

FAITHFUL EXECUTION: THE PERSISTENT MYTH OF WIDESPREAD PROSECUTORIAL MISCONDUCT

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And all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.

- Article VI, Constitution of the United States

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Professors, politicians, activists, journalists, and bloggers alike stand ready to denounce prosecutorial misconduct—the more egregious the misconduct, the more vociferous the denunciation, and rightly so. Ordinarily, such public denunciation would have a salubrious effect. Unfortunately, this remedial process has been hijacked by those who insist that prosecutorial misconduct is widespread and has infected all facets of the criminal justice system, to the detriment of defendants and the consternation of the public. Their vitriol precludes a dispassionate evaluation of the criminal justice system generally and prosecutorial misconduct specifically. This article demonstrates that, contrary to expectations, prosecutorial misconduct occurs with reassuring infrequency. The article also proffers a few explanations for the persistence of the myth that prosecutorial misconduct is endemic, discusses various problems related to the criminal justice system that are improperly attributed to prosecutors, and evaluates a few well-intentioned but misguided proposals intended to remedy prosecutorial misconduct.

INTRODUCTION

Overzealous prosecutors, intentionally or negligently exceeding the scope of their legitimate authority, present a systemic threat to the very foundation of our criminal justice system and perhaps to our constitutional republic, right? The academic literature reflects the persistence of this belief through many years: 1987 – “[p]rosecutorial suppression and falsification of evidence strikes [sic] at the very heart of our criminal justice system;”² 1992 – prosecutorial misconduct [poses] a far more pernicious threat to the future of adversarial justice and individual rights;”³ 1997 – “[o]ur system of justice . . . is compromised [by prosecutorial misconduct] even when the defendant

2. Richard Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 731 (1987).

3. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 405 (1992).

actually committed the offense for which he is tried;”⁴ 1998 – prosecutorial misconduct “illuminate[s] one of the most fundamental issues in criminal justice and the very notion of government under law;”⁵ 1999 – intentional prosecutorial misconduct “presents a threat to the integrity of the criminal justice system;”⁶ 2005 – prosecutorial misconduct “may still threaten to undermine public confidence in the fairness of the proceeding as a whole and the general integrity of the criminal justice system;”⁷ 2011 – “[t]here is an obvious need for an effective check on prosecutorial misconduct.”⁸ 2013 – “[p]rosecutorial discretion poses an increasing threat to justice.”⁹ 2017 – there is an “ongoing threat of prosecutorial misconduct.”¹⁰

Denunciations of prosecutorial misconduct in the popular media correspond in frequency to the academic literature cited above. A libertarian publication announces “a stunning report” purporting to show un-redressed prosecutorial misconduct in Massachusetts;¹¹ an independent outfit concludes that most prosecutorial misconduct goes unpunished;¹² a left-wing newspaper boldly declares “[w]ith impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious cases[.]”¹³

4. Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 835 (1997).

5. Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 887 (1998).

6. Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 118 (1999).

7. Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 67 (2005).

8. David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J.F. 203, 212 (2011).

9. Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 102 (2013).

10. Nina W. Chernoff, *How Foster Can be Useful to Defense Attorneys*, CHAMPION 40, (Jan.–Feb. 2017).

11. Anthony L. Fisher, *Prosecutorial Misconduct Goes Unpunished in Massachusetts*, REASON: HIT & RUN BLOG (Apr. 12, 2016), <http://reason.com/blog/2016/04/12/prosecutorial-abuse-massachusetts>.

12. Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013), <https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody>.

13. Ken Armstrong & Maurice Possley, *Part I: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html>.

and a writer for *National Review* believes “[p]rosecutorial misconduct is a plague upon these United States.”¹⁴

And, of course, some examples of prosecutorial misconduct are well known. The most pernicious occurred when former Durham District Attorney Mike Nifong disgraced himself in the so-called “Duke-lacrosse” case by knowingly withholding exculpatory evidence.¹⁵ Nifong’s atrocious conduct led to his disbarment and a conviction for contempt.¹⁶ He served a one-day jail sentence.¹⁷ Only slightly less well known was the ill-fated prosecution of late Senator Ted Stevens. Following numerous irregularities, a federal court ordered a special counsel to investigate the government’s investigation and prosecution of Senator Stevens.¹⁸ The special prosecutor’s report, made public in 2012, found that Department of Justice lawyers “intentionally withheld and concealed significant exculpatory information . . . [and] significant impeachment information.”¹⁹ Although its conclusions were not accepted universally, and a fair review of the facts of the case suggests that the disclosure failures were unintentional, this incident was reported as an example of an epidemic of prosecutorial misconduct.²⁰

Notwithstanding the above, this article will show that prosecutorial misconduct occurs with admirable infrequency; that the nation’s federal, state, and local prosecutors perform their daily tasks with an impressive fidelity to their legal and ethical responsibilities; and that the empirical data do not substantiate the vitriol with which they are attacked.

14. Kevin Williamson, *When District Attorneys Attack*, NAT’L REV. (May 31, 2015), <http://www.nationalreview.com/article/419110/when-district-attorneys-attack-kevin-d-williamson>.

15. Tom Jackson, *Disbarred Duke Lacrosse Prosecutor Mike Nifong is Back, Along with More Misconduct Allegations*, WASH. POST (Aug. 30, 2016), <http://www.charlotteobserver.com/news/local/crime/article9122669.html>.

16. Anne Blythe, *City of Durham Settles Long-Running Lawsuit with Former Duke Lacrosse Players*, CHARLOTTE OBSERVER (May 16, 2014), <http://www.charlotteobserver.com/news/local/crime/article9122669.html>.

17. Jackson, *supra* note 15.

18. *In re Special Proceedings*, 825 F. Supp. 2d 203, 204–05 (D.D.C. 2011).

19. Notice of Filing of Report to Hon. Emmet G. Sullivan, *In re Special Proceedings*, No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012).

20. *Goeke v. Department of Justice*, 2015 M.S.P.B. 1, 3 (2015) (“After reviewing OPR’s report, the assigned [PMRU] attorney became convinced that the appellants’ conduct did not rise to the level of professional misconduct as the agency defined the offense.”); *see also* Kenneth L. Wainstein, Jeffrey S. Nestler, & Sara S. Zdeb, *Response to the United States Department of Justice Office of Professional Responsibility Final Report* (Jan. 25, 2012), <https://www.leahy.senate.gov/imo/media/doc/052412-BottiniResponse.pdf>.

Prosecutorial misconduct is also the putative cause of an array of tangential issues, including the explosion of “coercive” plea bargaining, selective or vindictive prosecution, excessive criminal sentences, the criminalization of inherently non-criminal conduct (i.e., conduct that is *malum prohibitum* as opposed to *malum in se*), the relative infrequency of actual jury trials, the use of grand juries, the failure to use grand juries, even the *number* of criminal charges in an indictment (or other charging document), and myriad other “ills” pertaining to the criminal justice system. Those ills, the literature argues, are caused by prosecutorial misconduct. This article will show that these ills are not attributable to prosecutorial misconduct.

That’s not to say that these concerns aren’t themselves valid—some of them, like the criminalization of *malum prohibitum* conduct, are alarming both theoretically and practically; others, like the relative infrequency of jury trials may be theoretically and practically concerning. But, a fair evaluation of these concerns demonstrates that they are not properly attributable to prosecutorial misconduct or that they are not inherently destructive of defendants’ rights specifically or our criminal justice system generally. In other words, some of these concerns reflect a visceral dissatisfaction with state and congressional legislation, whether or not those who express such concerns recognize that their dissatisfaction is properly directed at state legislatures and the United States Congress. Others fail to appreciate the inherent reality that the nation’s prosecutorial resources are limited and must be utilized so as to accomplish the goals of prosecution generally, while accounting for defendants’ constitutional rights as well as professional ethical standards. Scarcity of resources necessarily implies tradeoffs.

Lastly, this article will discuss the merits of some of the remedies intended to reduce prosecutorial misconduct. Many of those remedies, such as a revised *Brady* standard, more frequent use of grand jury indictments (or as some have argued, less frequent resort to grand jury indictments), and independent prosecutorial commissions, are actually solutions in search of problems that don’t exist. Other proposals, such as the repeal of statutes, particularly at the federal level, that criminalize *malum prohibitum* conduct, should be severed from the question of the relative frequency of prosecutorial misconduct. They are political questions. Repeal of these types of laws would not reduce prosecutorial misconduct, except to the extent that it would reduce all conduct by prosecutors.

In summary, in Section I, I scrutinize the few studies that purportedly demonstrate that prosecutorial misconduct is widespread. In Section I, I also evaluate the various explanations for

the shortage of empirical support for the claim that prosecutorial misconduct is widespread. In Section II, I proffer some explanations for the persistence of the myth of prosecutorial misconduct, despite the absence of supporting evidence. In Section III, I discuss several political, legal, and procedural issues that are improperly attributed to prosecutorial misconduct. In Section IV, I comment on a variety of proposed remedies for prosecutorial misconduct. In Section V, I conclude with a few personal observations from my time as a state and federal prosecutor.

Before proceeding, a brief disclaimer. In this article, I do not argue that prosecutorial misconduct never occurs. I also do not argue that prosecutorial misconduct, when it occurs, is excusable.

I. MEASURING PROSECUTORIAL MISCONDUCT

An evaluation of the long list of ills that various authors attribute to prosecutorial misconduct, and a subsequent analysis of the merits of the numerous “solutions” to this putative problem, first require a brief exploration of the scope of prosecutorial misconduct. A thorough review of the literature addressing prosecutorial misconduct suggests that the problem is rampant and unchecked. This view is widespread. For example, one commentator states that “there is considerable evidence to suggest that misconduct is a pervasive problem;”²¹ another cites the “disturbing frequency of prosecutorial misconduct;”²² while a third cites the “widespread problem of prosecutorial misconduct in the United States.”²³ Sometimes, authors dispute the *quantum* of evidence supporting the assertion, but, curiously, make it anyway: “[w]hat little evidence we do have indicates that prosecutorial misconduct is a serious problem.”²⁴ To at least one author, “the undeniable fact is that many innocent people have been wrongly convicted of crimes as a result of prosecutorial misconduct.”²⁵ On the other end of the political spectrum, Professor Reynolds opined fairly recently that the “threat has in fact grown more severe to the point of becoming a due process issue.”²⁶ These

21. Angela Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007).

22. Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 172 (2004).

23. Keenan et al., *supra* note 8, at 205.

24. *Id.* at 211.

25. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 53 (2005).

26. Reynolds, *supra* note 9.

conclusions aren't new. In 1987, one commentator declared "this kind of misconduct occurs frequently enough to generate considerable concern about devising an effective remedy," basing this assertion on "enough reported cases containing strong evidence."²⁷ No citations were provided.

A. Empirical Evidence of Prosecutorial Misconduct

What, then, is the evidence of prosecutorial misconduct? Several of the fairly-recent articles cite a study conducted by the Center for Public Integrity.²⁸ That study, already fifteen years old, found "over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals."²⁹ Stated otherwise, the study found that, on average, there were approximately sixty instances of "proven" prosecutorial misconduct per year (between 1970 and 2003) in the entire United States.³⁰ These examples include cases in which the only form of misconduct was "improper opening or closing arguments."³¹ At the risk of taking a minority position, this doesn't seem to be the egregious abuse of power that justifies the ubiquitous call to arms against the nation's prosecutors.

To put the numbers in perspective, there were 2,249,159 total felony convictions in the United States in 2007 alone, the most recent year for which data are available at both the state and federal level. These consist of 72,436 federal felony convictions obtained mostly by the U.S. Attorneys' Offices³² and 2,176,723 state felony convictions

27. Rosen, *supra* note 2, at 697.

28. See, e.g., H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 60 (2013); Davis, *supra* note 21, at 278; Johns, *supra* note 25, at 60; Keenan et al., *supra* note 8, at 211 among several other articles cited herein.

29. Keenan et al., *supra* note 8, at 209–10.

30. The study may also have counted as "prosecutorial misconduct" errors committed by police and other government actors involved in the investigative process. See George A. Weiss, *Prosecutorial Accountability After Connick v. Thompson*, 60 DRAKE L. REV. 199, 218–219 (2011).

31. *Methodology, The Team for Harmful Error: How the Center Compiled Data for These Articles*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2003/06/26/5530/methodology-team-harmful-error>.

32. U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2007 at 11 (2008), http://www.justice.gov/usao/reading_room/reports/asr2007/07statrpt.pdf. Data for 2012 are available for federal, but not state, prosecutions.

obtained by state and local prosecutors.³³ These numbers demonstrate that the average of sixty instances of prosecutorial misconduct per year—presumably substantiated by real evidence—constitute a negligible fraction of the total annual felony prosecutions. If the frequency of prosecutorial misconduct were actually one hundred times greater than suggested by the available evidence, approximately 99.73% of all felony convictions in 2007 still would have been untarnished by such conduct.

These objectively low rates of prosecutorial misconduct are confirmed by an analysis of the percentage of felony convictions in California that were the subject of any type of prosecutorial misconduct from 1997 through 2006. California courts reported that during those ten years there were 444 instances of prosecutorial misconduct in California.³⁴ But there were also 2,107,067 felony convictions in California during the same time period.³⁵ Here again, if the frequency of prosecutorial misconduct were actually one hundred times greater than reported, almost 98% of all felony cases in California during that time would have been completely free from *any* form of prosecutorial misconduct. Although many authors suggest that the problem of prosecutorial misconduct is larger than indicated by the relevant data, none appears to believe that the problem is one hundred times larger. To belabor the point, the problem is actually less severe in California than those 444 cases tend to suggest. “In 390 of these cases, . . . [an appellate] court concluded the misconduct was harmless error and affirmed the conviction.”³⁶ This presents an obvious problem to those who declare, without further support, that prosecutorial misconduct is pervasive.

A similar conclusion may be reached in a different fashion. Not only does prosecutorial misconduct occur in a tiny fraction of all felony convictions, allegations of prosecutorial misconduct are also a tiny fraction of all allegations of attorney misconduct generally. As depicted in the following chart, both substantiated and unsubstantiated allegations of prosecutorial misconduct constitute a

33. Steven W. Perry & Duren Banks, U.S. Dep’t of Justice, *2007 National Census of State Court Prosecutors* 5 (Dec. 2011), <http://www.bjs.gov/content/pub/pdf/psc07st.pdf>.

34. CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 71 (Gerald Uelmen & Chris Boscia eds., 2008), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs> [hereinafter California Justice Report].

35. KAMALA D. HARRIS, CAL. DEP’T OF JUSTICE, CRIME IN CALIFORNIA 2012, at 49 (2013), <https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd12/cd12.pdf>.

36. California Justice Report, *supra* note 34.

negligible fraction of all attorney misconduct allegations in Illinois from 2010 through 2016, the last year for which data are available.

ILLINOIS ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION <i>Annual Reports of All Attorney Misconduct, 2010 through 2016</i>						
Year	Allegations (All)	Allegations (Prosecutorial)	% of Allegations (Prosecutorial)	Sanctions (All)	Sanctions (Prosecutorial)	% of Sanctions (Prosecutorial)
2016 ³⁷	7,075	175	2.473%	108	1	0.926%
2015 ³⁸	7,224	126	1.744%	129	0	0%
2014 ³⁹	7,174	99	1.380%	116	2	1.724%
2013 ⁴⁰	7,581	117	1.543%	155	1	0.645%
2012 ⁴¹	8,299	71	0.856%	106	1	0.943%
2011 ⁴²	7,775	64	0.823%	166	0	0%
2010 ⁴³	7,014	99	1.411%	155	1	0.645%
Total	52,142	751	1.440% (avg.)	935	6	0.642% (avg.)

The Illinois Attorney Registration & Disciplinary Commission, which compiled the data summarized in the above chart, also tracked five types of sanctions ranging from most to least severe: disbarment, suspension, probation, censure, and reprimand. From 2010 through 2016, only the misconduct of two prosecutors was severe enough to warrant disbarment or suspension.⁴⁴ The remaining four offenses were low-level infractions warranting only a censure or reprimand.⁴⁵

37. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, ANNUAL REPORT OF 2016, at 20, 37 (2017), <http://www.iardc.org/AnnualReport2016.pdf>.

38. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, ANNUAL REPORT OF 2015, at 13, 29 (2016), <http://www.iardc.org/AnnualReport2015.pdf>.

39. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, ANNUAL REPORT OF 2014, at 14, 31 (2015), <http://www.iardc.org/AnnualReport2014.pdf>.

40. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, ANNUAL REPORT OF 2013, at 15, 30 (2014), <http://www.iardc.org/AnnualReport2013.pdf>.

41. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, ANNUAL REPORT OF 2012, at 13, 25 (2013) <http://www.iardc.org/AnnualReport2012.pdf>.

42. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, ANNUAL REPORT OF 2011, at 17, 30 (2012) <http://www.iardc.org/AnnualReport2011.pdf>.

43. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, ANNUAL REPORT OF 2010, at 17, 28 (2011), <http://www.iardc.org/AnnualReport2010.pdf>.

44. See ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, *supra* notes 37–43.

45. See ATTORNEY REGISTRATION & DISCIPLINARY COMM'N, *supra* notes 37–43.

B. Explanations for the Lack of Empirical Evidence

Since there is little evidence substantiating the claim that prosecutorial misconduct is endemic, those making the argument must carry the burden of persuasion. At the very least, this requires the proffer of some basis for believing that prosecutors are in fact misbehaving and an explanation for the dearth of evidence. The literature fails to meet this burden. Some authors simply “[a]ssum[e], for the sake of analysis, that prosecutorial misconduct is a problem worthy of addressing,”⁴⁶ while others construct elaborate frameworks of incentives and disincentives presumed to dictate the actions of prosecutors, as well as the actions of defendants, defense attorneys, and judges who may report prosecutorial misconduct.

For example, the 2011 Yale Law Journal article described above began by noting that “[s]everal empirical problems hamper efforts to provide an accurate assessment of prosecutorial misconduct in the United States.”⁴⁷ These problems include: prosecutors acting inappropriately “do not want to be discovered and therefore take steps to conceal their misdeeds[;]”⁴⁸ there is a lack of external oversight that “creates an environment in which misconduct can go undetected and undeterred[;]”⁴⁹ “the vast majority of known instances of prosecutorial misconduct come to light only during . . . trial or [on appeal;]”⁵⁰ prosecutors have autonomy; prosecutors have “almost unlimited discretion over whom to prosecute and which offenses to charge[;]” pre-trial hearings are unable to deter prosecutorial misconduct;⁵¹ and “those in the best position to report misconduct—namely judges, other

46. Dunahoe, *supra* note 7, at 49.

47. Keenan et al., *supra* note 8, at 209.

48. Keenan et al., *supra* note 8, at 209.

49. Keenan et al., *supra* note 8, at 210.

50. Keenan et al., *supra* note 8, at 210.

51. *Id.*; see also Medwed, *supra* note 22, at 134–36 (arguing that “[a]s a preliminary matter, the vision of each prosecutor as a minister of justice . . . may clash with the emphasis . . . place[d] on conviction rates. An individual prosecutor’s conviction rate may provide a quantifiable method . . . to measure that prosecutor’s success [O]ffices may use conviction statistics as leverage in budget negotiations. . . . [U]pon achieving a conviction, both the individual prosecutor and the office may become vested in maintaining the integrity of the conviction. Simply put, prosecutors may perceive (or fear the public will perceive) the post-conviction exoneration of an innocent prisoner as undermining the credibility of the office. . . . In a sense, each exoneration . . . precipitat[es] an . . . assessment of whether local prosecutors may have convicted other innocent people. Indeed, some prosecutors may have reason to fear such post-mortems. . . .”) (emphasis added). At the risk of stating the obvious, all of those things may happen, but only in the sense that it is not logically impossible that they could happen.

prosecutors, and defense attorneys and their clients— are often disincentivized from [reporting misconduct] for both strategic and political reasons”⁵² and, as such, are “unlikely [to] . . . lodge a complaint against a prosecutor for *Brady*-type misconduct.”⁵³ Although these propositions could be true, very few of them are substantiated empirically.

Take the argument that defense attorneys and judges “are typically reluctant to report prosecutorial misconduct.”⁵⁴ To those who espouse this argument, it is an “empirical fact that very few defense attorneys report prosecutors who commit misconduct to the state bar or any other disciplinary authority.”⁵⁵ The cited support for that bold proposition is a terse reference to a 2009 article.⁵⁶ A little investigative work, however, reveals that the actual support for this proposition is dubious at best: a forty-one-year old survey of 1,000 Boston lawyers who were asked about their willingness to report misconduct by their colleagues generally (not by prosecutors, specifically).⁵⁷

These same authors believe that these explanations are compounded to the extent that “available statistics significantly underreport the extent of prosecutorial misconduct . . . because courts have embraced a ‘harmless error’ standard when reviewing criminal convictions”⁵⁸ and because “most defendants . . . [don’t] worry about reporting possible prosecutorial misconduct.”⁵⁹ The reality appears to be the opposite, however. Neither harmless error nor a dearth of effort by defendants are plausible explanations for the shortage of evidence of prosecutorial misconduct. In the case of harmless error (setting aside for the moment the questionable utility of categorizing harmless error as prosecutorial misconduct), these authors provide no

52. Keenan et al., *supra* note 8, at 210; *see also* Medwed, *supra* note 22, at 136, and accompanying comments, *supra* note 51.

53. Rosen, *supra* note 2, at 734. Curiously, in support of the assertion that prosecutorial misconduct often goes unreported, the author cited to *Smith v. Kemp*, 715 F.2d 1459 (11th Cir. 1983), a case involving alleged prosecutorial misconduct. In connection with that case, a complaint against the prosecutor *was* filed. *See Smith*, 715 F.2d at 1465 (noting that the prosecutor “was subject to [state bar] proceedings”).

54. Caldwell, *supra* note 28, at 81.

55. Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 433 (2011).

56. *Id.* at n.164 (citing Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1086 (2009)).

57. Gershowitz, *supra* note 56, at 1086 and n. 157 (2009).

58. Keenan et al., *supra* note 8, at 212.

59. Caldwell, *supra* note 28, at 82.

support for their implied position that conduct classified as harmless couldn't be tabulated for reporting purposes. It is not immediately apparent why it couldn't be. If judicial opinions describe prosecutorial error, classify it as harmless, and reach their holdings accordingly, this information is available to be researched, analyzed, dissected, and counted. This obvious fact is made apparent in the same article, only eight pages later, where the authors cite to research conducted by the "Northern California Innocence Project" which found "707 cases [of prosecutorial misconduct] between 1997 and 2009 . . . 159 of which were deemed harmful."⁶⁰ This, of course, is direct evidence of "available statistics" tabulating "prosecutorial misconduct" from harmless error. Then, two sentences later: "[a]s these studies indicate, infrequent punishment of prosecutors cannot be blamed on a paucity of discoverable violations."⁶¹ Apparently, there is an insufficiency of evidence due to reporting problems but enough evidence so as to make the lack of punishment inexcusable.

As to reluctance by defendants to report prosecutorial misconduct, a quick example rebuts the proposition. In 2011 alone, the Office of Professional Responsibility "received 1,381 complaints alleging attorney misconduct."⁶² Of these complaints, 52% were filed by incarcerated persons.⁶³ Apparently, inmates are not dissuaded from alleging prosecutorial misconduct. For what it's worth, in those 1,381 cases only eleven prosecutors were found to have engaged in some form of misconduct.⁶⁴ Of those eleven prosecutors, at least two were involved with the well-documented case against the late Senator Ted Stevens,⁶⁵ which, as it turned out, may not have involved intentional prosecutorial misconduct after all.⁶⁶

Another author declares that that the lack of evidence might "indicate that prosecutors . . . rarely engage in prosecutorial

60. Keenan et al., *supra* note 8, at 220.

61. Keenan et al., *supra* note 8, at 220.

62. Caldwell, *supra* note 28, at 79.

63. Caldwell, *supra* note 28, at 79 n.201.

64. Caldwell, *supra* note 28, at 80.

65. Caldwell, *supra* note 28, at 80.

66. Jeffrey Toobin, writing for the New Yorker summed up the ambiguity: "it's difficult to say if the prosecution team's errors were inadvertent or intentional." Jeffrey Toobin, *Casualties of Justice, The Justice Department Clearly Wronged Senator Ted Stevens. Did it Also Wrong One of His Prosecutors?*, NEW YORKER (Jan 3, 2011), <http://www.newyorker.com/magazine/2011/01/03/casualties-of-justice>. For a strong, and as-of-yet unrebutted, case that the prosecutors in the Stevens matter acted appropriately see Letter from Kenneth L. Wainstein, Attorney for Joseph Bottini, to Eric Holder, U.S. Attorney General (March 15, 2012) (available at <http://lawprofessors.typepad.com/files/2012-03-15-wainstein-letter-to-ag-holder.pdf>).

misconduct,” but quickly reverses courses explaining that the deficiency “might also suggest that prosecutorial misconduct is not being discovered and/or that defense attorneys or others are failing to make appropriate referrals.”⁶⁷ Her proposed solution: if “a low referral rate [is discovered] . . . investigate the cause and seek an appropriate resolution.”⁶⁸ In other words, the absence of evidence is presented as evidence of misconduct.⁶⁹ Flimsy explanations like these are not new.⁷⁰ It’s hard to take seriously a mandate to investigate the causes of a problem when the evidence tends to show that the problem isn’t real.

C. Theoretical Evidence of Prosecutorial Misconduct

These attempts to explain the absence of evidence are laudable, perhaps even plausible, and certainly superior to those authors who dispense entirely with the need to explain the absence of evidence: “In addition to the reported cases, a large number of cases undoubtedly occur in which the suppression or falsification is never discovered.”⁷¹ At their most analytical, these authors simply assume that prosecutorial misconduct is an endemic problem, often for the purpose of arguing a different point.⁷²

Bridging the divide between analysis and polemics are those authors who depict an environment crowded with insidious prosecutors pursuing unjust convictions to be deterred only by strong, material consequences for misbehaving. For example, one author declares that “a prosecutor contemplating *Brady*-type misconduct knows” that he is “[e]ffectively insulated from disciplinary punishment and immune from civil suit.”⁷³ He follows up by stating that “the prosecutor can take added comfort in” the strict materiality

67. Davis, *supra* note 21, at 310.

68. Davis, *supra* note 21, at 310.

69. Of course, the absence of evidence is not evidence of absence. But, the absence of evidence requires any reasonable observer to shift the burden of persuasion to those who argue that the problem exists, the lack of evidence notwithstanding. It’s not enough to acknowledge the dearth of evidence, assume the problem exists anyway, and then discuss *ad nauseum* the implications of the “problem.” Within this framework, any conceivable social ill could be attributed to prosecutorial misconduct.

70. See Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SMU L. REV. 965, 975 (1984) (most prosecutorial misconduct “goes unreported, either because it occurs in secret or in seclusion or because the various observers of the misconduct do not complain.”).

71. Rosen, *supra* note 2, at 703.

72. See, e.g., Dunahoe, *supra* note 7.

73. See, e.g., Rosen, *supra* note 2, at 731–32.

standards applicable to post-conviction relief.⁷⁴ Another author believes that prosecutors are unlikely to be subject to professional discipline and concludes that it “is likely that knowledge of this fact, together with the availability of absolute immunity for grand jury conduct, provides an incentive for prosecutors to disregard professional norms before the grand jury.”⁷⁵ Such a disparaging view of the nation’s prosecutors is apparently common: “an intelligent prosecutor, who must weigh the benefit of perjured testimony only against the risk of appellate reversal, can see the practical benefits in occasionally suborning perjury.”⁷⁶ Tellingly, none of the above authors cites any empirical support for the supposition that prosecutors are akin to Oliver Wendell Holmes’s “bad man,”⁷⁷ rationally calculating the expected cost of violating their sworn oaths. What’s more, these sinister depictions of prosecutors “taking comfort” in injustice bear little resemblance to my experience.

D. Mischaracterized Evidence of Prosecutorial Misconduct

With alarming frequency, commentators cite to evidence that purports to substantiate their claims of rampant prosecutorial misconduct but which upon closer inspection fails to deliver the support implied by the proffered citations. In the most egregious instances, it must be admitted that some commentators provide no support whatsoever for their explicit propositions.

For example, the author of a 2005 article declared boldly that “[i]n light of these findings, one can no longer indulge in the comforting but false fantasy that our criminal justice system sufficiently protects the innocent from prosecutorial misconduct and ensuing wrongful convictions.”⁷⁸ The “findings” proffered in support of that righteous indictment consist of four studies: (1) the 2003 report by the Center for Public Integrity criticized above; (2) a 2000 study by the Innocence Project, updated through 2005, which identified 154 people who served time for crimes they did not commit; (3) a 2000 study by a

74. See, e.g., Rosen, *supra* note 2, at 731–32.

75. Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3471 (1999).

76. Carissa Hessick, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 255, 263 (2002.).

77. Holmes’ “bad man” theory, also known as prediction theory, posits that law is defined by a “bad man’s” opinion (or prediction), of what the courts are likely to do, rather than a moral understanding of right and wrong. Marco Jimenez, *Finding the Good in Holmes’s Bad Man*, 79 FORDHAM L. REV. 2070, 2073–74 (2011).

78. Johns, *supra* note 25, at 60.

Columbia Law School professor that reviewed 4,578 state capital cases and concluded that “sixty-eight percent contained serious error warranting reversal;” and (4) a 1999 Chicago Tribune study that identified 381 homicide convictions reversed for “serious prosecutorial misconduct.”⁷⁹

Undoubtedly, the worst kind of prosecutorial misconduct is that which results in the conviction of an innocent defendant. But, as explained below, upon closer inspection these studies do not support the conclusion that innocent defendants are exposed to a real risk of conviction due to prosecutorial misconduct.

1. Study by the Center for Public Integrity

In Section I. A., entitled “Empirical Evidence of Prosecutorial Misconduct,” I addressed the claim that the Center for Public Integrity study supports the conclusion that the criminal justice system is plagued by an epidemic of prosecutorial misconduct. But, can that study support the narrower conclusion that “our criminal justice system [does not] sufficiently protect[] the innocent from ensuing wrongful convictions”?⁸⁰ Without rehashing the points made above, I add here only that the Center for Public Integrity study documented instances of prosecutorial misconduct, not instances of prosecutorial misconduct that resulted in wrongful convictions of innocent people. It’s a safe bet that wrongful convictions attributable to prosecutorial misconduct occur even less frequently than prosecutorial misconduct counted without respect to outcome.

2. Study by the Innocence Project

Second, the author claims that the conclusions reached by the inchoate Center for Public Integrity study are “reinforced [by] the ongoing investigation by the Innocence Project.”⁸¹ That investigation, the author claims, concluded “that 76 people had been sent to prison and death row for crimes they did not commit.”⁸² Her citation is to page XIV of a book called *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted*.⁸³ Perhaps she misread—the actual quotation is: “DNA testing has provided stone-

79. Johns, *supra* note 25, at 60–61.

80. Johns, *supra* note 25, at 60.

81. Johns, *supra* note 25, at 57.

82. Johns, *supra* note 25, at 60–61.

83. Johns, *supra* note 25, at 61 n.51.

cold proof that sixty-seven people were sent to prison and death row for crimes they did not commit.”⁸⁴ Sixty-seven people, not seventy-six. I do not contend that the author overstated the numbers intentionally. Indeed, her errors also work against her preferred conclusion. For example, the author believes that “[p]rosecutorial misconduct was a factor in twenty-six percent of those cases.”⁸⁵ But, the Innocence Project reported that prosecutorial misconduct was a factor in twenty-six of sixty-two cases of wrongful conviction in the United States.⁸⁶ This is 42%, not 26%.⁸⁷ The larger point, however, is that the author clearly failed to read Scheck, Neufeld, and Dwyer’s book. Their work is about wrongful convictions per se with a focus on the role of DNA testing in exoneration. It is not about prosecutorial misconduct any more than it is about any of the other factors that they conclude lead to wrongful convictions, including: DNA inclusions, other forensic inclusions, false confessions, biased informants, false witness testimony, bad defense lawyering, microscopic hair comparison, defective or fraudulent science, police misconduct, serology inclusion, and mistaken identification.⁸⁸ There were 248 instances of such mistakes or misconduct in the sixty-two wrongful convictions reported by the Innocence Project, approximately 10% of which were attributed to prosecutorial misconduct.⁸⁹ It is illuminating that some of the strongest evidence that author can muster is both objectively weak and pulled from a source concerned primarily with a different issue.

3. Study by Columbia Law Professor Liebman

Third, the portion of Columbia Law Professor James Liebman’s study cited by the author addresses all types of defendants and all types of error. It is not limited to innocent defendants and prosecutorial misconduct specifically. In Professor Liebman’s own words, “the overall error-rate in our capital punishment system was 68%.”⁹⁰ But, “the most common errors . . . are [] egregiously

84. BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED XIV* (2000).

85. Johns, *supra* note 25, at 61 (emphasis added).

86. SCHECK ET AL., *supra* note 84, at 246.

87. SCHECK ET AL., *supra* note 84, at 246.

88. SCHECK ET AL., *supra* note 84, at app. 2 at 263.

89. SCHECK ET AL., *supra* note 84, at app. 2 at 263.

90. James Liebman et al., *Habeas: Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (1999–2000).

incompetent defense lawyering (accounting for 37% of . . . reversals)” followed by prosecutorial misconduct “accounting for another 16%.”⁹¹ Thus, of the 4,578 cases reviewed by Professor Liebman, 3,113 had some form of error. Of those, the errors in 16% (or 498 cases) were attributable to prosecutorial misconduct.⁹² That’s roughly 22 cases per year from 1973 through 1995. But, that’s not the end of our analysis. Using Professor Liebman’s numbers, only 7% of these cases resulted in a defendant being “cleared of the capital offense.”⁹³ We can assume that at least a portion of these defendants were convicted of some extremely serious offense on re-trial, such as when a defendant is convicted of second degree murder instead of first degree murder. In any event, this means that Liebman’s study can support only the following narrow conclusion: during each year from 1973 through 1995, at most an average of 1.5 innocent defendants were convicted of a capital offense due to either intentional or unintentional prosecutorial misconduct. This number is a tragedy for those defendants wrongfully convicted. From an operational perspective, however, it is a success. What’s more, it is simply disingenuous to conclude based upon these numbers that it is a “fantasy” that “our criminal justice system sufficiently protects the innocent from prosecutorial misconduct.”⁹⁴

4. Study by the Chicago Tribune

Lastly, in support of the claim that prosecutorial misconduct is endemic, the author cites “a 1999 national study by the *Chicago Tribune* [that] found that since 1963, 381 homicide convictions have been reversed for serious prosecutorial misconduct, including using false evidence or suppressing exculpatory evidence.”⁹⁵ The anecdotes relayed by the *Tribune* article involve prosecutors hiding exculpatory evidence (an alibi for the defendant), framing innocent men (trying a black man when the victim’s brother said the killer was white), knowingly mischaracterizing evidence (depicting red paint as human blood), and other forms of appalling prosecutorial misconduct.⁹⁶ The problem is, assuming all the allegations made by the *Tribune* are true and portrayed in context, a review of the five-part article reveals that nearly every salacious story involved prosecutorial misconduct that

91. *Id.*

92. *Id.*

93. *Id.* at 1852.

94. Johns, *supra* note 25, at 60–61.

95. Johns, *supra* note 25, at 61.

96. Armstrong & Possley, *supra* note 13.

occurred prior to 1980.⁹⁷ The point is not to defend the behavior that tainted these convictions or to dispute whether prosecutorial misconduct was a problem between 1963 and 1980. Rather, the point is that a dated compilation of anecdotes cannot substitute for the lack of timely empirical evidence. In this respect, the sheer multitude of scholarly articles relying on the *Tribune* survey is itself cause for concern.⁹⁸

E. Summary of Evidence of Prosecutorial Misconduct

The above four examples reveal the frequency with which analyses of prosecutorial misconduct are based on tenuous empirical foundations and dubious arguments. Unfortunately, fallacious reasoning is not the worst problem exhibited in this polemical literature. At its most egregious, some commentators include citations without performing even a cursory review of the cited material. For example, in support of the proposition that prosecutorial misconduct has resulted in a high rate of wrongful convictions, one commentator cited to a newspaper article that, according to the commentator, “report[ed] that California, especially Los Angeles County, has exonerated a large number of wrongfully convicted defendants, in part because of prosecutorial misconduct.”⁹⁹ But, the cited article doesn’t address prosecutorial misconduct, doesn’t include the phrase “prosecutorial misconduct” or any equivalent term, doesn’t allude to prosecutorial misconduct, and doesn’t suggest that prosecutorial misconduct is the cause of these wrongful convictions.¹⁰⁰ Indeed, the actual article states that the discovery of many wrongful convictions was due to the development of DNA evidence, which revealed that the convictions were improper and often revealed “police corruption or witnesses who recanted [as well as] faulty eyewitness testimony and

97. The *Tribune* discovered, for example, that a prosecutor concealed exculpatory evidence in Zollie Arline’s 1972 conviction for manslaughter; James Richardson was wrongly convicted and “set free in 1989 after serving 21 years;” and Willie Gene was retried in 1980 following a tainted trial at some earlier date. *Id.*

98. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 131 (2006); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 976 n.67 (2009); Gershowitz, *supra* note 56, at 1063 n.12; Keenan et al., *supra* note 8, at 212 n.47; Medwed, *supra* note 22, at 174–75 n.255.

99. Caldwell, *supra* note 28, at 60 n.49.

100. David G. Savage, *Registry Tallies Over 2,000 Wrongful Convictions Since 1989*, L.A. TIMES (May 20, 2012), <http://articles.latimes.com/2012/may/20/nation/la-na-dna-revolution-20120521>.

lying witnesses.”¹⁰¹ According to the author of the newspaper article, the developments came as a “surprise [to] many prosecutors and judges.”¹⁰²

Unfortunately, this is not an isolated instance with this particular commentator. On the same page, referring to an article that cited the Liebman study discussed *supra*, this commentator wrote: “Another nationwide survey, focusing on capital cases, revealed a sixty-eight percent rate of reversible error from prosecutorial misconduct.”¹⁰³ This statement is demonstrably false. As explained above, in Professor Liebman’s own words the bulk of these errors were attributed to “egregiously incompetent defense lawyering” not prosecutorial misconduct.¹⁰⁴ At the risk of piling on, immediately after making these dubious remarks about prosecutorial misconduct, the same commentator referenced a New York State Bar Association task force that “examined fifty-three cases of wrongful convictions, over half of which may have involved misconduct by the government.”¹⁰⁵ While this is technically true, a fairer representation of the study’s results would have acknowledged that “misconduct by the government” included misconduct by police officers and judges, including faulty eyewitness identification procedures, improper handling of forensic evidence, false confessions, and unreliable jailhouse informants.¹⁰⁶ This additional detail is particularly important in an article based entirely on the premise that *prosecutorial misconduct* is a problem.

In summary, there is a shortage of evidence establishing the claim that prosecutorial misconduct is rampant; but, there are at least some theoretically plausible explanations for the absence of such evidence. Unfortunately, however, there does not appear to be empirical support for any of these explanations. How do we know whether prosecutors really decline to report misconduct by their colleagues?¹⁰⁷ Do judges really fail to report prosecutorial misconduct for “both strategic and political reasons”?¹⁰⁸ Where are the studies to determine whether such theoretical assertions are true in practice? These seem like

101. *Id.*

102. *Id.*

103. Caldwell, *supra* note 28, at 60.

104. Liebman et al., *supra* note 90, at 1850.

105. Caldwell, *supra* note 28, at 60.

106. FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION’S TASK FORCE ON WRONGFUL CONVICTIONS 8–14 (2009), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26663>.

107. Keenan et al., *supra* note 8, at 211.

108. *Id.* at 210.

straightforward questions the answers to which could be illuminating. To be fair, absence of evidence is not evidence of absence, and, as described above, there are some plausible explanations for this absence. But, whatever the reasons, the empirical evidence suggesting that prosecutorial misconduct is endemic is severely lacking. Moreover, the implication is that the lack of such evidence is simply irrelevant. Given the absence of evidence of widespread prosecutorial misconduct, and given the lack of evidence for the explanations for such absence, there remains precious little on which to base the claim that prosecutorial misconduct is a threat to our criminal justice system.

II. EXPLAINING THE PERSISTENT MYTH OF PROSECUTORIAL MISCONDUCT

Undeterred by the dearth of empirical evidence, many commentators construct elaborate frameworks of incentives that, they argue, induce prosecutors to commit misconduct. As described below, they next argue that such theoretical incentives for prosecutorial misconduct exceed the posited theoretical disincentives for prosecutorial misconduct. From this premise, they conclude that prosecutorial misconduct must be a widespread reality, all without the hard work of weighing the evidence. These arguments at least have the merit of theoretical consistency, unlike those commentators who resort to anecdotes and dated case citations or, worse still, those who trumpet the banal canard that the entire criminal justice system is plagued by racism.

A. *Where There's an Incentive, There Must be a Way!*

“[O]ne report estimates the average tenure of a [prosecutor] in [one large city] to be two years.”¹⁰⁹ Arguably, this is the most useful framework for explaining the cause of the small quantum of empirically-verifiable prosecutorial misconduct. The author of that quotation, Alexandra Dunahoe, recognized that inexperienced prosecutors, especially those handling numerous or complicated cases, are more likely to err if only because they “generally have less training and experience.”¹¹⁰ As a result, they are “less familiar with state and federal constitutional strictures applicable to law

109. Dunahoe, *supra* note 7, at 60 (citing Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 63 (2002)).

110. Dunahoe, *supra* note 7, at 63.

enforcement, and more susceptible to inadvertent constitutional violations.”¹¹¹ This premise—which could be summarized as “most prosecutorial error is the result of inexperience”—is, I think, a useful starting point for a reasonable discussion about the shortcomings of prosecutors’ offices.

Unfortunately, Dunahoe immediately abandons her straightforward premise by drawing the inexplicable conclusion that “[t]he potential for unconscious, knowing, or even malicious misconduct is, therefore, greater among” inexperienced prosecutors.¹¹² But ignorance and inexperience do not cause intentional and malicious misconduct.¹¹³ This realization undermines Dunahoe’s conclusion that deterrence “must focus on influencing the individual cost-benefit calculus of the low-level, transitory prosecutor,” an assertion that is misguided for at least two reasons.¹¹⁴

First, it is precisely the “low-level, transitory prosecutor” whose ignorance and inexperience preclude him from knowing enough to weigh the costs or benefits of prosecutorial misconduct. But Dunahoe, having adopted the cost-benefit framework for understanding human action, proceeds to its logical conclusion: “[a] prosecutor who stands to profit . . . as a result of his misbehavior will *only* be deterred by civil money damages if they are likely to create costs that exceed those benefits.”¹¹⁵ At the risk of belaboring the point, the assumption that the nation’s prosecutors can *only* be deterred from misconduct by the threat of financial penalties is shocking. To accept that cynical view is to believe that such men and women are automatons whose entire lives can be reduced to a simple expected value calculation. Instead, I employ the language of costs and benefits, incentives and disincentives, only for the purpose of rebutting their usefulness as real-world devices for understanding the behavior of prosecutors. Along these lines, I acknowledge that economic-linguistic abstractions like the following are in vogue, even if they have limited practical relevance:

In sum, the efficient use of judicial censure and publicity devices requires that the cost, in terms of the reputational harm to the prosecutor, of the reprimand imposed

111. Dunahoe, *supra* note 7, at 63.

112. Dunahoe, *supra* note 7, at 63.

113. Curiously, the author appears to recognize this point: “low-level, transitory prosecutors . . . rarely directly reap (or perhaps fully perceive) the social rewards for their performance.” Dunahoe, *supra* note 7, at 75.

114. Dunahoe, *supra* note 7, at 64.

115. Dunahoe, *supra* note 7, at 99 (emphasis added).

approximate the private and social costs of the prosecutor's misconduct, while accounting for the possibility that the social costs of under-deterrence might exceed the costs of over-deterrence, therefore justifying what would otherwise be an excessive (from an economic standpoint) reprimand.¹¹⁶

Whatever theoretical appeal that may have, it is of limited practical relevance. The reader, skeptical of those economic-linguistic abstractions, might reasonably inquire how a cost-benefit framework like the above would be implemented in practice.

Second, it is not clear how Dunahoe expects to evaluate the incentives applicable to a type of prosecutor who can be identified only after he has departed. After all, as long as he is employed by the office, presumably he is not "transitory." In this way, the author's transition from a reasonable premise to her awkward conclusion is unfortunate. Like most of the literature in the field, it discards reasonable discussion only to posit a malevolent prosecutorial conspiracy designed to enhance individual careers at the expense of justice and individual rights.

Dunahoe's denouement notwithstanding, the premise that ignorance and inexperience contribute to prosecutorial misconduct is still a thoughtful one worthy of exploration. I briefly explore some of its obvious implications below, but will leave a more detailed analysis to others. First, if ignorance and experience contribute to unintentional prosecutorial misconduct, then reducing ignorance and inexperience is a worthy goal.¹¹⁷ As with any goal, it must be weighed against its costs. Obviously, hiring and retaining experienced prosecutors is more financially expensive than staffing the bulk of prosecutors' offices with recent law school graduates. But, many offices adopt the latter approach because of budgetary pressures that leave few alternatives. This approach has both short and long-term consequences. In the short term, it means that prosecutors' offices tend to hire attorneys with limited or no legal experience. Long term, the problem is compounded as experienced and informed prosecutors depart for other opportunities. This is something of a death spiral for prosecutorial competence, the long-term costs of which could easily exceed the short term financial savings. It is also a much more

116. Dunahoe, *supra* note 7, at 75-76.

117. Prosecutorial misconduct is either intentional or unintentional. Dunahoe's supposition is that most prosecutorial misconduct is committed unintentionally by inexperienced prosecutors. One may wonder how unintentional conduct could be the subject of deterrence.

effective explanation for the existence of unintentional prosecutorial misconduct and has the added benefit of not impugning the character of the nation's prosecutors.

The trade-off, then, can be characterized as follows: lower financial costs result in higher qualitative costs in terms of injustice to the public and defendants, and vice versa. The reader should be careful, however, not to conclude that more money necessarily would reduce prosecutorial misconduct. As described in Section I, prosecutorial misconduct taints only a negligible portion of felony prosecutions. To reduce it further might require an exponential increase in costs.

B. Anecdotes and Dated Case Citations

One author claims there are “numerous reported cases showing violations of [disciplinary] rules,”¹¹⁸ and cites to approximately sixty separate cases of putative prosecutorial misconduct. But these cases are less illuminating than their numbers might indicate. For one, many of the cited cases were more than twenty-five years old at the time the article was written.¹¹⁹ Next, a thorough review of the cited cases reveals that many involve unfounded allegations of prosecutorial misconduct,¹²⁰ while others are actually examples of admirable prosecutorial conduct.¹²¹ Curiously, that same author acknowledges that “[m]any claims turn out to be baseless,”¹²² but persists nonetheless: “Even disregarding these categories of cases, however, a disturbingly large number of published opinions indicate that prosecutors knowingly presented false evidence or deliberately suppressed unquestionably exculpatory evidence.”¹²³ Here again, the author cites to four cases only, including *Brady*, forcing the adverbs

118. Rosen, *supra* note 2, at 697.

119. Rosen, *supra* note 2, at 697–703 nn.19–52.

120. Rosen, *supra* note 2, at 698 n.20 (“[D]efendant’s claim that prosecutor failed to disclose that witness was negotiating a lighter sentence in exchange for testimony was *without basis*.” (emphasis added) (citing *Potts v. State*, 243 S.E.2d 510 (1978))). See, also, Rosen, *supra* note 2, at 698 n.21.

121. See Rosen, *supra* note 2, at 697 n.19 (“[O]n discovering new evidence after trial that was favorable to defendant, prosecutor immediately informed governor.” (citing *Imbler v. Pachtman*, 424 U.S. 409 (1976))); *id.* (“[O]n learning that witness had committed perjury, prosecuting attorney immediately informed court.” (citing *United State v. Rosetti*, 768 F.2d 12 (1st Cir. 1985))); *id.* (“[P]rosecutor acted in good faith when prompt disclosure was made of document favorable to defendant.” (citing *United State v. Dupry*, 760 F.2d 1492 (9th Cir. 1985))).

122. Rosen, *supra* note 2, at 698.

123. Rosen, *supra* note 2, at 698.

“disturbingly” and “unquestionably” to do the work that the data cannot. But this limited support is sufficient for that author, who writes that “[t]here are . . . enough reported cases containing strong evidence of intentional prosecutorial withholding of exculpatory evidence and presentation of false evidence to demonstrate that this kind of misconduct occurs frequently enough to generate considerable concern about devising an effective remedy.”¹²⁴

Consider the logical problem associated with citing to *Brady* as evidence of the problem of prosecutorial misconduct. *Brady*, the reader will recall, is the *sine qua non* of Supreme Court cases remedying prosecutorial misconduct. The author, then, is citing to a remedy for the problem as evidence of the problem. This type of reasoning reduces ad absurdum, and would allow, for example, that same author to cite to his own proposed remedies as evidence that further remedies are needed.¹²⁵ It also tends to suggest that the problem is more pervasive than it may actually be.

C. Perceived Racial Bias in the Criminal Justice System

At their worst, the condemnations are histrionic bordering on conspiratorial, and proceed in the face of all evidence to the contrary. For example, one author, Angela Davis, believes that “prosecutorial discretion [is] a major cause of racial inequality in the criminal justice system.”¹²⁶ This bold declaration is repeated frequently throughout the author’s polemic, but nowhere in the article does she cite to any empirical evidence of prosecutorial racism. Indeed, the article reads as a call to arms to generate “studies” yielding the conclusion that

124. Rosen, *supra* note 2, at 697.

125. At least one commentator has very nearly done this. See, e.g., Angela Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 279 n.7 (2007) (citing DAVIS, *supra* note 98); *id.* at 280 n.15 (citing Angela Davis, *Incarceration and the Imbalance of Power*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 61–78 (Marc Mauer & Meda Chesney-Lind eds., 2002)); *id.* at 281 n.31 (citing Angela Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001)); *id.* at 298 n.110 (citing Angela Davis, *They Must Answer for What They Have Done: Prosecutors Who Misuse Discretion or Abuse Power Should be Held Accountable*, LEGAL TIMES, Aug. 6, 2007); *id.* at 301 n. 128 (citing Angela Davis, *It’s Class and Race*, WASH. POST, Nov. 25, 1995). There are 176 notes in Davis’s article mentioned here, thirty-one of which are self-referential.

126. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17 (1998).

racist prosecutors, including those afflicted by “unconscious racism,” plague the criminal justice system.¹²⁷

This infatuation with race hints that this author’s interest does not lie in documenting and correcting actual prosecutorial misconduct. As an example, consider another article by Davis in which she explained and *excused* the blatant misconduct of Mike Nifong, the prosecutor in the notorious Duke lacrosse case. To wit: she claims, plausibly, that historically “prosecutors never charged white men who raped African American women.”¹²⁸ Of this proposition, “Nifong was undoubtedly mindful.”¹²⁹ Plausible, no doubt; but the author concludes that “[i]f Nifong had failed to pursue the prosecution of wealthy white college students accused of raping a poor black woman, he would have been justifiably criticized.”¹³⁰ This medley of sex, gender, race, and class grievances almost distracts the reader from Davis’s outrageous conclusion: we would be justified in criticizing Nifong, she believes, if he had *not* prosecuted innocent people. One can only blanch at this. Of course, the irony is that, the author’s views notwithstanding, Nifong was punished justly and ultimately disbarred. The author acknowledges this point, but attributes the outcome to the race of the victim and of the alleged perpetrators.¹³¹ That is, Davis presumably believes that Nifong would not have been punished if the defendants were black or the victim was white.¹³² This type of incoherent broadside against the nation’s prosecutors is not helpful for purposes of fostering calm and rational discourse about potential solutions for real problems with the criminal justice system.

127 *Id.* at 54 (“Thus, the first step is the implementation of racial impact studies designed to reveal racially discriminatory treatment. The second step is the publication of these studies so victims of discrimination and the general public may act to eradicate undesired policies and practices.”) These statements suggest that such racial impact studies would be conducted *pro forma*, with the outcome pre-determined.

128 Davis, *Failure to Discipline*, *supra* note 21, at 297.

129 Davis, *Failure to Discipline*, *supra* note 21, at 297.

130 Davis, *Failure to Discipline*, *supra* note 21, at 297–98.

131 See Davis, *Failure to Discipline*, *supra* note 21, at 297–99.

132 The author’s vitriol is most palpable in the stunning assertion that the defendants in the Duke Lacrosse case “receive[d] favorable treatment based on their race.” Davis, *Failure to Discipline*, *supra* note 21, at 302.

III. OTHER ISSUES IMPROPERLY ATTRIBUTED TO PROSECUTORIAL MISCONDUCT

A. *Plea Bargaining*

Plea bargaining has garnered an enormous amount of attention recently, most of it negative. Examples abound: Professor Reynolds asserts that the “criminal justice system, as presently practiced, is basically a plea-bargain system with actual trial of guilt or innocence a bit of showy froth floating on top.”¹³³ Other authors claim that “plea bargains . . . creat[e] a heightened risk of undetected prosecutorial misconduct” because they are “rarely the subject of extensive investigation or judicial review.”¹³⁴

Professor Reynolds has serious concerns about the criminal justice system, including overzealous prosecutors and overreaching government. I share his concern that abuses of government power are a threat to our criminal justice system and our constitutional republic, and I am pleased that his scholarship is taken seriously. However, I think Professor Reynolds has a view of prosecutors that is more pessimistic than warranted. Remember, he wrote an article ostensibly about prosecutorial misconduct. The article presupposes that plea bargaining and prosecutorial misconduct are correlated—the subtitle of the relevant section of his article is: “Better Approaches to Prosecutorial Accountability.”¹³⁵ The problem, however, is that there does not appear to be any evidence establishing the correlation between prosecutorial misconduct and plea bargaining.

In light of the absence of empirical support for that claim, it appears that the only remaining basis for the claim is that the plea-bargaining process is prosecutorial misconduct, per se. Absent a showing that prosecutorial misconduct increases as the ratio of trials to plea bargains falls, it seems Professor Reynolds must argue that the plea-bargaining process is inherently unfair. This is exactly the point the good professor makes: he begins by stating that “it is time to look at structural changes in the criminal justice system that will more successfully deter prosecutorial abuse.”¹³⁶ But, he fails to connect prosecutorial misconduct with plea bargaining other than through the assertion that “the problem stems from a dynamic in which those charged with crimes have a lot at risk, while those doing

133. Reynolds, *supra* note 9, at 107.

134. Keenan et al., *supra* note 8, at 205.

135. Reynolds, *supra* note 9, at 106.

136. Reynolds, *supra* note 9, at 106.

the charging have very little ‘skin in the game.’”¹³⁷ Professor Reynolds assumes prosecutors have no skin in the game because of prosecutorial immunity, and he concludes therefore that prosecutorial misconduct must be rampant.¹³⁸

I think prosecutorial misconduct has no role in Professor Reynold’s argument. If plea bargaining is unfair because prosecutors can negotiate with large hammers (i.e., the possibility of lengthier sentences if conviction is obtained through trial), then plea bargaining is unfair, period. This amounts to an argument that plea bargaining is unfair because prosecutors might have compelling evidence of a defendant’s guilt. In practice, however, plea bargaining occurs because both parties—the prosecution and the defense—have leverage. It is true, of course, that prosecutors negotiate with the “threat” of lengthier sentences. But, defendants negotiate with the fact of limited prosecutorial resources and with some assessment of the likelihood of conviction. Defendants (or at least defense lawyers) know that prosecutors cannot try every case or even most cases and that, even if they tried, they would lose some that they should win.

It is this dynamic of respective costs that is at work every time prosecutors and defendants negotiate plea deals. Depending on the facts and circumstances of any given case, the ratio of prosecutorial leverage to defense leverage will change. This ratio, however, depends on circumstances that are both subjective and variable: the risk preferences of the prosecutor and the defendant, the work load of the prosecutor and the defense counsel, the efficacy of prospective witnesses, the admissibility of evidence, the effectiveness of the respective negotiation tactics, etc. The ratio also depends upon objective and variable circumstances: the potential jury pool, the nature of the charges, the relative experience of the attorneys, and governmental budget cuts or governmental shutdowns (which could affect the prosecution or, in the case of indigents, the public defender’s office). In this regard, another commentator, Professor Bibas,¹³⁹ is exactly right: “[f]rom the point of view of these insiders, plea

137. Reynolds, *supra* note 9, at 106. It seems ungenerous to say that prosecutors have no skin in the game. Prosecutors represent communities, and communities have an interest in the criminal justice system delivering justice, not merely guilty verdicts. The conviction of an innocent defendant results in injustice. But the exoneration of a guilty defendant also results in injustice. The prosecutor has much more “skin” in this game than any honest, but otherwise uninvolved, member of the community.

138. Reynolds, *supra* note 9, at 106.

139. President Trump recently nominated Professor Bibas to serve on the Third Circuit. Dylan Reim, *Penn Professor Will Be Nominated to Serve on The U.S. Court of Appeals for the Third Circuit*, DAILY PENNSYLVANIAN (June 8, 2017, 3:40 PM), <http://www.thedp.com/article/2017/06/bibas-third-circuit-nomination>.

bargaining [makes] perfect sense. Lawyers who have seen a lot of trials can predict with some accuracy whether a jury will convict and what sentence a judge will likely impose.”¹⁴⁰

But this is only part of the story. Plea bargains also make perfect sense to taxpayers in any given jurisdiction, since taxpayers are interested in correct verdicts, obviously, but they are also interested in the efficient use of tax dollars and in ensuring that guilty defendants are prosecuted. In other words, trials aren't preferable to plea bargaining in-and-of-themselves; but, rather, only as mechanisms for obtaining the truth. In the criminal context, the truth that trials seek to discover is guilt or innocence. Plea bargains also seek to find this truth. The difference, however, is that plea bargaining finds that truth at a substantially lower cost than trial.

Absent evidence that plea bargaining results in more erroneous convictions than would be the case if all plea bargains were replaced by trials, there is no apparent reason to denigrate the plea-bargaining process. Further, even if such evidence existed, it would not follow that plea bargaining is correlated with prosecutorial misconduct. Rather, it would suggest that the lower cost alternative (plea bargaining) has a greater failure rate (i.e., greater risk of convicting innocent defendants). This trade-off between cost and quality, however, is not limited to the criminal justice system; it is part of the fabric of reality. At any rate, for purposes of this article, not one of the factors that contributes to the respective bargaining positions of the parties *necessarily* involves prosecutorial misconduct, illustrating that the problems of plea bargaining (whatever they may be) are distinct from the issue of prosecutorial misconduct.

If the above conclusion seems mundane, it is. Professor Reynold's argument reduces to the proposition that the bargaining position of prosecutors is simply too great, period. Maybe so, but that bargaining position also reflects a legislative recognition that prosecutorial and law enforcement resources are limited. And one way to adapt to limited resources is to increase the potency of low-cost deterrence mechanisms, like imposing lengthier prison sentences, “three-strike” laws, mandatory periods of parole ineligibility, and other devices that are intended to facilitate the meting out of justice. Obviously, all these mechanisms alter the relative bargaining positions of the

140. Stephanos Bibas, *The Machinery of Criminal Justice: From Public Morality Play to Hidden Plea Bargaining Machine*, VOLOKH CONSPIRACY (Mar. 13, 2012, 9:22 AM), <http://www.volokh.com/2012/03/13/the-machinery-of-criminal-justice-from-public-morality-play-to-hidden-plea-bargaining-machine/>.

prosecutor and the defense, but they don't themselves constitute prosecutorial misconduct.

Moreover, it is not clear that any substantial change to the plea-bargaining process is possible absent a substantial financial investment in courts, prosecutors' offices, and public defenders' offices. Of course, it is not possible to replace all plea bargains with trials since trials are costly, this being the justification for plea bargaining. Thus, any proposal to increase trial frequency must take into consideration the resulting decrease in prosecutions of guilty defendants and compare that to the hypothesized decrease in erroneous verdicts. Importantly, however, such a shift would result in fewer prosecutions of guilty defendants, whereas it may result in fewer erroneous verdicts. The following example will help to illustrate this point: assume that in a given year, a prosecutor is able to prepare for and complete ten trials and zero plea bargains or zero trials and one hundred plea bargains. Assume further that each trial results in a conviction. This implies a ten to one ratio of plea bargain convictions to trial convictions. If, hypothetically, 10% of the trials and 20% of the plea bargains result in erroneous verdicts, then, in the first case, one innocent defendant and nine guilty defendants would be convicted. In the second case, twenty innocent defendants and eighty guilty defendants would be convicted. This may seem startling before one considers that, in the case of the trial prosecutor (as opposed to the plea-bargaining prosecutor), seventy-one guilty defendants were not prosecuted at all.

The current trade-off between plea bargains and trials is perhaps the unintended consequence (although not necessarily a deleterious consequence) of the political process. The political process defines its intended aims (in this case, the administration of criminal justice), balances the competing interests that underlie the criminal justice system (accuracy, costs, etc.), and attempts to accomplish those aims within the parameters of the real world, i.e. with limited resources. Prosecutorial misconduct is logically unrelated.

Perhaps Professor Reynolds is actually making a different argument: plea bargaining results in injustice generally. That is a point worthy of consideration. As an example, consider the current estimate that more than 90% of felony criminal cases are resolved via plea bargain.¹⁴¹ If 10% or 20% resulted in a trial, would that alleviate the injustice Professor Reynold's perceives? If so, why? If we assume that defendants will act in their self-interest, the fact that virtually

141. *About the Federal Courts – Criminal Cases*, <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases>.

all felony cases result in a plea bargain could be interpreted to mean that most defendants are, in fact, guilty of the charged offenses and know they will be convicted at trial. This implies that defendants realize the penalty associated with the plea deal constitutes a material discount from the sentence that would follow conviction at trial.¹⁴²

Ironically, the fact that more than 90% of felony cases are resolved via guilty plea could be understood as an injustice to the victims of crime and to the public. After all, if at least 90% of defendants presented with the option of going to trial choose instead to plead guilty, this implies that the terms associated with the offered plea deal are too lenient in light of the alleged criminal conduct, at least relative to the legislatively-determined range of possible punishments from within which the judiciary is able to select a specific punishment. In this regard, the victims of the offense that are the subject of the plea, and the public more generally, are treated unjustly. This need not be the case in any single instance to be the case when considering all plea bargains collectively. But, to be fair, if the plea-bargaining process were a perfect approximation of justice (and took no account of limited prosecutorial and judicial resources), one would expect exactly one-half of all plea deals to be accepted and the remainder of all cases to be adjudicated at trial. And, for those cases that went to trial, it is fair to say that the vast majority would result in conviction.

B. Selective Prosecution

Another form of alleged prosecutorial misconduct occurs when a prosecutor is presumed to choose to prosecute a defendant for reasons unrelated to his culpability, such as race, ethnicity, political affiliation, or celebrity. This is especially true of prosecutions alleging *malum prohibitum* conduct, such as violations of campaign finance laws and federal firearms laws. Recent putative examples include the

142. The standard response to this argument is that more than 90% of felony cases are resolved via plea bargain because prosecutors “over charge” cases. I dispense with this argument in the sub-section “Overcharging and Numerous Counts,” *infra*.

prosecution of Dinesh D'Souza, notable conservative author,¹⁴³ and the non-prosecution of David Gregory, notable liberal journalist.¹⁴⁴

D'Souza was tried and convicted for channeling a \$20,000 donation to United States Senate candidate Wendy Long, a violation of federal campaign finance laws.¹⁴⁵ Gregory, on the other hand, was never prosecuted for a flagrant violation of Washington D.C.'s ban on the possession of "high-capacity" ammunition magazines.¹⁴⁶ The evidence established Gregory's guilt beyond a reasonable doubt, but an affidavit for his arrest went unheeded by prosecutors.¹⁴⁷ Putting aside the evidentiary merits of these prosecutorial decisions, they appear politically motivated if only because other people in similar positions seem to have avoided criminal prosecution for campaign finance offenses, whereas ordinary, non-celebrities are prosecuted even for unintentional violations of strict firearms laws.¹⁴⁸ At the very least, the appearance, if not the substance, of bad faith and hypocrisy lends credence to their concerns.

But, for purposes of this article, there is no doubt that the conduct has been deemed criminal by statute. Thus, the outcry arises from the appearance that prosecutors are abusing their authority through

143. See *Selective Prosecution of Dinesh D'Souza: Liberals Take Revenge on a Conservative Documentary Producer*, THE WASHINGTON POST (May 19, 2014), <http://www.washingtontimes.com/news/2014/may/19/editorial-selective-prosecution-of-dinesh-dsouza/>; Erica Ritz, "Selectively Prosecuted": Dinesh D'Souza Speaks Out About Pleading Guilty in Campaign Finance Case, THE BLAZE (June 3, 2014, 1:15 PM), <http://www.theblaze.com/news/2014/06/03/selectively-prosecuted-dinesh-dsouza-speaks-out-about-pleading-guilty-in-campaign-finance-case/>.

144. Steven Nelson, *David Gregory Arrest Affidavit: NBC Knew He Would Violate D.C. Gun Law*, U.S. NEWS (Jan. 23, 2015, 4:07 PM), <https://www.usnews.com/news/articles/2015/01/23/david-gregory-arrest-affidavit-nbc-knew-he-would-violate-dc-gun-law>.

145. 2 U.S.C. §§ 441f and 437g(d)(1)(D). See also *Indictment of Dinesh D'Souza*, available at <https://www.documentcloud.org/documents/1009434-indictment-against-dinesh-dsouza.html>.

146. D.C. Code § 7-2506.01 ("No person in the District shall possess . . . any large capacity ammunition feeding device regardless of whether the device is attached to a firearm. For the purposes of this subsection, the term "large capacity ammunition feeding device" means a magazine . . . or similar device that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition.").

147. Affidavit available at <http://www.judicialwatch.org/wp-content/uploads/2015/01/Jacobson-v-DC-Gregory-arrest.pdf>.

148. New Jersey has a well-deserved reputation for ensnaring law-abiding citizens within its draconian criminal firearms laws. See, e.g., Charles C.W. Cooke, *New Jersey's Gun Laws Are as Confusing as Its Highways – The Garden State's Draconian Firearms Regulations Have Ensnared Another Innocent Person – But He May Beat The Rap*, NAT'L REV. (Mar. 20, 2015, 3:15 PM), <http://www.nationalreview.com/article/415739/new-jerseys-gun-laws-are-confusing-its-highways-charles-c-w-cooke>.

selective prosecutions based on race, political affiliation, or another inappropriate factor. As described above, there are innumerable articles lamenting the prosecution of Dinesh D'Souza.¹⁴⁹ But, there do not appear to be any hard facts supporting the supposition that the decision to prosecute D'Souza was politically motivated. Indeed, it appears that campaign finance violations are prosecuted with some regularity.¹⁵⁰ The vast majority of these prosecutions obviously don't attract the publicity D'Souza's prosecution attracted, suggesting that the public misunderstands the relative frequency with which democrats are prosecuted for the same offenses.

Moreover, the selective prosecution argument is one-dimensional to the extent that it presupposes that prosecutions that are not politically-motivated are acceptable. This one-dimensionality is illustrated by a simple hypothetical. Imagine that a well-known republican and a well-known democrat both committed unrelated *malum in se* crimes, like burglary. Now assume that the evidentiary merits of both cases and all other factors were identical, but that only the democrat were prosecuted. It is fair to assume that public outrage would focus on the non-prosecution of the guilty republican. Now change the hypothetical and assume that the republican and democrat didn't commit burglary but, instead, were to violate *malum prohibitum* campaign finance laws. If prosecutors charged only the democrat, it is fair to assume that a greater portion of the public outrage would focus on the fact that the guilty democrat was prosecuted, not that the guilty republican was not. This distinction helps to illustrate that people intuit that the real problem is with ill-conceived laws, not with the decisions to enforce them.

Finally, what would "non-selective prosecution," for lack of a better term, look like? Should we assign prosecution quotas requiring that aggregate prosecution distributions correspond to the number of registered Republicans, Democrats, and Independents within a given jurisdiction? Should we audit the Department of Justice and state prosecutors' offices to ensure compliance with these audits? If the audits were to reveal non-compliance with the quotas, would that generate a mandate akin to the following: next quarter, your office must prosecute 17% more republicans? No fair-minded American

149. See note 143, *supra*.

150. Alison Frankel, *Dinesh D'Souza Faces "Surprisingly Frequent" Campaign Finance Charges*, REUTERS BLOG (Jan. 14, 2014), <http://blogs.reuters.com/alison-frankel/2014/01/24/dinesh-dsouza-faces-surprisingly-frequent-campaign-finance-charges/>.

remotely concerned with the rule of law would condone this course of action.

The problem then, stated succinctly, is that the criminalization of *malum prohibitum* conduct has yielded a state of affairs in which prosecutions may appear to be, and may actually be, politically motivated. This, in turn, created an understandable uproar against such politically-motivated prosecutions (or, stated more accurately, against prosecutions that *appear* politically motivated). As described above, however, that uproar is better understood as a reaction to the criminalization of conduct that is not intuitively or morally wrong. Nevertheless, that small ground swell became part of the rising tide that washed over prosecutors generally—a tide caused by supposed systemic abuses that do not exist.

C. Criminalization of *Malum Prohibitum* Conduct

Of the issues addressed in this article, none enjoys broader bipartisan support than the concern that “over-criminalization” has deleterious social consequences.¹⁵¹ However, this broad support may have augmented the unfortunate belief that over-criminalization is a problem within the domain of prosecutors. For example, an article in *Slate* bemoans prosecutors who are “extremely aggressive in their charging decisions without having to worry about how much it will cost the local taxpayers who elected them.”¹⁵² Author Leon Neyfakh’s explicit concern is the cost of incarceration, which he claims amounts to “\$31,286 per year.”¹⁵³ He believes that these costs can be managed by turning them into expenses on the annual budgets of prosecutors’ offices. This will, he presumes, deter prosecutors from “overzealous prosecution.” Clever, no doubt, but, his more fundamental concern “is the idea that prison is just one way to deal with crime—and it’s far from clear it’s the most effective one.”¹⁵⁴ In other words, that author believes certain conduct should not result in incarceration because incarceration is expensive and ineffective, and then concludes that

151. CJ Ciaramella, *Criminal Justice Reform Brings Together Liberals, Conservatives*, Washington Free Beacon (November 20, 2014, 10:00 AM), <http://freebeacon.com/issues/criminal-justice-reform-brings-together-liberals-conservatives/>.

152. Leon Neyfakh, *How to Stop Overzealous Prosecutors*, SLATE (Feb. 25, 2015, 8:44 PM), http://www.slate.com/articles/news_and_politics/crime/2015/02/overzealous_prosecutors_hold_them_accountable_by_defunding_state_prisons.html.

153. *Id.*

154. *Id.*

prosecutors must be overzealous because the relevant conduct resulted in incarceration.

There are many problems with this framework: none of the law criminalizing the conduct, the range of sentences available following a conviction for the conduct, or the specific sentence imposed for a given conviction is determined by the prosecutor. The first two are determined by the legislature. The last is determined by the court. The prosecutor is simply the instrument that connects the legislature's will with the court's judgment. It is meaningless to characterize that instrument as "overzealous" when he applies predetermined laws to specific facts and presents the combination to a court for its consideration and final approval.

"Overzealous," then, becomes a useful proxy-word that reflects the personal views of the speaker regarding the appropriateness of sending people to prison for certain misconduct. Undoubtedly, any person could identify an example of misconduct that he feels should not have resulted in prison time. Analogously, that same person could identify conduct that should have resulted in prison time. What is important, however, is that most existing criminal laws command the assent of a majority, and examples to the contrary are few. Otherwise, what would prevent a legislature from de-criminalizing the conduct? At any rate, it does not follow from this subjective feeling that the prosecutor was "overzealous" in applying extant law to specific facts.

This non-sequitur is evidenced by the author's seemingly unintentional transition when he quotes Professor W. David Ball: "The state should not pay for prison unless prison is better, and prison isn't better."¹⁵⁵ It is unclear from the article whether this quotation is a fair characterization of Professor Ball's view. It appears, however, that the *Slate* author believes that prison is never better. Following the logic inherent in the author's reasoning would require the conclusion that every time a conviction results in incarceration, a prosecutor must have acted "overzealously." This might be an unpopular characterization, even among people who believe over-criminalization is problematic.

D. Overcharging and Numerous Counts

Some commentators argue that "prosecutors frequently charge more and greater offenses than they can prove beyond a reasonable

155. *Id.* (emphasis added).

doubt,”¹⁵⁶ or that they include charges that “add[] an enhancement of little merit.”¹⁵⁷ Neither commentator provides an iota of empirical support for either of these blanket assertions. Moreover, the quantity of charges that are too many, and the meaning of the term “little merit,” in this context are not clear. Undaunted, however, they believe that these actions “give an unfair advantage to the prosecutor.”¹⁵⁸ It seems that both commentators are unaware that both actions (charging many offenses or offenses that cannot, at the time of charging, be proven beyond a reasonable doubt) may be employed for legitimate purposes. Indeed, the conclusion that such actions are unfair is presupposed by the premise that prosecutors “overcharg[e] [to] forc[e] the defendant to determine whether going to trial is worth the risk of the devastating penalties the inflated charges carry.”¹⁵⁹ Another commentator repeats this concern. She begins with the premise that prosecutors overcharge to gain “more leverage during plea negotiations” and concludes that this “caus[es] the defendant to plead guilty to ‘reduced charges’ for fear of being convicted of all of the charges brought in the indictment.”¹⁶⁰ Neither commentator provides any empirical support for the premise or the conclusion. But, once the premise is accepted, it is easy to reach the emotionally-charged, but inaccurate, conclusion that prosecutors are attempting to obtain an “unfair” advantage.

More practical explanations exist. For example, prosecutors may present entire cases (consisting of one or several charges) to a grand jury prior to the time that the underlying investigation is complete (i.e., when the charge can be proven to a lesser standard than beyond a reasonable doubt) in order to toll the statute of limitations. They can do this with the full intent of completing the investigation post-indictment or, indeed, in the hopes that the case will be resolved via a plea bargain without the need for further investigation.

Furthermore, prosecutors may present numerous charges for statutory reasons, even though logic might call for only one charge. For example, consider the crime in New Jersey of second degree health care claims fraud: “A [doctor] is guilty of a crime of the second degree if [he] knowingly commits health care claims fraud in the

156. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 413 (2001).

157. Caldwell, *supra* note 28, at 62.

158. Caldwell, *supra* note 28, at 62.

159. Caldwell, *supra* note 28, at 62–63.

160. Davis, *supra* note 156, at 413.

course of providing professional services.”¹⁶¹ “Health care claims fraud” means:

making, or causing to be made, a false, fictitious, fraudulent, or misleading statement of material fact in, or omitting a material fact from, or causing a material fact to be omitted from, any record, bill, claim or other document, in writing, electronically or in any other form, that a person attempts to submit, submits, causes to be submitted, or attempts to cause to be submitted for payment or reimbursement for health care services.¹⁶²

In the medical industry, the medical billing process has been standardized. Medical providers submit invoices to their patients’ insurance carriers on standardized “health care claims forms” using codes designated in the Current Procedural Terminology manual published by the American Medical Association. These “CPT” codes correspond to medical procedures. The insurance carriers use these health care claims forms to determine whether the coded medical procedures are covered by the underlying insurance policies and also to determine how much to pay the doctors. The uniformity of this billing practice may have reduced costs, but it also contributed to fraud and theft. Unscrupulous medical providers falsify these health care claims forms in order to bill for services they did not render or for patients they did not attend to. Under the criminal code cited above, if a doctor submits only *one* of these health care claims forms on which he has coded for a procedure that he did not, in fact, provide, then that doctor has committed health care claims fraud, a second-degree felony. In New Jersey, second-degree felonies carry a presumption of incarceration,¹⁶³ and are punishable by five to ten years in state prison.¹⁶⁴

In practice, however, presenting evidence to a jury of only one falsified health care claims form is highly unlikely to convince a jury, beyond a reasonable doubt, that a doctor who in the ordinary course of business submitted thousands of health care claims forms *knowingly* committed a criminal offense on one particular occasion. Thus, practically speaking, it is necessary to present evidence to a

161. N.J. STAT. ANN. § 2C:21-4.3a (West 2013).

162. N.J. STAT. ANN. § 2C:21-4.2.

163. N.J. STAT. ANN. § 2C:44-1d (“The court shall deal with a person who has been convicted of a crime of the first or second degree . . . by imposing a sentence of imprisonment.”).

164. N.J. STAT. ANN. § 2C:43-6(a)(2).

grand jury that an unscrupulous doctor submitted dozens or hundreds of falsified health care claims forms. A close reading of the health care claims fraud statute reveals that each such falsified health care claims form submitted to an insurance carrier (or to the state's Medicaid program) is a separate second-degree offense. Thus, a doctor who engages in a multi-year scheme to submit hundreds of falsified health care claims forms should be indicted on hundreds of counts of second degree health care claims fraud. To consolidate them all into one count would be to ignore the plain meaning of the statute.

Employing the above commentators' understanding of charging practices to this specific situation would mandate the conclusion that an indictment charging hundreds of counts of health care claims fraud is meant to "force[] the defendant to determine whether going to trial is worth the risk of the devastating penalties the inflated charges carry."¹⁶⁵ In practice, however, a doctor convicted of hundreds of counts of second degree health care claims fraud will be sentenced to a total of between five and ten years of prison, even though *each* such count is punishable individually by five to ten years of prison. This is so because the sentence on each count will run concurrently to the sentences imposed on all other counts.¹⁶⁶ Circumstances are similar in federal court, where each conviction for health care fraud, pursuant to 18 U.S.C. § 1347, are grouped pursuant to relevant sentencing guidelines and the sentences are served concurrently not consecutively.¹⁶⁷ All prosecutors, defense attorneys, and judges know this. As a result, the existence of hundreds of counts in an indictment or other charging document has no effect on the defendant's decision to accept a given plea offer—it makes no difference whether he pleads to one count or one hundred counts. It is understandable, however, that inexperienced observers are not familiar with this practice and, therefore, have confused a theoretical problem for a real one.¹⁶⁸ Nevertheless, this understanding is inconsistent with the belief that including a large number of counts in an indictment is a form of prosecutorial misconduct.

165. Caldwell, *supra* note 28, at 62–63.

166. This is not limited to health care claims fraud.

167. See U.S. SENTENCING GUIDELINES MANUAL § 5G1.2, cmt. n.1 (U.S. SENTENCING COMM'N 2016) ("Except as otherwise required by . . . law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently . . .").

168. See, e.g., *An Epidemic of Prosecutor Misconduct*, CTR. FOR PROSECUTOR INTEGRITY 1, 4 (2013), <http://prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf>. See *id.* at 5, for bizarre reasoning that prosecutorial misconduct must be an epidemic because "42.8% of [survey] respondents" say it is. The survey respondents were the "public." *Id.* at 5.

IV. COMMENTS ON SOME PROPOSED SOLUTIONS

A. *Revisiting Brady, Its Progeny, and Related Cases*

Many commentators believe that the standard set in *Brady* is insufficient, concluding that the loophole, which precludes reversal in the case of “harmless error,” harms defendants’ rights and excuses prosecutorial misconduct.¹⁶⁹ Many of these commentators argue that the standard set in *Brady* should be revised.¹⁷⁰ The first appears to be Professor Rosen, who, in the context of analyzing prosecutorial misconduct, proposed revisions to *Brady* nearly thirty years ago.¹⁷¹ Since the analyses by subsequent authors retread his original cogent argument, my response focuses on his article: *Disciplinary Sanctions Against Prosecutors For Brady Violations: A Paper Tiger*, published in 1987.

Rosen’s analysis began with citations to dozens of cases of putative prosecutorial misconduct—he claims that these cases support his assertion that “[p]rosecutorial suppression of exculpatory evidence or presentation of false evidence is not an isolated phenomenon.”¹⁷² However, the bulk of those cases resulted in reversals under the standard set in *Brady*, or they otherwise depicted responsible prosecutors ensuring that defendants’ rights were protected, undermining the author’s argument for revisiting *Brady* at the outset.¹⁷³ The reader will recall that the *Brady* Court held “that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”¹⁷⁴ This is exactly the correct outcome, and is sufficiently capacious to merit reversal in any case involving the suppression of material evidence. But, the precedent could be understood to stand for a broader proposition. As noted, the “good faith or bad faith of the prosecutor” is irrelevant to the determination of materiality. This

169. Michael T. Fisher, *Note: Harmless Error, Prosecutorial Misconduct, and Due Process: There’s More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1319 (arguing “the state should bear the burden of demonstrating that the prosecutorial misconduct did not affect the outcome of the proceeding”); see Rosen, *supra* note 2, at 697.

170. Fisher, *supra* note 169, at 1319; Rosen, *supra* note 2, at 697.

171. See Rosen, *supra* note 2, at 697.

172. Rosen, *supra* note 2, at 694; see also Rosen, *supra* note 2, at 697–703 & nn.19–50.

173. See *supra* notes 121–23.

174. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

implies that the scope of *Brady* goes beyond evidence that is “suppressed,” at least to the extent that “to suppress” is an active verb implying consciousness on the part of the prosecutor. In other words, it is difficult to imagine how a prosecutor could suppress material evidence in good faith. As such, if material evidence is overlooked, forgotten, or misunderstood by a prosecutor, there can be no argument that the prosecutor acted in bad faith with respect to such evidence by not disclosing it. But, there also can be no argument that the prosecutor “suppressed” such evidence. Quite simply, the verb cannot accommodate ignorant or unknowing omissions. Nevertheless, under *Brady*, a due process violation would be sustained, and reversal would be the remedy.

This wasn’t enough, apparently, for Rosen, who argued that “[m]ateriality has a special meaning in the *Brady* due process context.”¹⁷⁵ By this Rosen meant that under *Brady*, “suppressed evidence must be of sufficient importance that, when viewed in light of all of the evidence in the case, its presence or absence would affect the outcome of the case.”¹⁷⁶ Rosen’s assertions notwithstanding, this is the standard definition of materiality, not a “special” definition. More important, however, is the obvious observation that a lesser standard would result in a due process violation whenever the prosecution failed to disclose *any* evidence, even the most ancillary item related to the merits of a case in the most trifling way. This is exactly the standard that Rosen proposed: “[w]ith regard to *Brady*-type misconduct,” he explained, the Supreme Court should adopt “a standard that requires [automatic] reversal of a conviction on a finding that a prosecutor intentionally suppressed exculpatory evidence or presented false evidence; that is, on a finding that a prosecutor acted in bad faith.”¹⁷⁷

Rosen’s proposal reveals two conceptual difficulties. First, by appending the clause “that is, on a finding that a prosecutor acted in bad faith” to the clause regarding the suppression of exculpatory evidence, he presumes that suppression can only be done in bad faith.¹⁷⁸ He is right about this point, which is simply a restatement of the point made above that to suppress, used as an active verb, necessarily implies bad faith. But, if this interpretation is to prevail, then Rosen’s proposed rule must be understood to be narrower in one respect than the rule set by *Brady* and its progeny, which require

175. Rosen, *supra* note 2, at 705.

176. Rosen, *supra* note 2, at 705.

177. Rosen, *supra* note 2, at 737.

178. Rosen, *supra* note 2, at 737.

reversal whenever exculpatory evidence is introduced at trial, irrespective of bad faith.¹⁷⁹ Second, Rosen's proposal referred erroneously to exculpatory evidence and the presentation of false evidence as "*Brady*-type misconduct." The latter, however, is not, strictly-speaking, *Brady*-type misconduct. Rather, it is more properly understood to be *Mooney*-type misconduct. *Mooney* and its progeny establish unequivocally that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."¹⁸⁰ The genealogy of these cases extends far enough to require reversal even where evidence "gave the jury a false impression,"¹⁸¹ regardless of whether the evidence was false in a traditional binary sense. Needless to say, there is no materiality requirement in this context.¹⁸²

The prevailing law set by *Brady*, *Mooney*, and affiliated cases can be summarized as follows: (1) the failure to discover material exculpatory evidence requires reversal; and (2) the use of "false evidence" (or evidence that creates a "false impression") regardless of materiality requires reversal. Thus, Rosen's proposed rule, read strictly, would not require reversal in any case not already covered by *Brady* or *Mooney*, and might not require reversal where *Brady* would require it. How, then, can we interpret Rosen's proposal so as to give it traction where *Brady* and *Mooney* might fail? His closing remarks are illuminating:

The proposed bad faith rule would serve . . . to deter future misconduct by removing any incentive for a prosecutor to gamble that a decision to suppress . . . will be given retrospective approval because of the strength of the other evidence in the case.¹⁸³

179. *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, *irrespective of the good faith or bad faith of the prosecution.*" (emphasis added)).

180. *Miller v. Pate*, 386 U.S. 1, 7 (1967) (citing *Mooney v. Holohan*, 294 U.S. 103 (1934)); *see also*, *Giglio v. United States*, 405 U.S. 150, 153 (1972).

181. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

182. *But see*, *Giglio*, 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)) ("[A] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .'"). But, *Napue* doesn't stand for that proposition. Rather, the standard set by *Napue* is whether the false testimony "may have had an effect on the outcome of the trial." 360 U.S. at 272. This misinterpretation worked its way through the case law up to and including *United States v. Agurs*, 427 U.S. 97, 103 (1976), which was overruled.

183. Rosen, *supra* note 2, at 741.

Courts don't give "retrospective approval" to bad faith decisions to suppress evidence. Rather, appellate courts set aside the ethical concerns associated with misconduct in order to focus on the question of materiality. If prosecutorial misconduct is material, reversal is required, irrespective of bad faith. In this regard, the nature of Rosen's proposal emerges: his "bad faith rule" is really a proposal to adopt an "any misconduct irrespective of consequence" standard. That is, Rosen was really proposing that courts reverse any conviction that involved any misconduct by the prosecutor, presumably including mild forms of misconduct such as improper forms of closing argument. This extreme standard provides some insight into the nature of the "prosecutors-gone-wild" mindset. It assumes that prosecutorial abuse is so rampant, the lack of evidence for this proposition notwithstanding, that we ought to penalize even the most trivial "abuses" by reversal.

Rosen attempted to mitigate the magnitude of his proposal by asserting that "[adding] a bad faith standard to the current *Brady* doctrine is not an attempt to make the due process clause a code of ethics for prosecutors."¹⁸⁴ In practice, however, Rosen's proposal would seem to mandate new and separate post-conviction judicial inquiries into the minds of prosecutors. As a simple example, imagine that a defendant in a large white-collar case involving thousands of records discovers years after his conviction that certain evidence of minimal relevance was not disclosed by the prosecutor. Assume also that the defendant loses an appeal on *Brady* grounds because the evidence is, *ex hypothesi*, immaterial. Rosen's proposal would still require some formal judicial inquiry into whether the prosecutor intended to withhold this immaterial evidence. In a small case, this would require the prosecutor and his office to locate the case file, review it thoroughly, review all correspondence relating to the case, review all relevant internal memoranda about the case, discuss the matter with all case agents and have them review their archived files, and then decide whether to adopt one of three possible positions: (1) admit the withholding was intentional (bad faith); (2) assert that the withholding was unintentional (good faith); or (3) assert that no determination as to intentionality can be made one way or the other.

If the prosecutor's office admits that the withholding was intentional, Rosen's bad faith rule requires reversal, but only after the incredibly burdensome process described above has been completed. If the prosecutor's office ascertains that the withholding was

184. Rosen, *supra* note 2, at 741.

unintentional, then further litigation must follow the already burdensome process described above until the adjudicating body can make a determination. Both of these outcomes contemplate the expenditure of imaginary resources. But, these are the least costly outcomes in this high-cost endeavor.

The most likely outcome would be that no determination could be made as to whether the conduct was intentional due to the obvious fact that it would be extraordinarily difficult to recreate the circumstances under which evidence was not discovered. This problem would be compounded if the relevant prosecutor left the office in the intervening years.¹⁸⁵ This would require that Rosen's bad faith rule impose a burden of proof on one of the parties: either the burden is on the government to prove the conduct was unintentional or the burden is on the defendant to prove that it was intentional. If the burden is to be on the government, then the consequences of Rosen's rule would disrupt the entire criminal justice system: convictions would be reversed whenever a prosecutor failed to turn over an item of trivial evidentiary value for unknown reasons. This sounds exactly like an attempt to "make the due process clause a code of ethics for prosecutors."¹⁸⁶

Almost ten years after Rosen's proposal, Professor Gershman spelled out explicitly the obvious implications of Professor Rosen's proposals. He placed the exact burden described above on the government. He argued that "courts should always consider a prosecutor's intent in determining whether a rule was violated and whether the verdict was prejudiced,"¹⁸⁷ and his examples contemplated that prosecutors would have to prove their good faith. For instance, Gershman identified what he calls "subterfuges", i.e. cases in which "a prosecutor tries to introduce inadmissible hearsay evidence under the guise of impeachment."¹⁸⁸ In the prototypical case, the prosecutor:

calls a witness who has made a statement prior to trial that incriminates the defendant, but who has retracted that statement before trial. Knowing of the retraction, but desiring to place the original inculpatory statement before the jury anyway, the prosecutor puts the witness on the stand,

185. A likely outcome, given the observation that "the average tenure of an Assistant D.A. in New Orleans [is] two years." Dunahoe, *supra* note 7, at 60.

186. Rosen, *supra* note 2, at 741.

187. Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 132 (1998).

188. *Id.* at 146.

questions the witness about the prior statement, and after the witness denies having made the statement, or claims that the statement is untrue, calls the person to whom the prior statement was made to elicit proof of the statement under the guise of impeaching the witness declarant.¹⁸⁹

As professor Gershman recognized, there is nothing improper about this *per se*.¹⁹⁰ Much depends on the nature of the witness's statement. But, Professor Gershman added the following: "[I]f a court finds that the prosecutor knew prior to putting the witness on the stand that the witness would not contribute relevant information, then a court would be justified in scrutinizing the prosecutor's intent in calling that witness."¹⁹¹ It is difficult to imagine how a witness who gave a statement that clearly incriminated a defendant could not possibly "contribute relevant information," whether or not the witness later retracted that statement. Indeed, witnesses who retract statements frequently do so because they were threatened by the defendant (or by people operating on his behalf). In that situation, not only would the initial incriminating statement be "relevant information," but the subsequent retraction would itself be relevant. My point is not to provide some justification for the hypothetical prosecutor in Professor Gershman's example; rather, it's to point out that Professor Gershman's example of bad faith involved a prosecutor calling a witness who at some point made a statement that clearly incriminated the defendant.

Professor Gershman then places the burden on the government to justify its decision, possibly years after the fact: "If the prosecutor offers no plausible explanation for his conduct, then a court would be justified in concluding that the prosecutor intended to manipulate the rules of evidence in order to place inadmissible evidence before the jury."¹⁹² Having determined that the government should bear the burden of persuasion, Gershman next loaded the dice: "certain types of rule-violating conduct by prosecutors [is] . . . so frequently encountered that . . . courts in these instances should *presume* that the violation was intentional."¹⁹³

Professor Gershman's argument reduces to the following: if a material witness has made inconsistent statements, calling that

189. *Id.*

190. *Id.*

191. *Id.* at 146–147.

192. *Id.* at 147.

193. *Id.* at 162 (emphasis added).

witness to testify is prosecutorial misconduct even if the prosecutor discloses the inconsistent statements, unless the prosecutor can articulate some justification for calling the witness that is unrelated to the witness's relevant testimony; and, courts should presume that there is no such justification. Moreover, a failure to overcome the presumption should result in reversal of the defendant's conviction even if the error was immaterial. This result would flow directly from the logic of Professor Rosen's proposed revisions to *Brady*, as extrapolated by Professor Gershman. The consequences of it would severely impede the functioning of the criminal justice system.

B. Grand Juries

The premise that grand juries serve as an institutional check to prosecutorial misconduct specifically, or to systemic abuses in the criminal justice system generally, is not shared universally. Some commentators believe that "grand juries should be relied on more, not less," and believe they should resemble the full and familiar petit jury trial.¹⁹⁴ Others believe grand juries are the problem.¹⁹⁵ In this respect, there is no consensus whether grand juries aggravate or mitigate prosecutorial misconduct.

One editorialist laments that "typically prosecutors act as puppeteers, controlling all of the evidence and testimony presented to the grand jury and directing [the grand jury] to indict on the most serious possible counts."¹⁹⁶ He would prefer "that grand juries proceed . . . with an impartial prosecutor, the lawyer representing the target if the lawyer requests to be present, and with full transparency at the end of the process,"¹⁹⁷ by which he means public disclosure of witness testimony together with a description of all relevant evidence. This proposed revision presupposes that prosecutors are engaged in widespread misconduct that a different grand jury system would remedy, a supposition unsupported empirically.

Moreover, to the extent that the rules of criminal procedure are applied more fully to the grand jury process (the presence of defense counsel, the opportunity to cross-examine witnesses, the opportunity to present the defense's case, full public disclosure of evidence and testimony, etc.), the more closely does the grand jury process

194. Harvey Silvergate, *Ferguson's Unexpected Lessons*, THE BOSTON GLOBE (Nov. 26, 2004), <http://www.bostonglobe.com/opinion/2014/11/26/ferguson-unexpected-lesson-over-grand-juries/7PhNikOvwGG6NfoQiHr9iO/story.html>.

195. Reynolds, *supra* note 9.

196. Silvergate, *supra* note 194.

197. Silvergate, *supra* note 194.

approximate a full trial. This is particularly true in the case of those commentators who argue that prosecutorial misconduct is caused in part by rules that permit “prosecutors [to] bring [] charges supported by probable cause.”¹⁹⁸ They believe that such rules are lamentable because “probable cause is a minimal threshold that is well below what is required to convict” and, therefore, “insufficient to deter unprincipled prosecutors” from engaging in misconduct.¹⁹⁹ In essence, the proponents of a more fulsome grand jury process really are arguing that defendants ought to be convicted twice by independent petit juries, and that the rules of evidence and criminal procedure as well as the panoply of constitutional protections apply at what is otherwise intended to be a preliminary screening phase. One wonders why two convictions would be sufficient. Why not three or four?

Ironically, one proponent of these revised grand jury standards notes that a more fulsome grand jury process was employed in 2014 by St. Louis County Prosecutor Robert McCulloch in connection with the shooting death of Michael Brown.²⁰⁰ Setting aside the merits of that case, it is a reasonable supposition that many people who believe prosecutorial misconduct is rampant also believe *that* grand jury erred when it declined to indict Officer Darren Wilson. The author reconciles these apparent inconsistencies by asserting that:

this sort of grand jury reform will almost certainly result in decreasing the conviction of the innocent and, not so incidentally, lowering the incarceration rate of, among others, many young, black men who now populate our prisons at such a disproportionate rate.²⁰¹

But this does not clarify which problem the author believes the “improved” grand jury process will solve. The purpose of the grand jury is “to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.”²⁰² With this in mind, the fulsome grand jury process employed

198. Caldwell, *supra* note 28, at 63.

199. Caldwell, *supra* note 28, at 63.

200. Silvergate, *supra* note 194.

201. Silvergate, *supra* note 194. Any material obstacle to criminal prosecution will have the incidental consequence of “decreasing the conviction of the innocent,” if only for the mundane reason that it would also decrease, in much greater quantities, convictions of the guilty. Another way to reduce the rate of mistaken convictions would be to eliminate criminal prosecution entirely. Silvergate, *supra* note 194.

202. Woods v. Georgia, 370 U.S. 375, 390 (1962).

in the Michael Brown case apparently worked as intended—it avoided a malicious prosecution based on ill will. It accomplished this, however, not by precluding prosecutorial misconduct (of which there were no allegations); but, rather by returning a no-bill notwithstanding the immense ill will and pressure from a public inflamed by outside agitators. However, the grand jury was only afforded this opportunity *after* the prosecutor, presumably having reviewed the evidence and having determined there was no case (a conclusion reached every day by prosecutors across the country) realized his predicament: (1) use his prosecutorial discretion and decline to present the case to the grand jury; or (2) present the case to the grand jury, but permit the jurors to direct the proceedings, to call and question fact witnesses, and to disclose the whole process to the public. In either case, the prosecutor believed that Officer Wilson should not have been indicted, and he was not.²⁰³

This is particularly ironic, however, because it appears that the fulsome grand jury returned the same decision that it would have returned had the prosecutor taken a more active and leading role—no indictment. In other words, the prosecutor empaneled a powerful grand jury to mitigate the ire of an angry mob and reach the proper result. Atticus Finch would be proud.

Illustrating the contentious views surrounding the grand jury in the Michael Brown case is an excerpt from a December 2014 polemical in *Slate*. There, the author argued that:

secret grand jury proceedings [allow] prosecutors [to] pass the buck, using grand jurors as pawns for political cover. The Michael Brown and Eric Garner cases are examples of how prosecutors manipulate the grand jury process.²⁰⁴

Setting aside the fact that the grand jury empaneled in the Brown case was no secret, the subsequent explanation of the prosecutor's "manipulation" of the Brown grand jury reveals the author's bias in favor of a pre-determined result, as opposed to one dictated by a reasonable evaluation of the evidence. After declaring that "the prosecutor improperly asked Wilson leading questions" and

203. An argument could be made that a prosecutor commits misconduct by presenting to *any* grand jury a case he knows is not supported by the evidence.

204. LaDoris Hazzard Cordell, *Grand Juries Should Be Abolished*, SLATE (Dec. 9, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/abolish_grand_juries_justice_for_eric_garner_and_michael_brown.html.

lamenting that the prosecutor didn't interrupt Wilson when he gave a "1,889-word narrative about the shooting," she concludes:

By convening grand juries, the prosecutors in Missouri and New York ensured that there would be no justice for Michael Brown and Eric Garner. Sadly, these two men are gone. But if we abolish criminal grand juries, at least their deaths will not have been in vain.²⁰⁵

From this, it seems the author believes that justice required that the primary witness in the Brown case not be permitted to speak and that, instead, his case skip the grand jury process and proceed directly to trial. But, if empaneling a grand jury and permitting Officer Wilson to testify uninterrupted are unjust actions, then it is difficult to escape the ominous conclusion that justice could only be served if Wilson were convicted summarily without the opportunity to testify in his defense, whether to a petit or grand jury. This, of course, is not a tenable position.

In summary, some commentators believe that grand juries reduce the incidence of prosecutorial misconduct, and others believe that grand juries are the embodiment of it. The author of the *Slate* piece cites to specific examples that don't support her conclusion. No author cites to any empirical support establishing that putative specific examples are large-scale problems. Without more, it's not clear that the use or non-use of grand juries has any connection to prosecutorial misconduct.

C. Independent Prosecutorial Commissions

Several authors applaud the use of independent or "neutral" prosecutorial review commissions,²⁰⁶ including those that are comprised at least in part of lay-persons.²⁰⁷ Various states have attempted "neutral" oversight of prosecutorial functions. Texas, for example, "created the Texas Prosecutor Council" in 1977.²⁰⁸ This council, which was abolished in 1986, consisted of a "combination of lay citizens and prosecuting attorneys" and permitted "[a]ny member of the public [to] file a complaint alleging prosecutorial misconduct."²⁰⁹

205. *Id.*

206. Caldwell, *supra* note 28, at 76.

207. Caldwell, *supra* note 28, at 69.

208. Caldwell, *supra* note 28, at 76.

209. Caldwell, *supra* note 28, at 76.

In addition, “[i]n 2011, the [Department of Justice (DOJ)] established the Professional Misconduct Review Unit (PMRU)” to review allegations of misconduct by Assistant United States Attorneys who prosecute criminal offenses.²¹⁰ These reviewing bodies confirm the absence of systemic prosecutorial misconduct. For example, the PMRU, and the Office of Professional Responsibility, reviewed 1,381 allegations of prosecutorial misconduct in 2011 alone, including 720 filed by inmates. In total, the committees found only eleven instances of prosecutorial misconduct.²¹¹

Furthermore, these calls for independent investigative bodies seem partially insincere. When PMRU/OPR found only eleven instances of prosecutorial misconduct, one author decried it as “anything but a reliable mechanism for scrutinizing prosecutorial misconduct” because “the DOJ scheme is still entirely internal with DOJ personnel investigating other DOJ personnel.”²¹² Given that at the end of 2011 there were approximately 117,285 DOJ employees,²¹³ this assertion is analogous to arguing that a review mechanism will be “internal”—and, thus, ineffective—as long as government personnel are investigating other government personnel. Perhaps so, but that’s a heavy burden to carry.

As for commissions like those tried in Texas, proponents too frequently ignore the practical difficulties associated with appointing lay-persons to pass judgment on complex legal issues. It is almost certainly true that defendants are “unable to correctly distinguish between misconduct and zealous advocacy because of [] inadequate knowledge of the criminal justice system.”²¹⁴ If defendants who are intimately familiar with the facts of their own cases are ill-equipped to pass judgment on complex legal issues arising therefrom, it should be obvious that non-defendant lay persons are even less suited to pass such judgments—having no personal familiarity with either the legal or factual issues of a particular case.

CONCLUSION

210. Caldwell, *supra* note 28, at 78.

211. Caldwell, *supra* note 28, at 79, n. 201.

212. Caldwell, *supra* note 28, at 80–81.

213. U.S. OFFICE OF PERS. MGMT., DATA, ANALYSIS, & DOCUMENTATION: EMPLOYMENT AND TRENDS – December 2011, <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/employment-trends-data/2011/december/table-2/>.

214. Caldwell, *supra* note 28, at 82.

Prosecutorial misconduct is a real problem only in the sense that when it occurs it *may* result in tragic and unjust outcomes. As described above in Section 0, these lamentable outcomes are widely known. But, they are widely known because they are so lamentable. Of the millions of annual felony prosecutions in the United States, a reassuringly-negligible percentage are tainted by the scourge of prosecutorial misconduct. This professional and ethical competence is not newsworthy, which is why it is not in the news. The literature to the contrary notwithstanding, prosecutorial misconduct of all sorts occurs with trivial infrequency. Reformers should look elsewhere within the criminal justice system for opportunities for improvement. Some suggestions for reform have been described herein, including the pressing need to decriminalize *malum prohibitum* conduct. These issues were discussed herein only because many commentators confuse them with prosecutorial misconduct per se. They are worthy areas for investigation, but they are not prosecutorial misconduct.

I am happy to report that the dearth of empirical evidence for prosecutorial misconduct nationwide confirms my personal experience at the Office of the Attorney General in New Jersey and at the United States Attorney's Office for the Eastern District of Tennessee. During my years with both offices, I have interacted with hundreds of Assistant United States Attorneys, Deputy Attorneys General, Assistant Attorneys General, Assistant Prosecutors, District Attorneys, and Assistant District Attorneys, virtually all of whom were uniformly ethical and honest.

The residents of this nation, whether they encounter the criminal justice system personally or, like most residents, consider it only in the abstract, should take comfort knowing that prosecutors take their professional, legal, and ethical obligations seriously. The Constitution binds them by oath or affirmation to do so, and all of the empirical evidence supports the happy conclusion that they satisfy this oath.