecutors as they wrestle with the ethical and office management dimensions of their work; many American prosecution offices use them as the office’s ethics manual. These ABA Standards are probably the prosecutor and ethics rules most cited by

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64 Id., r. 3.8(g)(1)-(2) and (h).
65 Id., r. 3.8(f) and 3.8, commentary.
69 ABA Standards, supra, note 66.
courts when they consider misconduct by American prosecutors. The ABA Standards address:

- the organization and management of the American prosecution office;\(^{70}\)
- the proper role for American prosecutors during a law enforcement investigation, and how to manage risk during investigations;\(^{71}\)
- the limits and characteristics of ethical relations with American prosecutors’ witnesses and victims;\(^{72}\)
- the American prosecutors’ parameters for maintaining ethical relations with bench and bar;\(^{73}\)
- the obligations of American prosecutors during discovery;\(^{74}\)
- the ethical parameters and permissible considerations for American prosecutors when they exercise charging discretion;\(^{75}\)
- the ethical exercise of discretion by American prosecutors when disposing of charged cases, diverting potential cases, and negotiating plea agreements and their terms and conditions;\(^{76}\)
- ethical criminal trial practice for American prosecutors;\(^{77}\)
- the ethical exercise of sentencing discretion, ethical limits on sentencing arguments, and permissible sentencing options that may be proposed, sought, argued for and agreed to by American prosecutors;\(^{78}\)
- how American prosecutors should avoid conflicts of interest, and resolve them when they arise;\(^{79}\)
- permissible public statements by American prosecutors,\(^{80}\) and

\(^{70}\) Id., at 19-46.
\(^{71}\) Id., at 47-84.
\(^{72}\) Id., at 53-58.
\(^{73}\) Id., at 35-39.
\(^{74}\) Id., at 81-84.
\(^{75}\) Id., at 59-62, 70-77.
\(^{76}\) Id., at 69, 85-90.
\(^{77}\) Id., at 91-112.
\(^{78}\) Id., at 113-116.
\(^{79}\) Id., at 7-11.
\(^{80}\) Id., at 12-16.
• American prosecutors’ duties to respond to misconduct of which they became aware. As the ABA Standards note: “The prosecutor is an administrator of justice. ... The duty of the prosecutor is to seek justice, not merely to convict.”

(c) National Prosecution Standards of the National District Attorneys Association

The National District Attorneys Association (“NDAA”) purports to be the oldest association of American prosecutors and prosecution agencies, with members at the local, state and federal levels, and in every American state. The NDAA intermittently updates its National Prosecution Standards, currently available in the third edition. Much more thorough in many ways than the ABA Standards, the National Prosecution Standards are much less frequently cited by courts when addressing misconduct by American prosecutors. Nonetheless, the National Prosecution Standards are in accord with Model Rule 3.8 and the ABA Standards that an American prosecutor is a minister of justice and a quasi-judicial officer, who is to seek justice, due process, and fairness, and not simply victories or notoriety, re-election, or re-appointment: “The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice. ...”

These three external ethical and practice codes for American prosecutors, the ABA Model Rules, especially rule 3.8, the ABA Standards and

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81 Id., at 17-18.
82 Id., at Standard 3-1.2(b)-(c).
84 National Prosecution Standards, supra, note 67.
85 The National Prosecution Standards contain far more detail than the ABA Standards regarding juvenile delinquency, forfeitures arising from criminal matters, pre-trial release, judicial and pre-judicial diversion, discovery, immunity, case screening, grand jury investigations and procedures, parole and early prison release, jury selection, sentencing, probation and post-sentencing procedures.
86 Westlaw ALLSTATES searches conducted on May 2, 2012 revealed that 501 state cases cited the ABA Standards when assessing prosecutorial misconduct (in attorney discipline and in other contexts), but just 34 cases cited the NDAA National Prosecution Standards (in the same contexts). That notwithstanding, at least one court has explicitly recognized the importance of the National Prosecution Standards. See Massameno v. Statewide Grievance Committee, 663 A.2d 317, at 322 (Conn. Sup. Ct. 1995). Note also that the ABA Standards expressly note: “[T]hese Standards may or may not be relevant in such judicial evaluations of alleged prosecutorial misconduct, depending upon all the circumstances.” ABA Standards, supra, note 66, Standard 3-1.1.
87 National Prosecution Standards, supra, note 67, at 1-1.1.
the NDAA National Prosecution Standards are the three predominant external sources guiding the process of behaviour modification as applied to American prosecutors. These are demanding standards, indeed, but the task of holding American prosecutors to task for violating these and other standards is complicated by American prosecutor immunities, and the rather decentralized and thus, ineffectual, systems for sanctioning errant American prosecutors. Those two roadblocks are addressed in the next two sections.

3. Immunities and the American Prosecution Systems

Actions for money damages against American prosecutors or prosecuting agencies for wrongful convictions are exceedingly rare, particularly since the United States Supreme Court in 2011 severely circumscribed them.\(^{88}\) Even exonerations of wrongly convicted persons in America rarely yield large settlements or awards, and those financial settlements and awards are never levied against an American prosecutor personally.\(^{89}\) Similarly, remedies under federal and state Rules of Criminal Procedure in America essentially never punish the American prosecutor personally, since, most often, when appellate courts substantiate misconduct and unethical behaviour by American prosecutors, or find other prosecutorial error, any remedy is strictly procedural and specific to the case in which the error or misconduct occurred.\(^{90}\) Those courts, faced with such error or behaviour, craft remedies within the case before them, such as suppressing evidence,\(^{91}\) dismissing charges or cases,\(^{92}\) granting

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88 Connick v. Thompson, supra, note 3 (holding that Brady violations — prosecutor’s failure to disclose relevant, exculpatory evidence — even repeated Brady violations committed within a prosecutor’s office, did not put the prosecutor sufficiently on notice that additional prosecutor training was needed, and thus no Section 1983 suit would lie even though the wrongfully convicted defendant served 18 years in prison for a crime he had not committed); see also David Keenan et al., “The Myth of Prosecutorial Accountability after Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct” (2011) 121 Yale L.J. Online 203.

89 See, e.g., Radley Balko, “Wrongly Convicted Missouri Man Ineligible for Compensation” (November 10, 2010), online: Reason <http://reason.com>; CNN Justice, “Time Doesn’t Pay, Wrongfully Imprisoned Find” (March 29, 2012), online: CNN <http://www.cnn.com> (citing the Innocence Project for the estimate that 40 per cent of all wrongfully convicted and later exonerated prisoners received no compensation after the exoneration, and that 27 states provide no such compensation).


92 Henning, supra, note 90, at 823-27.
mistrials and, at times, even barring retrial due to double jeopardy. But none of these serves as a personal penalty for the American prosecutor. Even sanctions related to reputation interests, such as re-election issues for elected American prosecutors, and termination potential for appointed American prosecutors, are usually difficult to measure. Occasionally, a sanctioning body expressly requires the unethical American prosecutor to forfeit the prosecutorial office. The American prosecutor is undergirded by essentially absolute immunity for conduct directly related to carrying out official prosecutorial duties. Even when an American prosecutor assists during the investigation phase of a criminal case, a phase considered outside of the absolute immunity protection, that American prosecutor enjoys qualified immunity. He or she has immunity so long as the assistance provided in the investigation phase was provided in good faith. Thus, absolute and qualified immunities, protection from personal civil suits and money judgments, and remedies that are case-specific and not directed at the prosecutor personally, all protect American prosecutors and, some argue, incentivize them to take chances and compromise their ethical compasses. But there is one last class of penalties for ethical misconduct that is personal to the American prosecutor: sanctions against the prosecutor’s licence to practise law.

4. American Prosecutor Sanctions Are Somewhat Rare but Expanding Rapidly

Not long ago, few American prosecutors faced sanctions against their licences to practise law. The authors published a study in 2012 that assessed the current state of prosecutorial sanctions across the United

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93 Id., at 799-808.
95 See, e.g., In re Jones, Mt. S. Ct. Cause No. PR08-0216 (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 defence attorney); Attorney General v. Pelletier, 134 N.E. 407 (Mass. Sup. Jud. Ct. 1922) (prosecutor removed from office for malfeasance, misfeasance and nonfeasance).
99 MacLean & Wilks, “Keeping Arrows”, supra, note 47.
States. The study illuminated a system on the mend, with sanctions for serious prosecutorial misconduct on the rise after decades of few serious sanctions for American prosecutors. Indeed, 32 of the 50 American states and the District of Columbia have disbarred one or more prosecutors for unethical behaviour in exercising their prosecutorial duties. Those disbarments, by American jurisdiction, are presented in a table at the end of this paper.

It is not just the most serious sanctions, such as disbarments, indefinite suspensions and forced resignation of public prosecution offices, that are on the rise in America. As is made clear in the authors’ 2012 study, prosecutor sanctions at all levels of severity are on the rise in America.

A pattern is rather easy to discern in those statistics, however. In order to impose disbarment, extraordinarily serious, often criminal behaviour, is generally required. For the 31 American jurisdictions that have disbarred one or more prosecutors, the unethical behaviour 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, serious sexual misconduct or multiple serious ethical violations.

On the other hand, lesser ethical violations, and generally all violations arising from trial tactics and strategy, earn much less severe sanctions such as private admonitions or temporary licence suspensions. Those ethical violations resulting in lesser sanctions include: conflicts of interest, discovery violations, ex parte communications, improper closing argument, improper extrajudicial statements, lack of candour to the tribunal, meting out special favours to friends, sexual improprieties and the like.

Although most of these lesser violations are tactical and strategic choices, or perhaps inadvertence, serious misconduct has also attracted less serious sanctions. At least one lesser sanction (specifically, a two-year

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100 As of early 2012, the following states have disbarred one or more prosecutors or former prosecutors for unethical behaviour in carrying out their prosecutorial duties: Alabama, Arizona, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Virginia, Washington State, West Virginia, Wisconsin, Wyoming and Washington, D.C. See MacLean & Wilks, “Keeping Arrows”, id.: table therein, “Most Severe Sanctions for Prosecutorial Conduct in State History”.

101 See id. and notes thereto. See the table at the end of this paper entitled “Notable Disbarments of United States Prosecutors”.


103 Id.
suspension) was handed down when one New Jersey prosecutor, in an
effort to retain his high profile and position, staged a fake assassination
attempt on his own life.\footnote{In re Asbell, 640 A.2d 837 (N.J. Sup. Ct. 2004) (prosecutor suspended two years for staging an assassination attempt on his own life in an effort to secure re-appointment to the prosecutorial position).}

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

The American prosecutor’s arrow is powerful, not merely because of
its capacity to advance the public interest, but because of its 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 preserving
public confidence in the administration of justice.

Based on this comparison of prosecutorial histories, organizational
design, decision-making, ethical codes and licence sanctions, several
conclusions stand out: (1) Canada’s prosecutors are also civil servants
operating within a more centralized system than their American counter-
parts; (2) Canada’s judiciary gives more leeway\footnote{See Miazga, supra, note 1, at para. 46, per Charron J.: “The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently of political pressures from government and sets the Crown’s exercise of prosecutorial discretion beyond the reach of judicial review ....” (emphasis added).} to prosecutorial decision-making, for example, in charging, dispositions, plea bargaining
and the like, than given by the American judiciary; (3) Canadian courts
tend not to severely discipline prosecutors as much as American
courts,\footnote{See the tables at the end of this paper. As just one concrete example, although there have been more than 100 disbarments of U.S. prosecutors for misdeeds in carrying out their official duties, the authors have found none in Canada. One possible exception is noted in the Crown Prosecutors table, infra: a Crown was disbarred for having sexual relations with two underage girls, who previously had been witnesses in one of the Crown’s criminal cases: Law Society of Upper Canada v. Johnston, [2001] L.S.D.D. No. 59 (L.S.U.C.).} arguably due to stronger concepts of unfettered prosecutorial
discretion and separation of powers; and (4) when serious misconduct is
substantiated, whether in Canada or in America, disciplinary bodies
(for example, law societies in Canada and bar discipline committees in
Canada) and the courts in both countries step in to severely sanction the
wayward prosecutors.
IV. WHAT CANADA AND THE UNITED STATES CAN LEARN FROM THE OTHER

1. What the United States Can Learn from Canada

As science, especially DNA, has driven an accelerating cascade of U.S. exonerations, focus on prosecutorial misconduct (although accounting for a rather small subset of U.S. exonerations) has increased. But it seems somewhat impotent to address each instance of U.S. prosecutor misconduct separately, one prosecutor and one case at a time. That discrete and distributed approach may penalize the individual violator, but it does little to improve the entire system of U.S. prosecution. As advanced above, that piecemeal approach may be grounded in the nature and history of the U.S. prosecution system, with each prosecutor, usually elected, serving at the pleasure of the electorate in the jurisdiction the prosecutor serves. But the Canadian model, exemplified by the Lamer Inquiry, offers the U.S. system an alternative approach, or at least, an augmenting approach.

At the outset, it is imperative to note that the recent “Court of Inquiry” in Texas is not an American step in the direction of the Canadian approach. The Texas Court of Inquiry model is just a variant of the American system of evaluating prosecutor conduct one case at a time. In In re Anderson, the accused was Texas State District Court Judge Ken Anderson; the Court of Inquiry was convened after fellow judge Sid Harle filed an Application and Affidavit alleging that Anderson, while serving as a prosecutor in 1986, had knowingly concealed exculpating evidence in a murder case. Judge Harle specifically alleged that

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108 Nelles SCC, supra, note 13, at para. 42.


110 Code of Criminal Procedure, TX Crim. Proc. Tit. 1 § 52.02 [hereinafter “Code of Criminal Procedure”].


113 Id., Note 81.
Anderson, by failing to disclose that evidence, had engaged in constructive criminal contempt of court,114 and had committed two crimes: tampering with or fabricating physical evidence115 and tampering with government records.116 Court of Inquiry presiding judge Louis Sturns issued his ruling in April 2013, finding probable cause to believe Anderson had committed all three referred offences.117 Judge Sturns then issued one order to show cause118 and two criminal warrants119 for the arrest of Anderson. Anderson was later released after posting $2,500 bond120 on each criminal warrant.121

So, the Anderson Court of Inquiry did not issue a sanction against Anderson’s attorney licence, and it did not find Anderson guilty of any crime or civil wrong. More importantly, it did not even purport to make more global pronouncements about repairs needed to the criminal justice system more generally. Rather, the Court of Inquiry produced only a single probable cause order, commencing but not concluding the criminal actions against Anderson. The Texas Court of Inquiry model is essentially analogous to a grand jury proceeding with a single judge, instead of a grand jury, issuing the probable cause decision. But again, this Texas approach only considered the actions of a single prosecutor in a single case. It should not be read as an American step in the direction of the Canadian formal Inquiry approach.

America has also seen the rise of state-wide Innocence Commissions, and similar entities, tasked with post-conviction assessment of cases with an eye toward possible exoneration.122 As of early 2013, only

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115 Penal Code, TX Penal tit. 8 § 37.09 (tampering with physical evidence, a crime).
116 Id. § 37.10 (tampering with a governmental record, a crime).
117 In re Anderson, Cause No. 12-0420-K26 (April 19, 2013). (Findings of Fact & Conclusions of Law). It is worth noting that the presiding judge acknowledged that there was a statute of limitations issue, since Anderson’s alleged misdeeds occurred in 1986, but the presiding judge found that consideration of the limitations issue was beyond the score of the Court of Inquiry’s purview.
118 Id. (Order to Show Cause).
119 Id. (Arrest Warrant, Tampering with or Fabricating Physical Evidence; Arrest Warrant, Tampering with Government Records).
120 Williamson County Sheriff’s Office, Bond Record, Kenneth George Anderson $2,500 posted for Tampering with Government Record (April 19, 2013) online: Williamson County Records Inquiry <http://judicialrecords.wilco.org>.
122 See, e.g., Kent Roach, “The Role of Innocence Commissions: Error Discovery, Systemic Reform, or Both?” (2010) 85 Chicago-Kent L. Rev. 89; Scheck & Neufeld, supra, note 40; see also
11 U.S. states have created such commissions, and some are extremely nascent efforts, or confine their assessments to death penalty cases only. None was exclusively focused on prosecutorial misconduct.

It may be that the American federalist system presupposes or requires piecemeal efforts, assessing miscarriages of prosecutorial discretion state-by-state instead of at the national level. But the Canadian public inquiries operate at federal and provincial levels, thus allowing for both national and regional responses to address systemic prosecutorial misconduct. Notwithstanding the difficulties inherent in a large inquiry effort, the distributed nature of prosecutorial power in the United States, and the American focus on sanctioning individual prosecutors for their unethical conduct in isolated cases, there is much to learn from the Canadian grand-scale inquiry approach. It provides a path to look at the forest and not just the trees, and thereby generate grander solutions to America’s prosecutorial misconduct problems. The criminal justice sentinel events research movement, which allows public review of multiple related cases, may prove to be an important step toward taking a broader view of American criminal justice system failures with an eye toward crafting prospective remedies.

Is American prosecutorial culture compatible with the kind of administrative review afforded by Anglo-Canadian public inquiries or innocence commissions? While the NCIIC model seems promising, there is little cultural fluency in such processes in U.S. law and one can predict a limited appetite for them among American prosecutors. Yet such


124 Four states (Florida, Louisiana, New York and Texas) have formed their commissions since 2008. Id.

125 For example, the Illinois Governor’s Commission on Capital Punishment only addresses death penalty cases. Id.

126 Funding from the U.S. Department of Justice, National Institute of Justice, Office of Justice Programs has recently catalyzed research into sentinel events research. Borrowed from medical sentinel event research, criminal justice sentinel events are clusters of cases betraying a systemic flaw. The sentinel event approach allows public review of multiple related cases at once intending to identify root causes and generate systemic solutions. For a brief overview, see National Institute of Justice, “The Sentinel Event Initiative: Proceedings from an Expert Roundtable” (Roundtable at the National Institute of Justice, May 21, 2013) online: National Institute of Justice <http://nij.gov>. See also James M. Doyle, “Learning from Error in American Criminal Justice” (2010) 100 J. Crim. L. & Criminology 109.
proceedings offer important benefits. Parties adversely affected by misconduct can seek closure. Government institutions can self-assess their own shortcomings and design better controls. The public is demonstrably assured that holders of public office will be subject to appropriate sanctions and educated about standards expected of those entrusted with authority to act in the public interest. Finally, public inquiries provide an opportunity to identify the ensuing harms caused when this authority is abused.

Whatever the salutary benefits, barriers remain and they are more cultural than substantive. Unlike their Canadian counterparts, American prosecutors are elected and would likely oppose the kind of scrutiny public inquiries inflict, especially where doing so might undermine prospects for re-election. Those who design administrative law proceedings may protect them from populist intrusion, but this protection does not reach the polling station where voters regularly determine an elected prosecutor’s fate.

2. What Canada Can Learn from the United States

In both Canada and the U.S., courts have set high evidentiary thresholds for civil remedies while allowing prosecutors to remain subject to the jurisdiction of professional regulators controlling admission to (and membership in) the practice of law.\textsuperscript{127} But just as notably, Canadian courts and law societies seem singularly unwilling to personally sanction Crowns who act unethically.\textsuperscript{128} A review of reported Canadian dispositions reveals only a bare handful of sanctions across Canada, a number of provinces with no reported sanctions at all, and only a single disbarment of a prosecutor, albeit for criminal behaviour only tangentially related to the Crown’s official duties. The wide latitude Canadian courts have, so far, accorded to Crown Attorneys in pursuit of their prosecutorial duties augurs poorly for personal sanctions against Crown Attorneys, but perhaps Canadian courts and law societies should produce a line of decisions that shift toward an American approach over time.\textsuperscript{129}

\textsuperscript{127} See generally, MacLean & Wilks, “Keeping Arrows”, \textit{supra}, note 47.
\textsuperscript{128} See \textit{infra}, table: “Notable Public Licence Sanctions Against Crown Prosecutors”.
\textsuperscript{129} See \textit{infra}, table: “Notable Disbarments of United States Prosecutors”.
V. SUMMARY OF FINDINGS: A BI-DIRECTIONAL VIEW FROM THE BORDER

Both Canadian and U.S. approaches to prosecutorial accountability combine narrow access to civil remedies with oversight by professional regulations governing all lawyers. While it seems unlikely, U.S. federal law needs to move away from the functional analysis as a threshold for establishing tort liability, since this approach improperly protects otherwise actionable conduct simply because it is not adjudicative. Both countries would benefit from a more responsive mix of administrative law systems, which combine ad hoc inquiries with Innocence Commissions akin to the North Carolina model. Rather than mechanisms born of crisis-driven political demands, Innocence Commissions can remain an ongoing institutional presence committed to ongoing review of wrongful convictions without depending on executive branches of government; commissions of inquiry should be reserved for exceptional cases that cry out for system-wide institutional reviews in tandem with the availability of structured compensation schemes where appropriate. (Alternatively, the independent counsel or inspector general mechanisms should be expanded to reach such systemically important cases with a preference for independent counsel models, given their capacity to remain immune from political interference.) This multi-faceted package of policy responses would provide a flexible range of pathways to securing accountability from prosecutors and other important actors within the criminal justice system.

### Notable Public Licence Sanctions against Crown Prosecutors

<table>
<thead>
<tr>
<th>Province</th>
<th>Sanction Details</th>
<th>Date</th>
<th>Conviction Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>“None in last seven years”</td>
<td></td>
<td></td>
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<tr>
<td>British Columbia</td>
<td>Stephen Neville Suntok</td>
<td>2005</td>
<td>Assault Conviction</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>90-day suspension</td>
</tr>
</tbody>
</table>

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130 There have been no licence sanctions levied against Crown Prosecutors in the Province of Alberta “in the last seven years”. Telephone interview of Jessica Arts, Privacy & Information Officer for the Alberta Law Society (March 2013). One full-time government attorney, not a prosecutor, while representing the Province of Alberta Surface Rights Board, and contrary to his agreement to represent no other clients, “moonlighted” for two law clients, and was terminated and then sanctioned: *Law Society of Alberta v. Elander*, [1999] L.S.D.D. No. 70 (Alta. Law Soc.) (after the attorney was discharged from government employment, the Law Society reprimanded him and assessed a fine and costs).

arising from an incident committed while Suntok was a Crown Prosecutor). In a case involving a Crown Prosecutor sanctioned for conduct unrelated to her prosecutor duties, a Crown was reprimanded and assessed costs for failing to intercede in her husband’s cruelty toward animals on their property: Law Society of British Columbia v. Stevens, [2001] L.S.D.D. No. 19 (B.C. Law Soc.). Two cases in British Columbia involved government attorneys who were not acting as prosecutors per se. A contract attorney, paid by the Government of Canada to represent several parties before the APEC Commission Inquiry, was sanctioned for seeking retroactive reimbursement for services previously performed pro bono: Law Society of British Columbia v. Nader, [2001] L.S.D.D. No. 40, [2001] LSBC 3 (B.C. Law Soc.) (18-month suspension). In another case involving acts as a government attorney, but not as a prosecutor, an attorney was sanctioned for sexual harassment that occurred during his employment with the Department of Justice: Law Society of British Columbia v. Kierans, [2001] L.S.D.D. No. 22 (B.C. Law Soc.).

132 Manitoba records still under review. A review of reported materials in Lexis, Westlaw and Quicklaw failed to identify any substantial individual sanctions against Crown Prosecutors for misconduct in conducting official duties. Of note, Crown Attorney Sean Brennan was very recently discharged from his public employment when it was revealed that he had dismissed charges against a Winnipeg company, after which that company made a substantial contribution to a charity with which the Crown Prosecutor was involved; the Law Society of Manitoba has indicated it “would have jurisdiction here”. Mike McIntyre, “Prosecutor fired over ethical issue” Winnipeg Free Press (July 11, 2013).

133 A review of reported materials in Lexis, Westlaw and Quicklaw failed to identify any substantial individual sanctions against Crown Prosecutors for misconduct in conducting official duties.

134 A review of reported materials in Lexis, Westlaw and Quicklaw failed to identify any substantial individual sanctions against Crown Prosecutors for misconduct in conducting official duties. There have been no licence sanctions levied against Crown Attorneys in the Northwest Territories “in the last eighteen years”. Telephone interview with Linda Whitford, Executive Director, Northwest Territories Law Society (March 2013).

135 There have been no licence sanctions levied against Crown Attorneys in Nova Scotia.” Telephone interview with Victoria Rees, Director of Professional Responsibility, Nova Scotia Barristers’ Society (March 2013).

136 A review of reported materials in Lexis, Westlaw and Quicklaw failed to identify any substantial individual sanctions against Crown Prosecutors for misconduct in conducting official duties.
Notable Disbarments of United States Prosecutors

<table>
<thead>
<tr>
<th>State</th>
<th>Attorney</th>
<th>Year</th>
<th>Misconduct Description</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Wayne Seymour Trammell</td>
<td>1983</td>
<td>Bribery</td>
<td>Disbarred</td>
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<tr>
<td>Alaska</td>
<td></td>
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</tbody>
</table>

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139 A review of reported materials in Lexis, Westlaw and Quicklaw failed to identify any substantial individual sanctions against Crown Prosecutors for misconduct in conducting official duties. One Crown Prosecutor was accused of failing to notify the court of law enforcement officer contact with prospective jurors; although acquitted of criminal misconduct for that allegation, the attorney was retroactively suspended for six months: Law Society of Saskatchewan v. Kirkham, [1999] L.S.D.D. No. 19 (Sask. Law Soc.). A Crown Prosecutor was formally reprimanded for exhibiting lack of candour and misleading defence counsel in a criminal case: Law Society of Saskatchewan v. Bliss, [2010] L.S.D.D. No. 119 (Sask. Law Soc.). Of note, the court removed a Crown Prosecutor from further work on a criminal case where the prosecutor had previously represented the accused as a legal aid defence attorney; there were no sanctions against the Crown’s licence: R. v. Lindskog, [1997] S.J. No. 449, 159 Sask. R. 1 (Sask. Q.B.) (original Crown Prosecutor was Robin Dale Ritter).

140 A review of reported materials in Lexis, Westlaw and Quicklaw failed to identify any substantial individual sanctions against Crown Prosecutors for misconduct in conducting official duties.

141 A review of reported materials in Lexis, Westlaw and Quicklaw failed to identify any substantial individual sanctions against Crown Prosecutors for misconduct in conducting official duties.

142 Trammell v. Disciplinary Board of Alabama 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 Simpson v. Alabama State Bar, 311 So.2d 307 (Ala. 1975) (a district attorney is not susceptible to a licence sanction, since the remedy for prosecutorial misconduct lies in the ballot box).

143 Alaska has never disbarred a prosecutor for ethical misconduct in office.
<table>
<thead>
<tr>
<th>State</th>
<th>Name</th>
<th>Year</th>
<th>Misconduct Description</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Andrew P. Thomas</td>
<td>2012</td>
<td>Multiple Ethical Violations</td>
<td>Disbarred</td>
</tr>
<tr>
<td></td>
<td>Lisa M. Aubuchon</td>
<td>2012</td>
<td>Multiple Ethical Violations</td>
<td>Disbarred</td>
</tr>
<tr>
<td></td>
<td>Lourdes Solomon Lopez</td>
<td>2007</td>
<td>Drugs and Lied to authorities</td>
<td>Disbarred</td>
</tr>
<tr>
<td></td>
<td>Bryce H. Wilson</td>
<td>1953</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Arkansas</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>California</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Colorado</td>
<td>Myrl Serra</td>
<td>2011</td>
<td>Extortion/Sexual Misconduct</td>
<td>Disbarred</td>
</tr>
<tr>
<td></td>
<td>James P. Anglin</td>
<td>1904</td>
<td>Bribery</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></td>
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<tr>
<td>Florida</td>
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</table>

145 In re Thomas, No PDJ-2011-9002 (Ariz. April 10, 2011), online: The BLT: The Blog of LegalTimes <legaltimes.typepad.com> (Maricopa County Attorney Andrew Thomas and a deputy prosecutor, Lisa Aubuchon, 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, 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); In re Lopez, Ill. Disc. Comm’n No. 04-2051 (2007) (prosecutor disbarred for obtaining illicit drugs, then lying to DEA, the bar, law enforcement, supervisor and the court about it); In re Wilson, 258 P.2d 433 (Ariz. 1953) (prosecutor disbarred for receiving “protection” money from a prostitute).

146 It appears Arkansas has never disbarred a prosecutor for ethical misconduct in office. It appears California has never disbarred a prosecutor for ethical misconduct in office.

148 In re Serra, Colo. Docket No. 11PDJ079 (Colo. 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 Colorado Bar Assn. v. Anglin, 78 Pac. Rep. 687 (Colo. 1904) (prosecutor disbarred for accepting bribes to discontinue or refrain from prosecuting a number of cases).

149 In re Hurley, Docket No. MMXCR08-0183632 (Conn. 2008) (prosecutor disbarred following conviction for embezzling funds from the Connecticut Association of Prosecutors).

150 Delaware has never disbarred, in fact has never disciplined to any degree, 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 (April 12, 2012) (on file with authors).

151 It appears Florida has never disbarred a prosecutor for ethical misconduct in office.
<table>
<thead>
<tr>
<th>State</th>
<th>Name</th>
<th>Year</th>
<th>Reason</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>Valerie Annette Redding</td>
<td>1998</td>
<td>Funds for Personal Use</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Elmer Russell Bevins</td>
<td>1922</td>
<td>Obstruction of Justice</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Idaho</td>
<td>James F. Baba</td>
<td>2008</td>
<td>Drugs from Evidence Locker</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Indiana</td>
<td>Jack R. Riddle</td>
<td>1998</td>
<td>Funds for Personal Use</td>
<td>Disbarred</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>William A. Norris</td>
<td>1899</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Thomas D. Underwood</td>
<td>1907</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td></td>
<td>Lawrence R. Carmichael</td>
<td>2008</td>
<td>Bribery</td>
<td>Disbarred</td>
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<tr>
<td>Louisiana</td>
<td>Fletcher R. Bell</td>
<td>2011</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
</tbody>
</table>

152 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).
153 In re Bevins, 26 Haw. 570, No. 1331, 1922 W.L. 2102 (Hawaii Terr. 1922) (prosecutor disbarred after seeking improperly to defeat an indictment brought against his wishes by the state attorney general).
154 It appears Idaho has never disbarred a prosecutor for ethical misconduct in office.
155 In re Baba, Ill Docket No. MR 22324 (2008) (prosecutor disbarred for stealing marijuana from an evidence locker, claiming it was needed in prosecuting a criminal case).
156 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).
157 In re TeKippe (see State v. TeKippe), 771 N.W.2d 653 (Iowa Ct. App. 2009) (prosecutor disbarred after repeatedly stealing cocaine from an evidence locker and replacing it with flour).
158 In re Norris, 57 Pac. 528 (Kan. 1899) (prosecutor disbarred for soliciting and accepting bribes to charge some cases and to dismiss others).
159 Underwood v. Commonwealth, 105 S.W. 151 (Ky. 1907) (prosecutor disbarred for accepting bribe to shield seller of intoxicating liquor from prosecution); Kentucky Bar Assn. v. 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).
160 In re Bell, 72 So.3d 825 (La. 2011) (prosecutor disbarred for accepting bribes to “fix” criminal and traffic cases); In re Dillon, 66 So.3d 434 (La. 2011) (deputy county attorney disbarred for sexually assaulting two women “under color of state law”); In re Jackson, 27 So.3d 273 (La. 2010) (prosecutor disbarred for accepting $500 bribe to dismiss intoxicated driving charge); In re...
<table>
<thead>
<tr>
<th>State</th>
<th>Name</th>
<th>Year(s)</th>
<th>Offense</th>
<th>Outcome</th>
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</thead>
<tbody>
<tr>
<td>Louisiana</td>
<td>Henry Dillon</td>
<td>2011</td>
<td>Sexual Improprieties</td>
<td>Disbarred</td>
</tr>
<tr>
<td></td>
<td>Darryl Jackson</td>
<td>2010</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td></td>
<td>Edwin E. Burks</td>
<td>2004</td>
<td>Bribery/Computer Fraud</td>
<td>Disbarred</td>
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<tr>
<td>Maine</td>
<td>Edwin E. Burks</td>
<td>2004</td>
<td>Bribery/Computer Fraud</td>
<td>Disbarred</td>
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<tr>
<td>Maryland</td>
<td>Joseph C. Pelletier</td>
<td>1922</td>
<td>Nonfeasance, Malfeasance</td>
<td>Removed</td>
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<tr>
<td>Massachusetts</td>
<td>Karen K. Plants</td>
<td>2012</td>
<td>Allowing Perjured Testimony</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Michigan</td>
<td>Mason M. Forbes</td>
<td>1934</td>
<td>Funds for Personal Use</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Minnesota</td>
<td>J. Cedric Conover</td>
<td>1958</td>
<td>Funds for Personal Use</td>
<td>Disbarred</td>
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<tr>
<td>Mississippi</td>
<td>Jeanette Kenick</td>
<td>1984</td>
<td>Helped Prisoner Escape</td>
<td>Disbarred</td>
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<tr>
<td>Missouri</td>
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<td>Montana</td>
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<td>Nebraska</td>
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<td>Nevada</td>
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</table>

Burks, 964 So.2d 298 (La. 2004) (prosecutor disbarred after his conviction for Computer Fraud for accepting bribes to dismiss tickets).

161 Maine has never disbarred, in fact has never disciplined to any degree, 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) (on file with authors).

162 It appears Maryland has never disbarred a prosecutor for ethical misconduct in office.

163 Attorney General v. Pelletier, supra, note 95 (prosecutor removed from office for malfeasance, misfeasance, and nonfeasance).


165 In re Forbes, 257 N.W. 329 (Minn. 1934) (prosecutor disbarred after overbilling government employer for various expenses for personal gain).

166 It appears Mississippi has never disbarred a prosecutor for ethical misconduct in office.

167 It appears Missouri has never disbarred a prosecutor for ethical misconduct in office.

168 It appears Montana has never disbarred a prosecutor for ethical misconduct in office.

169 State ex rel Nebraska Bar Assn. v. Conover, 88 N.W.2d 135 (Neb. 1958) (prosecutor disbarred after retaining for personal use fees for a tax forfeiture prosecution).

170 In re Kenick, 680 P.2d 972 (Nev. 1984) (prosecutor disbarred after helping a prisoner escape from custody).
It appears New Hampshire has never disbarred a prosecutor for ethical misconduct in office.

It appears New Jersey has never disbarred a prosecutor for ethical misconduct in office. Query why the following prosecutor was not more severely disciplined: In re Asbell, supra, note 104 (prosecutor suspended just two years for staging a faked assassination attempt on his own life to boost his media profile, and thus, to boost the likelihood he would be re-appointed as a prosecutor).

It appears New Mexico has never disbarred a prosecutor for ethical misconduct in office.

In re D’Arcy, 374 N.Y.S.2d 222 (App. Div. 1975) (prosecutor disbarred for forging a National District Attorneys Association letter, and for authoring a letter on letterhead improperly releasing a child from school without legal basis); In re Meli, 294 N.Y.S.2d 267 (App. Div. 1968) (lead title examiner in prosecutor’s office disbarred for kickbacks and perjury in title examinations); In re 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 Fauci, 834 N.Y.S.2d 523 (App. Div. 2007) (assistant district attorney allowed to resign his office when it was determined he had improperly served in that capacity when he was not licensed).

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

Oklahoma

<table>
<thead>
<tr>
<th>Name</th>
<th>Year</th>
<th>Misconduct</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clifford W. Ferguson</td>
<td>1934</td>
<td>Funds for Personal Use</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Oscar Simpson</td>
<td>1920</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Virgil R. Biggers</td>
<td>1909</td>
<td>Bribery</td>
<td>Disbarred</td>
</tr>
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</table>

Oregon

<table>
<thead>
<tr>
<th>Name</th>
<th>Year</th>
<th>Misconduct</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Terese M. Gustafson</td>
<td>2002</td>
<td>Candor to Tribunal</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Julie Ann Leonhardt</td>
<td>1997</td>
<td>False Statements to Court, etc.</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Charles W. Garland</td>
<td>1915</td>
<td>Funds for Personal Use</td>
<td>Disbarred</td>
</tr>
</tbody>
</table>

Pennsylvania

Rhode Island

South Carolina

South Dakota

178 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 Simpson, 192 Pac. 1097 (Okla. 1920) (prosecutor disbarred after accepting bribe to refrain from prosecuting a person who was running a gambling house); In re Biggers, 104 Pac. 1083 (Okla. 1909) (prosecutor disbarred after accepting a bribe in a criminal case)

179 In re Gustafson, 41 P.3d 1063 (Or. 2002) (prosecutor disbarred for making false statements to the court and for disclosing previously expunged records); In re 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. Garland, 150 Pac. 289 (Or. 1915) (special prosecutor disbarred for retaining for personal use proceeds belonging to the state).


181 Rhode Island has never disbarred, in fact has never disciplined to any degree, 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 (March 28, 2012) (on file with authors).

182 It appears South Carolina has never disbarred a prosecutor for ethical misconduct in office.

183 It appears South Dakota has never disbarred a prosecutor for ethical misconduct in office.
<table>
<thead>
<tr>
<th>State</th>
<th>Name</th>
<th>Year</th>
<th>Conduct</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tennessee</td>
<td>John Douglas Godbee</td>
<td>2012</td>
<td>Sexual Misconduct</td>
<td>Disbarred</td>
</tr>
<tr>
<td></td>
<td>William E. Gibson</td>
<td>2009</td>
<td>Conflicts of Interest, etc.</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Texas</td>
<td></td>
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<tr>
<td>Utah</td>
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<tr>
<td>Vermont</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></td>
<td>Charles E. Bonet</td>
<td>2001</td>
<td>Attempted to Absent Witness</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>
</tbody>
</table>


185 It appears Texas has never disbarred a prosecutor for ethical misconduct in office. However, Texas has permanently suspended a prosecutor: In re Terry D. McEachern (2005).

186 Utah has never disbarred, in fact has never disciplined to any degree, 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 (April 11, 2012).

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


190 State v. Hays, 61 S.E. 355 (W. Va. 1908) (prosecutor disbarred for receiving bribes to refrain from prosecuting “speakeasy” operators).

191 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).
<table>
<thead>
<tr>
<th>Location</th>
<th>Name</th>
<th>Year</th>
<th>Misconduct</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wyoming</td>
<td>Kevin P. Meenan</td>
<td>2004</td>
<td>Official Misconduct</td>
<td>Disbarred</td>
</tr>
<tr>
<td>Washington, D.C.</td>
<td>G. Paul Howes</td>
<td>2012</td>
<td>Financial Improprieties</td>
<td>Disbarred</td>
</tr>
</tbody>
</table>


193 In re Howes, 39 A.3d 1 (D.C. 2012) (prosecutor disbarred for distributing over $42,000 in witness vouchers to ineligible persons).