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**ABSENT ACCOUNTABILITY:
HOW PROSECUTORIAL IMPUNITY
HINDERS THE FAIR ADMINISTRATION OF
JUSTICE IN AMERICA**

*Scott J. Krischke**

*“The primary responsibility of prosecution is to see that
justice is accomplished.”*

– National District Attorney’s Association¹

INTRODUCTION

In the late afternoon of January 13, 2009, eighteen-year-old Rondell Rogers was marched from his jail cell at Orleans Parish Prison to Magistrate Court in New Orleans Criminal District Court.² Wearing an orange jumpsuit and the chains required of the inmates of Orleans Parish Prison, Rogers took hobbled, jangling steps over to the defense table to begin a probable cause hearing. Rogers, a local kid from the tough Mid-City neighborhood of New

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¹ NAT’L PROSECUTION STANDARDS §1.1 (2d ed. 1991).

² Telephone Interview with Stuart Weg, Assistant Pub. Defender, Orleans Pub. Defenders (Nov. 5, 2009); State v. Rogers, No. M-496735, 1–2 (Orleans Parish Crim. Dist. Ct. filed Dec. 17, 2008) (transcript on file with author).

Orleans, had been working towards a GED³ until December 16, 2008, when he was picked up by the New Orleans Police Department on suspicion of armed robbery and aggravated battery.⁴ By the time of the hearing, Rogers had been incarcerated for twenty-eight days and still had not been formally charged by the Orleans Parish District Attorney's office.⁵

Rogers's arrest arose out of an armed robbery that occurred in Mid-City in the late hours of November 28, 2008.⁶ A little after 11 p.m. on that night, a twenty-year-old man was approaching his car parked on the street when a black male suddenly approached him, pointed a handgun at him, and demanded money before striking the man in the head with the gun.⁷ The man gave the assailant his money and the assailant fled.⁸ The victim ultimately reported the crime to police, claiming that he recognized the assailant as a kid from the neighborhood.⁹ Shortly thereafter, New Orleans police put together a "six pack" photo lineup of young black males from the neighborhood who had been recently arrested, including Rondell Rogers, and showed it to the victim.¹⁰ The victim positively identified Rogers, and police secured an arrest warrant.¹¹ Within days, Rogers was arrested and brought to Orleans Parish Prison.¹²

³ Telephone Interview with Stuart Weg, *supra* note 2.

⁴ Transcript of Preliminary Hearing at 4, 35, State v. Rogers, No. M-496735 (Orleans Parish Crim. Dist. Ct. filed Dec. 17, 2008) (transcript on file with author).

⁵ After probable cause is established at arraignment and bond is set, the State of Louisiana does not require prosecutors to file charges against the accused for forty-five days in misdemeanor cases and sixty days in felonies. LA. CODE CRIM. PROC. ANN. art. 701 (West 2007). Typically, indigent defendants cannot afford bond and will wait the full forty-five to sixty days incarcerated before prosecutors file charges before they are granted access to substantive court proceedings. Telephone Interview with Stuart Weg, *supra* note 2.

⁶ Transcript of Preliminary Hearing, *supra* note 4, at 9.

⁷ *Id.* at 4, 9.

⁸ *Id.* at 4.

⁹ *Id.* at 4–5.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² See Criminal District Court Docket Master Search, ORLEANS PARISH SHERIFF'S OFFICE, http://www.opcs.org/index.php?option=com_wrapper&

Rogers had been falsely implicated by the victim in this case.¹³ But unlike many defendants who have been misidentified, Rogers actually had evidence to prove his innocence.¹⁴ At the time of the robbery, Rogers had been on supervised release—house arrest via electronic monitoring—while he awaited the outcome of an earlier charge against him in Orleans Parish.¹⁵ While that charge would ultimately be dismissed,¹⁶ the GPS-monitoring records from his ankle bracelet recording his location during the time of the robbery were preserved.¹⁷ Stuart Weg, an Orleans Public Defenders attorney representing Rogers, had secured those records along with the testimony of Rogers’s case manager, who monitored his ankle bracelet, and presented them in court on January 13, 2009.¹⁸ The case manager’s testimony detailed that at the time of the robbery, Rogers was in his home nearly a mile away from where the incident took place.¹⁹ The prosecuting attorney was given a copy of these records during the proceeding.²⁰

Yet, as Rogers presented this evidence to the magistrate judge, the assistant district attorney for Orleans Parish objected three times to testimony of Rogers’s case manager regarding the ankle bracelet records, including to its record of his whereabouts on 11:20 p.m. on November 28, 2008.²¹ The thrust of these arguments was that the records were unreliable and unsuitable for court use.²² These objections came notwithstanding the fact that the district attorney’s office and law enforcement routinely use the ankle

view=wrapper&Itemid=183 (search “Last Name” for “Rogers” and search “First Name” for “Rondell”; then follow “748800” hyperlink; then follow “496735 / M3” hyperlink) (showing initiation of proceedings) (last visited Nov. 12, 2010).

¹³ See *id.* (search “Last Name” for “Rogers” and search “First Name” for “Rondell”; then follow “748800” hyperlink; then follow “483927 / K” hyperlink) (showing prosecution ultimately withdrew case on June 30, 2009).

¹⁴ Transcript of Preliminary Hearing, *supra* note 4, at 25, 28; see also Telephone Interview with Stuart Weg, *supra* note 2.

¹⁵ *Id.*

¹⁶ Transcript of Preliminary Hearing, *supra* note 4.

¹⁷ *Id.* at 25.

¹⁸ Telephone Interview with Stuart Weg, *supra* note 2.

¹⁹ Transcript of Preliminary Hearing, *supra* note 4, at 24–36.

²⁰ *Id.* at 30.

²¹ *Id.* at 29–32.

²² *Id.* at 35–37.

bracelet monitoring records in court as reliable evidence to revoke bonds and probation of other defendants found in violation of supervised release or other reasons.²³ At the conclusion of the hearing, the magistrate judge found probable cause based on the eyewitness identification²⁴ and sent Rogers back to Orleans Parish Prison to await trial.²⁵

Within weeks, and despite having the records clearly placing Rogers almost a mile away from the scene of the crime, the Orleans Parish District Attorney's Office filed armed robbery charges against Rogers.²⁶ Over the course of the next five months, Rogers would appear in court six more times, all of which included references to the ankle monitoring records and pleas for the prosecutors to drop the charges.²⁷ Despite having these records and no physical evidence linking Rogers to the crime, prosecutors refused.²⁸ Rogers appeared for trial on June 30, 2009.²⁹ Minutes

²³ See Gwen Filosa, *Judge Jails Kashie Fernandez on Half-Million Dollar Bond*, NEW ORLEANS TIMES-PICAYUNE, May 13, 2009, http://www.nola.com/news/index.ssf/2009/05/judge_jails_kashie_fernandez_o.html (describing how prosecutors used Fernandez's ankle bracelet monitoring records to revoke her bond); Laura Maggi, *1 Juvenile Caught, 2 Sought After Escape*, NEW ORLEANS TIMES-PICAYUNE, Oct. 3, 2007, <http://www.nola.com/timespic/stories/index.ssf?/base/news-7/1191392627129840.xml&coll=1> (reporting juvenile fugitive caught after New Orleans police used his ankle bracelet monitoring to narrow his location down to within 100 feet).

²⁴ Eyewitness identification of the accused has long been regarded as highly unreliable and has played a role in more than 75 percent of convictions later overturned by DNA testing. See *Eyewitness Misidentification*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Sept. 22, 2010).

²⁵ Transcript of Preliminary Hearing, *supra* note 4, at 64; see also Criminal District Court Docket Master records, *supra* note 12 (showing no bond was posted).

²⁶ See Criminal District Court Docket Master Search, *supra* note 12 (search "Last Name" for "Rogers" and search "First Name" for "Rondell"; then follow "748800" hyperlink; then follow "496735 / M3" hyperlink).

²⁷ Telephone Interview with Stuart Weg, *supra* note 2; see also Criminal District Court Docket Master records, *supra* note 12.

²⁸ Transcript of Preliminary Hearing, *supra* note 4, at 30; see also Criminal District Court Docket Master records, *supra* note 12 (showing prosecutors asked for and received several continuances in the case after dating to December 2008).

before it was to begin, they dismissed the charges against him.³⁰ He would be released in the early morning hours of the next day after spending more than six months in prison.³¹ His efforts towards achieving his GED would need to start from square one, but he would finally be able to sleep in his own bed that night.

While some may find it easy to call the prosecution's handling of Rogers's case shameful, there is a more difficult question: How might prosecutors be held accountable for keeping him imprisoned for more than six months despite having clear evidence that he could not have committed this crime? The Orleans Parish District Attorney's office does not have an independent body tasked with investigating alleged prosecutorial abuses; as such, there is no source with authority over the prosecution to which Rogers could complain.³² There are no criminal statutes in Louisiana under which prosecutors may be prosecuted for this type of abuse.³³ Rogers could bring a federal civil rights action against the District Attorney's office for violation of his due process rights³⁴ but given that a magistrate judge had found probable cause based on the witness identification in the earlier photo lineup,³⁵ and established federal law grants absolute immunity from civil suits brought against prosecutors, he would be unlikely to prevail.³⁶

²⁹ *Id.*

³⁰ *Id.*

³¹ Telephone Interview with Stuart Weg, *supra* note 2.

³² See LA. CODE CRIM. PROC. ANN. (West 2010) (showing no statutes authorizing independent body to oversee prosecutors).

³³ See LA. REV. STAT. ANN. title 14 (West 2007).

³⁴ See 42 U.S.C.A. § 1983 (West 2006) (allowing for civil cause of action against those who use a position of governmental authority to deprive someone of his or her constitutional rights or privileges).

³⁵ See *supra* text accompanying note 24.

³⁶ Since 1976, prosecutors have functioned under the absolute immunity doctrine, which shields them from liability for civil actions brought by those charged or convicted as a result of "dishonest action" by prosecutors, including maliciously filing charges without probable cause. *Imbler v. Pachtman*, 424 U.S. 409 (1976). The Supreme Court refused to allow such suits as "it would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-28; see also *Kalina v. Fletcher*, 522 U.S. 118, 124 (1997) (stating that a prosecutor is not open to suit if acting within the realm of her duties); *Albright v. Oliver*, 510 U.S.

What happened in the case of Rondell Rogers was borne out of the wide discretion that prosecuting attorneys enjoy throughout the United States. Rondell Rogers is not alone. Abuse of prosecutorial discretion is just one way that defendants have found themselves denied justice. Recent revelations that prosecutors illegally withheld exculpatory evidence concerning defendants³⁷ have led to hundreds of overturned convictions.³⁸ Widespread complaints of police corruption and overreaching have led to the discovery of prosecutors tacitly approving and even encouraging perjured in-court testimony by police to violate suspects' constitutional rights.³⁹ But despite these well-documented faults in the criminal justice system, prosecutors' offices across the country have failed to substantively adapt to the realities of criminal law enforcement.⁴⁰

Part I of this Note will address the many ways in which criminal defendants are denied justice at the hands of prosecutors while Part II will document the consequences of a prosecutorial system without accountability. These consequences include undermined public trust and legitimacy of law enforcement,⁴¹ wasted taxpayer money,⁴² and the theft of liberty from the

266, 268 (1994) (stating that incarceration without probable cause is not grounds for a violation of substantive due process rights under the Fourteenth Amendment).

³⁷ See *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (establishing a constitutional due process right that evidence tending to exculpate the defendant must be provided to the defense).

³⁸ See discussion *infra* Parts I.A–B; see also Ken Armstrong & Maurice Possley, *Trial & Error: Part I: The Verdict: Dishonor*, CHI. TRIB., Jan. 11, 1999, <http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story> [hereinafter *Trial & Error: Part I*].

³⁹ See discussion *infra* Part I.C; see also CITY OF N.Y., COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, COMMISSION REPORT, 36–43 (1994) [hereinafter MOLLEN REPORT].

⁴⁰ See *infra* Part I.

⁴¹ See *infra* Part II.A.

⁴² This money includes the millions spent retrying overturned convictions, defending themselves against lawsuits (and paying those who are successful), and imprisoning the wrongfully convicted. See discussion *infra* Part II.B.

hundreds of innocent people wrongfully imprisoned.⁴³ Part III will propose potential solutions to address these concerns. These solutions involve improving the system for filing complaints against prosecutors, establishing independent bodies to investigate complaints, allowing complaints to be used as subjects for disciplinary review of prosecutors, and even the imposition of criminal charges in the most egregious of cases. A structured system of prosecutorial accountability that addresses these common injustices and a redefinition of the function and culture of prosecution must be undertaken to reform criminal prosecution and ensure a more efficient, effective, and honest criminal justice system. Only when we stop placing prosecutors above the law can we begin to see a wholesale reform and a greater credibility to the operation of our criminal justice system.

I. COMMON INJUSTICES

A. Abuse of Discretion

Prosecutorial discretion is essential to the function of the prosecutor. This discretion includes deciding when to charge, who to charge, what to charge, and when to dismiss.⁴⁴ Prosecutors are tasked with enforcing the criminal laws passed by legislatures and must often make hard decisions based on the facts of each individualized case and the office's available resources.⁴⁵ Considerations such as a defendant's prior criminal record and the severity of individual offenses require that prosecutors retain significant discretion and vesting the decision of whom and how to prosecute in an authority outside of a prosecutors' office is simply unworkable.⁴⁶ The vast implications of this discretion, however,

⁴³ See *infra* Parts I.A–B.

⁴⁴ Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279, 1280–82 (2002).

⁴⁵ See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 13–14 (2007).

⁴⁶ The Supreme Court has stated that “[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s

make it rife for abuse. Due to the broad nature of prosecutorial discretion, abuses of discretion are impossible to quantify. Abuse of discretion arguably occurred in the case of Rondell Rogers, where prosecutors ignored and even fought to suppress material evidence proving his innocence.⁴⁷ Other reported instances of abuse of discretion include threatening witnesses with trumped up or false criminal charges unless they testify in the prosecutor's favor,⁴⁸ offering jailhouse informants with near zero credibility reduced sentences in exchange for favorable testimony against another defendant,⁴⁹ and levying knowingly false allegations against defendants and witnesses during opening and closing statements at trial.⁵⁰ All of these practices not only violate common sense standards of decency, but also the American Bar Association's standards of professional conduct, the content of which all attorneys are required to swear an oath to uphold.⁵¹

Rogers's ordeal pales in comparison to the abuse of discretion involved in the case of Rolando Cruz, who in 1985 was sentenced to death in DuPage County, Illinois for the brutal rape and murder of ten-year-old Jeanine Nicarico.⁵² Cruz, then nineteen, became a person of interest in the case after he attempted to cash in on a \$10,000 reward by providing fabricated information to police investigating the case.⁵³ Despite having no physical evidence

enforcement policy." *Wayte v. United States*, 470 U.S. 598, 607 (1985).

⁴⁷ See *supra* notes 1–31 and accompanying text.

⁴⁸ DAVIS, *supra* note 45, at 123–24.

⁴⁹ Radley Balko, *Absolute Immunity on Trial*, REASON MAGAZINE, Nov. 9, 2009, <http://reason.com/archives/2009/11/09/absolute-immunity-on-trial>.

⁵⁰ Ken Armstrong & Maurice Possley, *Trial & Error: Part 2: The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, <http://www.chicagotribune.com/news/watchdog/chi-020103trial2,0,754391.story> [hereinafter *Trial & Error: Part 2*].

⁵¹ MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002).

⁵² Cruz was also convicted with another man, Alejandro Hernandez. *Rolando Cruz & Alejandro Hernandez*, THE JUSTICE PROJECT, <http://www.thejusticeproject.org/profiles/rolando-cruz-and-alejandro-hernandez/> (last visited Sept. 17, 2010). Jeanine Nicarico was abducted from her suburban Chicago home on February 25, 1983. Her body was found two days later less than two miles from her home. Alan Berlow, *The Wrong Man*, ATLANTIC ONLINE, Nov. 1999, <http://www.theatlantic.com/issues/99nov/9911wrongman.htm>.

⁵³ Berlow, *supra* note 52.

implicating Cruz, an entire case built around the testimony of jailhouse snitches, and a written confession to the Nicarico killing from Brian Dugan, a previously-confessed child rapist and murderer already incarcerated in neighboring LaSalle County, prosecutors charged Cruz and his co-defendant, Alejandro Hernandez.⁵⁴ Prosecutors in the Cruz case withheld Dugan's confession from defense attorneys and continued to prosecute Cruz, even when his convictions were overturned after Dugan's confession was finally revealed.⁵⁵ In their case against Cruz, prosecutors put police on the stand who told the jury that Cruz had made gravely incriminating statements—yet they had no recordings of any of these alleged statements.⁵⁶ Cruz's conviction would be overturned twice over the course of the next decade, and each time prosecutors reinstated charges, including in 1995 after receiving modern DNA test results showing Cruz's DNA was not found on Jeanine.⁵⁷ In November 1995 the charges against Cruz and Hernandez were finally dismissed,⁵⁸ and Cruz was freed after spending more than ten years on death row.⁵⁹ In 1999, three of the prosecutors who had continued to charge Cruz and four law enforcement officers who claimed in court that he made the unrecorded incriminating statements were placed on trial for conspiracy to frame Cruz by using false evidence.⁶⁰ All of them

⁵⁴ *Id.*

⁵⁵ *Cruz & Hernandez, supra* note 52.

⁵⁶ *Know the Cases: Rolando Cruz*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/77.php> (last visited Sept. 17, 2010). A police detective, a sheriff's lieutenant, a state's attorney, and an assistant attorney general all resigned their positions out of protest for the continued prosecution of Cruz. Berlow, *supra* note 52. The police detective would ultimately testify for the defense and the sheriff's lieutenant recanted his testimony as fabrications from Cruz's first trial. *See* *People v. Cruz*, 643 N.E.2d 636, 645–648 (Ill. 1994); *Cruz & Hernandez, supra* note 52.

⁵⁷ *Know the Cases: Rolando Cruz, supra* note 56.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Ken Armstrong & Maurice Possley, *Trial & Error: Part 3: Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, <http://www.chicagotribune.com/news/watchdog/chi-020103trial3,0,610421.story> [hereinafter *Trial & Error: Part 3*]. Other counts included perjury and obstruction of justice. *Id.*

were acquitted.⁶¹

B. Brady Violations

Prosecutors' duty to disclose evidence tending to exculpate the accused is an oft-cited subject of prosecutorial misconduct.⁶² On July 24, 1976, in Auburn, New York, George Sedor was sitting in his car in the parking lot of the restaurant that he owned when two unknown gunmen opened fire on him.⁶³ He was shot six times and killed.⁶⁴ His brother, who witnessed the shooting, told police that he saw two white men running from the scene.⁶⁵ Prosecutors kept that statement hidden from defense attorneys along with other statements taken from witnesses when they arrested Sammy Thomas and Willie Gene, both black, and charged them with Sedor's murder.⁶⁶ Prosecutors secured convictions based on the testimony of Steven Wejko, a witness who police believed supplied the guns used in Sedor's murder; they obtained Wejko's

⁶¹ Bob Gibson, *When Justice Hides its Face*, J. DUPAGE COUNTY B. ASS'N, May 2005, at 3, <http://www.dcba.org/brief/mayissue/2005/art10505.pdf>. *But see* Patrick A. Tuite, *The DuPage Seven Case from My Perspective*, J. DUPAGE COUNTY B. ASS'N, June 2000, <http://www.dcba.org/brief/junissue/2000/art040600.htm> (arguing that prosecutors acted in good faith). Brian Dugan, the original confessed killer of Jeanine Nicarico, pleaded guilty to her rape and murder in DuPage County in 2009. Art Barnum, *Brian Dugan Admits to Nicarico Slaying, Rape*, CHI. TRIB., July 29, 2009, <http://www.chicagotribune.com/news/local/brian-dugan-guilty-090729,0,5402784.story>. At sentencing, DuPage County prosecutors successfully argued for a death sentence for Dugan. Art Barnum & Ted Gregory, *Jeanine Nicarico Murder: Tears of Joy as Brian Dugan Gets Death Penalty*, CHI. TRIB., Nov. 12, 2009, <http://www.chicagotribune.com/news/chi-dugan-death-penalty-12-nov12,0,2638852.story>. Cruz later reached a settlement in a civil suit against the DuPage County State's Attorney's Office for \$3.5 million. Gibson, *supra* at 3.

⁶² *See Trial & Error: Part 1*, *supra* note 38. *See also* Brady v. Maryland, 373 U.S. 83 (1963) (establishing a defendant's due process right to material information tending to prove his innocence).

⁶³ Walter Rewald, *Sedor Decision in Two Weeks*, THE CITIZEN (Auburn), Jan. 25, 1979, at 1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

testimony in exchange for a reduced sentence.⁶⁷ Thomas and Gene's convictions were later overturned after the exculpatory witness statements were discovered; the charges against Thomas were dropped and Gene was acquitted after the defense entered the statements during his retrial.⁶⁸ The man who originally prosecuted them, Peter Corning, went on to become a judge.⁶⁹

In 1977, after an evening playing bingo, ninety-two-year-old Emma Crapser was returning to her home in Poughkeepsie, New York, when an unidentified assailant attacked her, severely beating and suffocating her.⁷⁰ In 1983, Dewey Bozella, eighteen-years-old at the time of the incident and with a history of petty crime, was convicted of Crapser's murder.⁷¹ Prosecutors had no physical evidence linking Bozella to the murder and relied entirely on testimony from jailhouse informants who testified in exchange for reduced sentences, were admittedly under the influence of drugs at the time of the crime, and who provided inconsistent accounts.⁷² In 2009, private attorneys who took on Bozella's case pro bono found old notes from a retired police lieutenant that implicated another man, Donald Wise, in the crime.⁷³ Bozella's attorneys then filed freedom of information requests and discovered a taped police interview of a witness who told police that he watched Donald Wise planning a burglary near the Crapser apartment and described how Wise may have already killed another woman.⁷⁴ Police found a fingerprint at the scene of the crime that would eventually be positively matched to Wise, who had been subsequently convicted

⁶⁷ *New York State (Exclusive of New York City)*, VICTIMS OF THE STATE, <http://www.victimsofthestate.org/NY/indexNYS.html> (last visited Sept. 17, 2010).

⁶⁸ *Trial & Error: Part 1*, *supra* note 38.

⁶⁹ *Id.*

⁷⁰ Joel Stashenko, *Citing Withheld Evidence, Judge Orders Third Trial in 1977 Slaying*, N.Y. L.J., Oct. 22, 2009, at 1, col. 4.

⁷¹ Peter Applebome, *Unyielding in His Innocence, Now a Free Man*, N.Y. TIMES, Oct. 28, 2009, <http://www.nytimes.com/2009/10/29/nyregion/29towns.html>.

⁷² Stashenko, *supra* note 70, at 1, col. 4.

⁷³ *Id.*

⁷⁴ *Id.*

for a near-identical murder in the same neighborhood.⁷⁵ After Bozella was granted a retrial in October 2009 in light of this evidence, prosecutors dropped the charges against him.⁷⁶

Thomas, Gene, and Bozella were all victims of prosecutors who failed to disclose evidence tending to exculpate the accused. Disclosure of such evidence is a constitutional due process right of all criminal defendants established by the Supreme Court in 1963.⁷⁷ The Supreme Court established the rule to ensure that the accused is granted a fair trial.⁷⁸ It is designed to remind the prosecutor of the responsibility to administer justice and that the “system of the administration of justice suffers when any accused is treated unfairly.”⁷⁹ The decision embodied the earlier words of Supreme Court Justice George Sutherland, opining that the prosecutor, “while he may strike hard blows, is not at liberty to strike foul ones.”⁸⁰ As the cases above demonstrate, the problem of prosecutors withholding exculpatory evidence persists.⁸¹ An

⁷⁵ Applebome, *supra* note 71.

⁷⁶ *Id.*

⁷⁷ See *Brady v. Maryland*, 373 U.S. 83, 86 (1963). The Supreme Court established three elements of a Brady violation: “[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). In order to satisfy the prejudice prong, it must be shown that the evidence was material to the outcome. See *id.* at 282.

⁷⁸ See *Brady*, 373 U.S. at 87.

⁷⁹ *Id.*

⁸⁰ *Berger v. United States*, 295 U.S. 78, 88 (1935). The quote continues, “It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Id.*

⁸¹ For more examples of cases that have been overturned after prosecutors withheld evidence, see Estes Thompson, *N.C. Man Acquitted of Murder*, CHARLOTTE NEWS-OBSERVER, Feb. 18, 2004, <http://www.truthinjustice.org/Alan-Gell.htm> (man sentenced to death for murder in 1995 acquitted after prosecutors concealed interviews with seventeen witnesses that proved suspect was in police custody at time of murder); Jennifer Emily, *Man Released from Jail After Judge Recommends Lifting Sexual Assault Conviction*, DALLAS MORNING NEWS, Nov. 18, 2008, <http://www.dallasnews.com/sharedcontent/dws/news/dmn/stories/111808dnmetjohnson.1c09af252.html> (two sexual assault convictions overturned after it was revealed that prosecutors failed to turn over

investigation conducted in 1999 by the Chicago Tribune found that between 1963 and 1999, at least 381 defendants nationwide had a homicide conviction thrown out after revelations that prosecutors concealed exculpatory evidence and presented evidence in court they knew to be false.⁸² Of those cases, sixty-seven had been sentenced to death.⁸³

C. Perjured Police Testimony

Michael Dowd was arrested in May 1992 by the Suffolk County Police Department on charges that he was running a mid-level cocaine ring through Brooklyn and Suffolk County, New York.⁸⁴ The case would not be unique aside from the fact that Dowd and his five co-defendants were all officers of the New York Police Department.⁸⁵ The highly-publicized arrests served as the bellwether for an investigation of New York City Police Department (“NYPD”) practices and tactics and led to the creation of what would later be known as the Mollen Commission.⁸⁶ The findings of the near two-year investigation were released in July 1994 and documented numerous instances of police corruption, a culture devoid of accountability, and systemic violations of citizens’ rights by police.⁸⁷ Aside from the blatant corruption in the

police interview notes with alleged victims in which they stated assault never occurred); Richard A. Webster, *Life Sentence: Justice Elusive for Wrongfully Convicted Victims*, NEW ORLEANS CITY BUSINESS, June 4, 2007, <http://www.r-a-e.org/press/life-sentence-justice-elusive-wrongfully-convicted-victims> (man acquitted after eighteen years in prison after former prosecutor admitted on his deathbed that he withheld blood evidence that would exonerate him).

⁸² *Trial & Error: Part 1*, *supra* note 38.

⁸³ *Id.*

⁸⁴ See MOLLEN REPORT, *supra* note 39, at 91.

⁸⁵ Richard Lacayo, Jordan Bonfante & Sharon Epperson, *Cops and Robbers*, TIME, Oct. 11, 1993, <http://www.time.com/time/magazine/article/0,9171,979358,00.html>.

⁸⁶ Harold Baer, Jr. & Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L. SCH. L. REV. 73, 73–74 (1995–1996).

⁸⁷ See *id.* The investigation concluded with the firing of dozens of officers and the institution of “integrity tests” administered at random to officers. Chris Smith, *The Police Police*, N.Y. MAG., Sept. 22, 1997, <http://nymag.com/news/features/49093/>.

Dowd case and others, the commission uncovered an established tradition of police officers concealing violations of suspects' constitutional rights by falsifying arrest reports and later, if needed, committing perjury when questioned in court about obtaining that evidence.⁸⁸ Police, knowledgeable of the constitutional right to be free from unreasonable search and seizure,⁸⁹ as well as the fact that any evidence arising out of a search in violation of this right is inadmissible at trial,⁹⁰ were found to consistently lie about how evidence was obtained.⁹¹ A common illustration of this is when police officers stop a car with no probable cause to believe that the driver has committed any crime.⁹² The driver is immediately ordered out of the car and without asking, police conduct searches of his car and person, discovering a bag of cocaine and a gun. The arresting officers later write up the report and subsequently testify that they saw the man run a red light and, upon speaking with him, the defendant permitted the officers to search the car.⁹³

Prosecutors throughout the country have acknowledged this problem and have expressed frustration in dealing with perjured testimony from police.⁹⁴ The dilemma for the prosecutor arises when police officers approach that prosecutor with cases in which

⁸⁸ See Baer & Armao, *supra* note 86, at 76–77.

⁸⁹ See MOLLEN REPORT, *supra* note 39, at 38.

⁹⁰ This is commonly known as the “exclusionary rule.” See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

⁹¹ MOLLEN REPORT, *supra* note 39, at 38.

⁹² U.S. CONST. amend. IV. (“[T]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . but upon probable cause, supported by Oath or affirmation”) (emphasis added); see also MOLLEN REPORT, *supra* note 39, at 38.

⁹³ Several legal writers have referred to this practice as “testilying.” See, e.g., Morgan Cloud, *Judges, “Testilying,” and the Constitution*, 69 S. CAL. L. REV. 1341 (1996); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996). Other ways police falsify reports include “throw down” or “dropsy” cases, where the police officer claims that the defendant threw narcotics on the ground after he approached him, effectively waiving his Fourth Amendment rights. See *People v. McMurty*, 314 N.Y.S.2d 194, 197 (Crim. Ct. N.Y. Cnty. 1970) (stating that judges should view “dropsy” cases with “especial caution”).

⁹⁴ Larry Cunningham, *Taking on Testilying: The Prosecutor’s Response to In-Court Police Deception*, 18 CRIM. JUST. ETHICS 26, 31 (1999).

there had been a likely violation of the defendant's constitutional rights, yet there is no solid proof of the violation aside from the defendant's testimony.⁹⁵ Ideally, prosecutors will investigate the case further and dismiss it if it proves untrustworthy.⁹⁶ But in reality, prosecutors will often ignore these violations and place the officer on the stand.⁹⁷ At worst, they will encourage and coach officers to change their testimony as to the facts of the arrest to ensure the evidence is admitted.⁹⁸ Almost always, and often in spite of clear evidence that the police violated constitutional rights, the evidence will be admitted as long as the story is not proven to be impossible.⁹⁹ While the Mollen Commission stated that it could not quantify the instances of police perjury,¹⁰⁰ an investigation of Chicago's criminal justice system included surveys of judges, prosecutors, and defense attorneys, of which more than 50 percent agreed that at least "half of the time prosecutors knew or had reason to know" a testifying officer was lying.¹⁰¹ Of the prosecutors, 89 percent stated that they believed police perjury occurs "at least some of the time."¹⁰²

The American Bar Association strictly prohibits an attorney from "knowingly . . . offer[ing] evidence that the lawyer knows to

⁹⁵ See *id.* at 28.

⁹⁶ See *id.* at 32.

⁹⁷ See Alan M. Dershowitz, Op-Ed., *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, <http://www.nytimes.com/1994/05/02/opinion/controlling-the-cops-accomplices-to-perjury.html> (describing prosecutors' "muteness" on the issue).

⁹⁸ Cunningham, *supra* note 94, at 31.

⁹⁹ See Carol A. Chase, *Rampart: A Crying Need to Restore Police Accountability*, 34 LOY. L.A. L. REV. 767, 772-73 (2001) (describing how judges rarely, if ever, suppress evidence despite improbable police testimony unless there is direct extrinsic evidence contradicting that testimony); see also ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 51 (1997) [hereinafter REASONABLE DOUBTS].

¹⁰⁰ See MOLLEN REPORT, *supra* note 39, at 42.

¹⁰¹ Myron W. Orfield, Jr., *Deterrence, Perjury, and the Healer Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 109 (1992).

¹⁰² *Id.* Allegations of perjured testimony played a major role in the O.J. Simpson murder prosecution when prosecutors attempted to enter the now-infamous "bloody glove." REASONABLE DOUBTS, *supra* note 99, at 80-86.

be false.”¹⁰³ In fact, it is a federal felony to procure or encourage perjury.¹⁰⁴ Still, police, prosecutors, and judges often ignore the practice of false testimony by looking at it as a means justifying the ends of law enforcement, seeing the fourth amendment as a protection of the guilty and the act of lying to get around it as merely “evening the odds” in the war on drugs.¹⁰⁵ The difficulty for the prosecutor in confronting this problem rests not only in accusing his co-workers—the police—of lying, but in determining when a lie is being told or when officers are “shading” testimony to certain facts but not others.¹⁰⁶ Even those prosecutors who would stand against perjured testimony face uncooperative police officers, indifferent investigators sent from the very police department they are tasked with investigating, and the possibility of implicating co-workers who have knowingly accepted perjured testimony.¹⁰⁷ This is not to say that prosecutors have never acted against this problem. Former Manhattan District Attorney Robert Morgenthau, for example, prosecuted several police officers for perjury after they lied under oath.¹⁰⁸ Aside from the inherent problems with investigating and proving these claims, a prosecutor could not be found guilty of subornation of perjury unless it can be proven that he or she “should have known” that the police-witness would testify falsely.¹⁰⁹ In addition, simple strict enforcement of these rules could potentially implicate a number of problems in practice. Even if these charges could be proven, prosecutors are unlikely to charge one of their own.¹¹⁰ Moreover, broadly pressing charges against prosecutors in this way could have a severe

¹⁰³ MODEL RULES OF PROF’L CONDUCT R. 3.3 (2002).

¹⁰⁴ See 18 U.S.C.A. § 1622 (West 2006) (providing that “[w]hoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both”).

¹⁰⁵ MOLLEN REPORT, *supra* note 39, at 42–43. See also Cunningham, *supra* note 94, at 27 (“Testilying is seen as morally acceptable, however, because it is deception used against someone (the defendant) who is himself morally blameworthy”).

¹⁰⁶ Cunningham, *supra* note 94 at 32.

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 32.

¹¹⁰ See generally *id.* at 32–33

chilling effect on prosecutors' willingness to put police officers on the stand, even if their testimony is true but seemingly suspect.¹¹¹ This could seriously hamper legitimate law enforcement efforts.¹¹²

II. UNDERMINING LAW ENFORCEMENT

A. Public Distrust

The explosive increase in the prison population in recent years and the racial disparity in the targets of criminal prosecutions and incarceration have garnered an enormous amount of attention.¹¹³ Between 1980 and 2007, the prison incarceration rate of people living in the United States increased by more than 350 percent—nearly 11 times faster than the growth of the nation's population.¹¹⁴ Among the communities most affected by law enforcement is the black community, which, in 2009, comprised 28 percent of the people charged with crimes in the United States, despite

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See generally TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED COMMUNITIES WORSE* (2009) (discussing how incarceration of large segments of adult males from minority communities contribute to social problems and perpetuation of criminal offenders in families); MARC MAUER, *RACE TO INCARCERATE* (1999) (documenting the massive expansion of the prison population and its effect on racial communities); JONATHAN R. SIMON, *GOVERNING THROUGH CRIME* 141 (2007) (stating that African Americans born in 2001 have a greater probability of going to jail than they do of going to college, getting married, or joining the military); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007) (demonstrating an often inadvertent difference in charging and plea bargaining along class and racial lines and the need for conscious reform among prosecutors).

¹¹⁴ U.S. DEP'T. OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES AND PRISONERS IN 2008*, (2008) available at <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>; *USA QuickFacts*, U.S. CENSUS BUREAU, (Aug. 16, 2010) <http://quickfacts.census.gov/qfd/states/00000.html>. This increase comes despite a 32 percent decrease in the violent crime rate since 1989. FED. BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES*, table 1 (2009) [hereinafter *CRIME IN THE UNITED STATES*].

representing just under 13 percent of the population.¹¹⁵ Perhaps more representative of the vast racial divide in law enforcement is the fact that in 2009, 40 percent of the total prison population was black, while whites were charged with nearly 70 percent of all crimes that same year.¹¹⁶ The community with the highest rate of contact with the criminal justice system also often harbors a strong distrust towards law enforcement.¹¹⁷ However, it is not the amount of charges alone that causes this suspicion—many in the black community have cited concerns such as unfair treatment, wrongful arrests, and failure to solve crimes as factors in their distrust of law enforcement.¹¹⁸ The importance that prosecutorial misconduct has played in public opinion and the legitimacy of law enforcement has not gone unnoticed. Highly-publicized stories of exonerations after revelations of prosecutorial misconduct have led state bar associations to criticize prosecutors who bring “the judicial system into disrepute by their conduct.”¹¹⁹

Aside from the damaging instances of wrongful convictions, prosecutors’ increased use of “snitches” in criminal prosecutions—informants testifying for leniency in their own cases—has been cited as a large factor in public suspicion of law enforcement,¹²⁰

¹¹⁵ CRIME IN THE UNITED STATES, *supra* note 114, at table 43; *USA Quickfacts*, *supra* note 114.

¹¹⁶ U.S. DEPT. OF JUSTICE, *supra* note 114; HEATHER C. WEST, U.S. DEP’T OF JUSTICE, MID-YEAR 2009 PRISON STATISTICS (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>.

¹¹⁷ A survey of several polls found that 17–30 percent of the black community has “little to no faith” in the police. Loretta J. Stalans, *Codes of Ethics*, in *THE ENCYCLOPEDIA OF POLICE SCIENCE* 188, 194 (Jack R. Greene ed., 2007) (citing V.J. ROBERTS & L.J. STALANS, *PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE* (2000)).

¹¹⁸ *Id.* at 194–95.

¹¹⁹ Joseph Neff, *Reprimands in Gell Case*, *NEWS & OBSERVER* (Raleigh, NC), Sept. 25, 2004, at A1, available at <http://www.bluelineradio.com/GELLPROSECUTORS.html>.

¹²⁰ See Alexandra Natapoff, *Bait and Snitch: The High Cost of Snitching for Law Enforcement*, *SLATE* (Dec. 12, 2005, 5:41 PM), <http://www.slate.com/id/2132092/> [hereinafter *Bait and Snitch*]. Natapoff, an associate professor of law at Loyola Law School Los Angeles, has written extensively on this subject. See, e.g., Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 *U. CIN. L. REV.* 645 (2004) [hereinafter *Snitching*] (arguing

particularly because the use of snitches often results in false information used to secure what are eventually proven to be wrongful convictions.¹²¹ In some high-crime urban communities, where as many as 50 percent of black males between the ages of eighteen and thirty-five are under some kind of court supervision at any given time,¹²² a large number of offenders seeking leniency will initiate contact with prosecutors in an attempt to “turn state’s witness” to avoid prison time.¹²³ This use of informant testimony can be a valid and important tool for criminal investigators and prosecutors looking to enlist assistance in building their cases against some of society’s most dangerous criminals, as “snitches” may in some instances be the only witnesses to these activities.¹²⁴ However, the pervasive and largely unsupervised use of snitch testimony by prosecutors, including the use of unreliable and inconsistent testimony, has been strongly criticized.¹²⁵ Prosecutors’ use of snitches is the leading cause for wrongful capital convictions in the United States—false testimony from snitches played a role in nearly 46 percent of the cases of death row exonerees between 1973 and 2004.¹²⁶ Their reliance on snitches undermines police legitimacy as law enforcement is increasingly seen to be on the side of unrepentant criminals who would lie about others’ involvement in crimes to receive leniency from law enforcement and continue their own criminal activities.¹²⁷ Further, the practice of police to arrest members of the community only to pressure them to snitch to evade facing a criminal charge has

that the use of snitches actually increases crime and often leads to the prosecution of innocent people with whom snitches have vendettas).

¹²¹ See ROB WARDEN, NW. UNIV. CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM (Winter 2004–2005).

¹²² *Snitching*, *supra* note 120, at 646 n.7 (referring to high crime communities in Baltimore, MD and Washington, DC).

¹²³ See *Bait and Snitch*, *supra* note 120.

¹²⁴ See Brian Lieberman, *Ethical Issues in the Use of Confidential Informants for Narcotics Operations*, POLICE CHIEF (June 2007), http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1210&issue_id=62007.

¹²⁵ See *Snitching*, *supra* note 120.

¹²⁶ See WARDEN, *supra* note 121, at 3.

¹²⁷ *Bait and Snitch*, *supra* note 120.

resulted in a growing sentiment of community “victimization” by police and has even fostered violence towards those accused of being snitches, further undermining law enforcement legitimacy in high-crime, urban communities.¹²⁸

Sociologists have found that in urban neighborhoods, a rise in negative perceptions of police legitimacy directly correlates to a rise in violent crime.¹²⁹ In order for communities to accept the law as moral and legitimate, its members must first believe the law and its procedures to be fair.¹³⁰ As community members begin to feel marginalized by a law enforcement system perceived as corrupt, they will refuse to cooperate with police and reject seeking police assistance to resolve conflicts—instead choosing to take the law into their own hands.¹³¹ Compromised law enforcement legitimacy will not only affect the opinions of potential criminal offenders, but will even do so for law-abiding members of communities who face pressure not to report crimes to a law enforcement system viewed as uncaring and corrupt.¹³² A twenty-two-year study of disadvantaged and poverty-stricken precincts in New York City found that increases in police misconduct and over-enforcement of non-violent crimes predicted increases in violent crime in those neighborhoods.¹³³ Another study conducted in Trinidad and Tobago documented how positive perceptions of law enforcement—stimulated by the introduction of community policing initiatives and frequent monitoring of police honesty and

¹²⁸ *Id.* In Baltimore, MD in 2004, a threatening underground DVD was produced entitled, “Stop Snitching.” The DVD featured commentary from local teens and drug dealers threatening violence against anyone who became a police informant and included a number of graphic images of murder victims who the video claimed to be snitches. Rick Hampson, *Anti-Snitch Campaign Riles Police, Prosecutors*, USA TODAY, Mar. 28, 2006, http://www.usatoday.com/news/nation/2006-03-28-stop-snitching_x.htm.

¹²⁹ See Robert J. Kane, *Compromised Police Legitimacy as a Predictor of Violent Crime in Structurally Disadvantaged Communities*, 43 CRIMINOLOGY 469, 490–91 (2005).

¹³⁰ With a general perception of procedural fairness will come communal acceptance of law enforcement, even when its consequences may be unfavorable. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 109 (1990).

¹³¹ Kane, *supra* note 129, at 470.

¹³² See *id.* at 474.

¹³³ *Id.* at 491.

fairness—led to greater collective community efficacy and an overall consistent drop in violent crime.¹³⁴ Central to these findings was the conclusion that law enforcement officials have the power to trigger increases in collective efficacy, corresponding with decreases in violent crime, simply by providing fair and lawful services to the community.¹³⁵

B. Cost to Taxpayers

While prosecutors enjoy absolute immunity from civil liability in nearly all federal civil rights actions,¹³⁶ seventeen states permit lawsuits against prosecutors or allow for automatic statutory indemnification for the wrongfully convicted.¹³⁷ Still, the state and

¹³⁴ See Tammy Rinehart Kochel, *Legitimacy as a Mechanism for Police to Promote Collective Efficacy and Reduce Crime and Disorder* 183–87 (Spring 2009) (unpublished Ph.D. dissertation, George Mason University) (on file with author).

¹³⁵ See *id.* at 186.

¹³⁶ See *supra* note 36 and accompanying text. See also Adam I. Kaplan, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 233 (2008) (observing that “[s]uccessful tort suits against the government or government officials are rare due to sovereign immunity and various substantial burdens of proof”).

¹³⁷ James L. Buchwalter, *Cause of Action or Claim Under State Statute Providing Remedy for Wrongful Conviction and Incarceration*, in CAUSES OF ACTION SECOND SERIES § 2 (2004), available at Westlaw, 25 COA2d 579. In Texas, passage of the Tim Cole Act (named after a wrongfully convicted man who died in prison) in 2009 provides the wrongfully convicted with a lump sum payment of \$80,000 per year of incarceration, including college payments. Hilary Hylton, *Texas: The Kinder, Gentler Hang ‘Em High State*, TIME, Sept. 19, 2009, <http://www.time.com/time/nation/article/0,8599,1924278,00.html>. In New York, tort actions against the state are permissible for the exonerated, provided that the plaintiff can prove that “he did not commit any of the acts” for which he was charged. N.Y. CT. CL. ACT §§ 8-b(2), 8-b(5)(c) (McKinney 2007). In Illinois, the wrongfully convicted can receive up to \$199,150, related to the total time spent imprisoned, provided they first obtain a “certificate of innocence” from a state Circuit Court. See 705 ILL. COMP. STAT. ANN. 505/8 (West 2010). *But see* Janet Roberts & Elizabeth Stanton, *Free and Uneasy—A Long Road Back After Exoneration, and Justice is Slow to Make Amends*, N.Y. TIMES, Nov. 25, 2007, <http://www.nytimes.com/2007/11/25/us/25dna.html> (showing that as of August 2007, forty percent of those exonerated nationwide by DNA evidence since 1989 had not been compensated at all).

federal statutes that compensate the wrongfully convicted allow for causes of action only against the state and federal government, meaning that successful claims for wrongful prosecution and conviction by exonerated defendants are paid for out of taxpayer dollars.

There is no cumulative study documenting the total amount taxpayers have paid to settle civil liabilities brought on by the unjustly convicted, but the media has followed a number of these settlements closely.¹³⁸ In California, Santa Clara County has paid out \$4.6 million in settlements to the wrongfully convicted since 2005.¹³⁹ Texas taxpayers have covered more than \$8.8 million in compensation to the exonerated since 2001.¹⁴⁰ And in Illinois, the DuPage County Board voted in 2000 to pay out \$3.5 million to settle lawsuits brought against its State's Attorney's Office filed by Rolando Cruz for his wrongful capital conviction in the Jeanine Nicarico case.¹⁴¹

These figures do not include the money the state must spend to defend these civil suits.¹⁴² For example, a wrongful conviction suit in Union County, North Carolina netted a \$3.9 million settlement in 2009 to Alan Gell, who was sentenced to death in 1995 when prosecutors failed to turn over more than a dozen exculpatory witness interviews and a recorded phone conversation in which the state's star witness spoke with a friend about framing Gell.¹⁴³ In that case, the State Bureau of Investigation spent \$731,000

¹³⁸ See *infra* notes 139–44 and accompanying text.

¹³⁹ John F. Terzano, *The Costs of Wrongful Convictions Continues to Rise*, JUSTICE PROJECT (Aug. 25, 2009), <http://www.thejusticeproject.org/blog/the-costs-of-wrongful-convictions-continue-to-rise/>.

¹⁴⁰ Jennifer Emily & Steven McGonigle, *Dallas County District Attorney Wants Unethical Prosecutors Punished*, DALLAS MORNING NEWS, May 4, 2008, http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-misconduct_04met.ART0.State.Edition2.46518c2.html.

¹⁴¹ *DuPage County Board Settles Cruz Lawsuits for \$3.5 Million*, CHI.-SUN TIMES, Sept. 27, 2000, at A1. See also *supra* notes 52–61 and accompanying text.

¹⁴² See *supra* notes 139–41 (showing no mention of attorneys' fees in either the criminal cases or civil actions).

¹⁴³ *The High Costs of a Wrongful Conviction*, Op-Ed., CHARLOTTE OBSERVER, Oct. 8, 2009, <http://www.charlotteobserver.com/408/story/989935.html>.

defending itself from that suit before finally agreeing to the settlement.¹⁴⁴ Factor in the cost of housing the average prisoner in the United States at \$22,650 a year and the financial ramifications of faulty convictions become apparent.¹⁴⁵ Furthermore, this breakdown does not include the costs of the initial felony prosecutions, which vary widely and have not been cumulatively quantified.¹⁴⁶ And when the stakes are high, so are the costs. Securing an average death penalty conviction—whether the defendant is innocent or guilty—costs taxpayers \$1.9 million more than a non-death penalty conviction.¹⁴⁷

C. The Human Cost

*“I’m free, but I’m trapped, and no matter how much I run,
I’ll never make up for the lost time.”*

– Jeff Deskovic, 34, who spent sixteen years in prison in New York for rape and murder before a DNA exoneration.¹⁴⁸

The most damaging of the injuries caused by a lack of prosecutorial accountability are those suffered by the victims of prosecutorial misconduct. On May 9, 2003, John Thompson stepped from the gates of the Orleans Parish Prison and into the southern Louisiana sun.¹⁴⁹ Clutching only a small bag of

¹⁴⁴ *Id.*

¹⁴⁵ See JAMES J. STEPHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE PRISON EXPENDITURES 2, 3 (2001) (reporting that operating costs among state penitentiaries in all fifty states averaged \$22,650 per inmate in 2001).

¹⁴⁶ See *Costs of the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/costs-death-penalty> (last visited Sept. 23, 2010) (providing information on the costs of capital prosecutions in both the federal and state systems).

¹⁴⁷ See JOHN ROMAN ET AL., URBAN INST., THE COST OF THE DEATH PENALTY IN MARYLAND (2008), <http://www.deathpenaltyinfo.org/CostsDPMaryland.pdf>.

¹⁴⁸ Fernanda Santos, *Vindicated by DNA, But a Lost Man on the Outside*, N.Y. TIMES, Nov. 25, 2007, <http://www.nytimes.com/2007/11/25/us/25jeffrey.html>.

¹⁴⁹ Gwen Filosa, *N.O. Man Cleared in ‘84 Murder*, NEW ORLEANS TIMES-

possessions and the ten dollars given to him by the Louisiana Department of Corrections for bus fare,¹⁵⁰ Thompson walked slowly away from the past eighteen years he spent incarcerated at Angola State Prison,¹⁵¹ the largest maximum security prison in the United States.¹⁵² But after spending more than eighteen years behind bars—including fourteen spent on death row—away from his family, friends, and society, Thompson had no idea how he would restart his life.¹⁵³

Thompson was exonerated for the 1984 murder of Ray Liuzza in New Orleans after he was granted a retrial when a New Orleans judge learned of an assistant district attorney's death bed confession that he hid blood evidence that could have cleared Thompson.¹⁵⁴ Thompson is not alone.¹⁵⁵ More than five hundred people have been released from prison following exonerations for wrongful convictions.¹⁵⁶ On average, they spend more than twelve years in prison before they prove their innocence.¹⁵⁷ The readjustment process is often jarring.¹⁵⁸ A 2005 study found that a few months after their release, two-thirds are not financially independent, one-third face long legal battles to regain custody of children taken away when they were wrongfully convicted, and one in four suffers from post-traumatic stress disorder relating to

PICAYUNE, May 9, 2003, <http://truthinjustice.org/John-Thompson.htm>.

¹⁵⁰ Webster, *supra* note 81.

¹⁵¹ *See id.*

¹⁵² *See* Melinda Stone, *Angola Prison and Prison Museum*, THE LAY OF THE LAND (Ctr. for Land Use Interpretation, Culver City, Cal.), Summer 1998, at 3, available at http://www.clui.org/lotl/pdf/14_summer1998.pdf (noting that Angola is one of the largest prisons in the United States and the largest, by area); *see also* THE FARM: ANGOLA, USA (Gabriel Films 1998).

¹⁵³ Webster, *supra* note 81.

¹⁵⁴ *Id.*

¹⁵⁵ *See About*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/content/index.php?option=com_content&view=article&id=46&Itemid=53 (last visited Sept. 23, 2010).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *See generally The Exonerated*, LIFE AFTER EXONERATION PROGRAM, http://www.exonerated.org/content/index.php?option=com_content&view=article&id=47&Itemid=54 (last visited Sept. 17, 2010).

their incarceration.¹⁵⁹ Re-entry services, such as job training and residency assistance available to parolees in the states that offer them, are not offered to exonerees.¹⁶⁰ Despite their innocence, most exonerees face the same challenges as the guilty when they are released from prison, including chronic unemployment, lack of health care, drug addiction, homelessness, and the social stigma associated with the formerly incarcerated.¹⁶¹ “Any time that anyone has been in prison, even if you are exonerated, there is still a stigma about you, and you are walking around with a scarlet letter,” explained exoneree Ken Wyniemko, in an interview in *The New York Times*.¹⁶² That stigma is further exacerbated by states’ traditionally slow responses in clearing the wrongful convictions from criminal records, if they do so at all.¹⁶³ Perhaps the greatest price is in the loss of youth for the wrongfully convicted—most are convicted in their twenties and spend an average of twelve years behind bars¹⁶⁴—and the difficulty of returning to a normal life after having spent more than a decade removed from society.¹⁶⁵

The majority of states do not offer civil remedies for the wrongfully convicted.¹⁶⁶ Those that do often require long legal battles, set strict limits on how much a plaintiff can receive, and exonerees can rarely satisfy the heavy burden of proving their innocence and lack of involvement in any crime that is typically required in such statutes.¹⁶⁷ Between 1985, when New York established a civil remedy for the wrongfully convicted, and 2001, the success rate of these lawsuits hovered around 7 percent.¹⁶⁸

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Roberts & Stanton, *supra* note 137.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *About*, *supra* note 155; Roberts & Stanton, *supra* note 137.

¹⁶⁵ For an in-depth look at the individual stories of 137 exonerees, see *Exonerated, Freed and What Happened Then*, Interactive Feature, N.Y. TIMES, Nov. 25, 2007, http://www.nytimes.com/interactive/2007/11/25/nyregion/20071125_DNAI_FEATURE.html.

¹⁶⁶ See Buchwalter, *supra* note 137, §§ 2, 19.

¹⁶⁷ See *id.*

¹⁶⁸ SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 3 (2004).

Nationwide, 40 percent of former inmates cleared through DNA evidence did not receive any compensation for the years they spent in prison for crimes they did not commit.¹⁶⁹

John Thompson's realization of these chronic and consistent problems among the wrongfully convicted and recently freed caused him to found the New Orleans-based Resurrection After Exoneration.¹⁷⁰ Resurrection After Exoneration, a non-profit organization, provides exonerees throughout the South with services such as job training, transitional housing, health insurance subsidies, and support group meetings.¹⁷¹ And while Thompson has found a positive outlet for his frustration over the eighteen years he spent in prison by helping others in similar situations, the root cause of his incarceration remains unresolved: a lack of meaningful disciplinary action against the prosecutors who concealed evidence of his innocence while seeking the death penalty against him. "They call it malfeasance of office and get a slap on the wrist while I'm up at Angola on death row for 18 years," Thompson told New Orleans City Business newspaper in June 2007.¹⁷² "Somebody help me understand this."¹⁷³

III. FINDING SOLUTIONS

A. *Changing Prosecutorial Culture*

Professionals and legal scholars of the criminal justice system often come to one conclusion when asked why prosecutors hide evidence and put witnesses on the stand they know to be lying—they do it to win.¹⁷⁴ Most people understand the role of attorneys

¹⁶⁹ Roberts & Stanton, *supra* note 137.

¹⁷⁰ John Thompson, *Letter from the Founder*, RESURRECTION AFTER EXONERATION, <http://www.r-a-e.org/about/letter-founder> (last visited Sept. 29, 2010). Resurrection After Exoneration is an "offspring" of the Innocence Project New Orleans. RESURRECTION AFTER EXONERATION, <http://www.r-a-e.org/home> (last visited Sept. 29, 2010).

¹⁷¹ *Services*, RESURRECTION AFTER EXONERATION, <http://www.r-a-e.org/programs/services> (last visited Sept. 24, 2010).

¹⁷² Webster, *supra* note 81.

¹⁷³ *Id.*

¹⁷⁴ *See Trial & Error: Part 1*, *supra* note 38.

as ethical and diligent advocates for their clients, whether they are a personal injury attorney representing an injured motorist or a contract specialist negotiating on behalf of a Fortune 500 company.¹⁷⁵ However, this traditional understanding of the attorney as an advocate does not fully carry over to prosecutors, at least in theory.¹⁷⁶ Prosecutors have officially described themselves as advocates primarily for the administration of justice.¹⁷⁷ The Supreme Court adopted this definition in a 1935 review of allegations of misconduct of an assistant United States Attorney, stating that the prosecutor “is the representative not of an ordinary party to a controversy . . . and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹⁷⁸ Unfortunately, this theory has not always been the standard for prosecutors in reality. Legendary twentieth century trial attorney Clarence Darrow once stated that lawyers always aim to seek justice, however, “justice” to a prosecutor is often seen as a guilty verdict of the defendant.¹⁷⁹ This mindset has also taken more extreme forms. In Illinois, prosecutors were excoriated in the media when the public learned of their “two-ton contest”—a running bet between prosecutors who vied to be the first in the year to convict defendants whose compiled weight was more than 4,000 pounds.¹⁸⁰

It is a regular practice for prosecutors’ offices to keep track of the conviction rates of its attorneys and often provide these figures

¹⁷⁵ MODEL RULES OF PROF’L CONDUCT R. 1.3 (2002).

¹⁷⁶ See *Berger v. United States*, 295 U.S. 78, 88 (1935); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: ‘The United States wins its point whenever justice is done its citizens in the courts.’”).

¹⁷⁷ NAT’L PROSECUTION STANDARDS §1.1 (2d ed. 1991).

¹⁷⁸ *Berger*, 295 U.S. at 88 (stating further that the prosecutor “is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilty shall not escape or innocence suffer”).

¹⁷⁹ See CLARENCE DARROW, *VERDICTS OUT OF COURT* 316 (Arthur & Lila Weinberg eds., Elephant Paperback 1989) (1963).

¹⁸⁰ Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 36 (2009) (citing Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at 1).

as evidence of success.¹⁸¹ However, the moment that one comes to the realization that not all people charged with crimes are guilty, the notion of keeping a tally of conviction rates and rewarding those prosecutors with the highest rates becomes defunct. Keeping score and pushing prosecutors to attain higher conviction rates presumes that all those arrested by police are guilty and therefore runs contrary to the cornerstone of criminal justice in democracies: that defendants are innocent until proven guilty.¹⁸²

Therefore, it is the recommendation of this author that, as an integral first step to fundamentally overhauling the culture of prosecutors' offices, conviction rate-tallying should be outlawed. Using the obtainment of a conviction as the prosecutor's fundamental goal encourages abuses of discretion, hiding exculpatory evidence, and putting on false testimony, whether these improprieties are intentional or unintentional. When prosecutors understand and fall in line with their defined role as ministers of justice and not advocates solely for conviction, a collective shift in mindset can begin to take place.

Still, comprehensive reform of the culture within prosecutors' offices must also deal with the nature of the prosecutorial culture:

¹⁸¹ See Carl Hessler Jr., *County Prosecutors Maintained High Conviction Rate in 2008*, TIMES HERALD (Montgomery Cty., Penn.), May 10, 2009, available at <http://www.timesherald.com/articles/2009/05/10/news/doc4a065381637fc800015016.txt>; Donna J. Miller, *Summit County Prosecutor Touts 96% Conviction Rate*, CLEVELAND.COM (Dec. 24, 2008, 7:49 AM), http://blog.cleveland.com/metro/2008/12/akron_summit_county_prosecutor.html; Glenn Nyback, *Staten Island D.A. Touts Highest Felony Conviction Rate in City*, STATEN ISLAND ADVANCE, June 18, 2009, available at http://www.silive.com/news/index.ssf/2009/06/staten_island_da_touts_highest.html (showing an average conviction rate among the five boroughs of New York City in 2008 of 88.8%). The United States Attorney routinely reports on the "batting average" of its prosecutors in obtaining convictions. JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 1.29 (4th ed. 2009).

¹⁸² See *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("[A] presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). Democracies throughout the world have followed this example as one of the pillars of a free and just society. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 11, §1, (Dec. 10, 1948) ("Everyone charged with a penal offence has the right to be presumed innocent until proved guilty.").

prosecutors often seek credit and praise for high conviction rates, try to build their own collection of “war stories,” and share these stories to feel like a part of the team.¹⁸³ While strong feelings cannot and should not be discouraged among prosecutors when they obtain a conviction against a factually guilty defendant whose rights were respected, there must be an effort to distinguish those cases from the ones where prosecutors do whatever it takes to preserve a perfect conviction rate.¹⁸⁴ Reform, then, should also include enhanced inter-office visibility when prosecuting attorneys wrongfully obtain convictions. For example, offices should share reports of instances when prosecutorial wrongdoing was uncovered and these reports should be included as part of required training of prosecutors by their offices. This will help to not only prevent similar abuses in the future but also to further endorse the understanding that prosecutors are ministers of justice and not simply advocates for conviction.

Even with internal reform, pressure for convictions will still persist, as the charge for convictions is often compounded by the strong influence of the media and a public clamoring for convictions and the death penalty for certain suspects, even when those people may be innocent or legally undeserving of such punishment.¹⁸⁵ Therefore, a second prong, involving increased transparency of prosecutorial actions must be adopted to combat these strong urges. In the past, supervisors have responded to a prosecutor who refuses to press charges against someone that he or she believes to be innocent by punishing, terminating, or simply forcing the prosecutor to give up the case.¹⁸⁶ Instead, those who

¹⁸³ Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV 283, 292 (2001).

¹⁸⁴ The group dynamics and loyalty that prosecutors often hold for one another have resulted in often unanimous defense of convictions secured by their colleagues despite abundant evidence of the defendants' innocence. See generally Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006).

¹⁸⁵ See DAVIS, *supra* note 45, at 85–86, 171–73 (describing how public opinion may be manipulated by political rivals to force death penalty prosecutions and a deferential news media).

¹⁸⁶ See Eric Zorn, Op-Ed., *Burris Failed His Only Major Test in Office as AG*, CHI. TRIB., March 3, 1998 (telling the story of Illinois assistant attorney

have refused to further prosecute cases should be given an official channel for filing an independent review of those charges.¹⁸⁷ When one of these cases is not pursued—and there was clear and convincing evidence of the defendant’s innocence—the prosecutor who refused to prosecute should be commended within her office and to the media. While the general public carries strong opinions toward holding the guilty accountable, it has also demonstrated revulsion for cases in which defendants are wrongfully convicted.¹⁸⁸ Speaking with the media about prosecutors who noticed errors and refused to prosecute further will serve to bolster the credibility and legitimacy of prosecutors and law enforcement among society as true champions of justice, and in turn, should reduce crime.¹⁸⁹ A shift away from a victory-at-all-costs mentality, combined with increased visibility of prosecutors’ faults and positive examples of the true administration of justice will work synergistically to shape the characteristics of prosecutors’ office to their intended role as ministers of justice and not advocates for conviction. This will thereby help to eliminate the recurrence of embarrassing wrongful convictions and harmful abuses of discretion.

B. Expanding Civil Liability

On October 6, 2010, the United States Supreme Court heard

general Mary Brigid Kenney, who was forced to resign in 1992 when she refused to further defend the death penalty conviction of Rolando Cruz, who was later found to be innocent). *See also supra* notes 52–61 and accompanying text (discussing the Rolando Cruz case).

¹⁸⁷ *See infra* Section III.C (discussing independent review board).

¹⁸⁸ *See* Melanie Takarangi, Eryn Newman & Maryanne Garry, “...And Justice for All?” Public Perceptions of Wrongful Conviction (March 4, 2009) (unpublished study) (on file with American Psychology-Law Society) (demonstrating a relationship towards distrust of the criminal justice system with the seriousness of the offense for which the later proven innocent defendant was charged and convicted); *see also About Us*, CENTER ON WRONGFUL CONVICTIONS (April 29, 2010), <http://www.law.northwestern.edu/wrongful-convictions/aboutus/> (describing success in pushes for legislation to provide for civil remedies for the wrongfully convicted throughout the United States).

¹⁸⁹ *See supra* Section II.A (concluding that positive perceptions of law enforcement correspond with reductions in crime).

oral arguments in the case of *Connick v. Thompson*, a Fifth Circuit decision stemming from an appeal by the New Orleans District Attorney's office of a \$14 million judgment granted to John Thompson, a man wrongfully convicted after prosecutors hid exculpatory evidence.¹⁹⁰ The case comes on the heels of a settlement in the earlier case of *Pottawattamie County v. McGhee*, where in November 2009 the Supreme Court heard oral arguments that examined the issue of absolute prosecutorial immunity, even in light of prosecutors who secured convictions by knowingly fabricating evidence.¹⁹¹ After arguments, the case was withdrawn due to an agreed settlement.¹⁹² If Thompson is successful, the decision will represent the first crack in the once-thought impenetrable shield of prosecutorial immunity from federal civil liability for wrongful convictions,¹⁹³ particularly where the prosecutor's office failed to properly train its assistant prosecuting attorneys on the rules of *Brady*.¹⁹⁴ In *Thompson*, the primary policy concerns of the Supreme Court in establishing absolute immunity were in preventing frivolous and time-wasting lawsuits against prosecutors, the "chilling effect" that the threat of civil suits could bring to the prosecutor's execution of duty, and "the possibility that [the prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust."¹⁹⁵ During oral arguments in the *McGhee* case, Supreme

¹⁹⁰ See Transcript of Oral Argument, *Connick v. Thompson*, 130 S. Ct. 1880 (2010) (No. 09-571) [hereinafter Transcript of Oral Argument, *Connick*]; see also Brad Heath, *Justices Question DA's Liability for Misconduct*, USA TODAY, Oct. 6, 2010, http://www.usatoday.com/news/washington/judicial/2010-10-06-prosecutors_N.htm. For more on John Thompson, see *supra* Part II.C.

¹⁹¹ See Transcript of Oral Argument, *Pottawattamie Cnty. v. McGhee*, 130 S.Ct. 1047 (2009) (No. 08-1065), 2009 WL 3640088 [hereinafter Transcript of Oral Argument, *Pottawattamie Cnty.*]; see also David G. Savage, *Prosecutor Conduct Case Before Supreme Court Is Settled*, L.A. TIMES, Jan. 5, 2010, <http://articles.latimes.com/2010/jan/05/nation/la-na-court-framed5-2010jan05>.

¹⁹² See Savage, *supra* note 191.

¹⁹³ *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (referring to absolute immunity against actions brought against prosecutors under 42 U.S.C. § 1983).

¹⁹⁴ Jessica Fitts, *Argument Preview: Court to Consider Liability for DA's Offices on Brady Violations*, SCOTUSBLOG (Oct. 4, 2010, 8:26 AM), <http://www.scotusblog.com/?p=105481>.

¹⁹⁵ *Imbler*, 424 U.S. at 423–24.

Court Justice Sonia Sotomayor, herself a former Manhattan prosecutor,¹⁹⁶ questioned the theory that imposing civil liability on prosecutors who present false evidence would cause too much second-guessing of possible evidence and affect the performance of their duty to administer justice.¹⁹⁷ “A prosecutor is not going to flinch when he suspects evidence is perjured or fabricated?” Sotomayor asked. “Do you really want to send a message to police officers that they should not merely flinch but stop if they have reason to believe that evidence is fabricated?”¹⁹⁸ Sotomayor hit the nail on the head—for far too long prosecutors have enjoyed absolute immunity, regardless of the level of their misconduct, which has contributed to a dependence on taking actions that carry no consequences as well as collective apathy towards defendants’ rights.

The numbers indicate that expanding civil liability has very little impact on conviction rates and prosecutorial practice. In the seventeen states and the District of Columbia that have passed legislation providing civil remedies against prosecutors for those who have been wrongfully convicted there has been little change to the prison population.¹⁹⁹ In fact, in 2009, district attorneys’ offices in the five boroughs of New York City reported a 91 percent average felony conviction rate,²⁰⁰ despite the fact that the state has

¹⁹⁶ *Sonia Sotomayor Biography*, BOSTON GLOBE (May 27, 2009), http://www.boston.com/news/nation/washington/articles/2009/05/27/sonia_sotomayor/.

¹⁹⁷ See Transcript of Oral Argument, Pottawattamie Cnty., *supra* note 191, at 21–22.

¹⁹⁸ *Id.* at 21.

¹⁹⁹ Compare *supra* note 137 and accompanying text (listing states with civil liability for wrongful convictions) with U.S. DEP’T OF JUSTICE, MID-YEAR 2009 PRISON STATISTICS (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf> (showing that Texas, Illinois, and New York, three of the top four largest jail jurisdictions in the U.S. also have wrongful conviction civil liability statutes and have seen virtually no change in total prison population over the last three years).

²⁰⁰ Kathleen Lucadamo, *GOP Attorney General Hopeful Dan Donovan’s Math Skills Lack Conviction*, N.Y. DAILY NEWS, Sept. 30, 2010, http://www.nydailynews.com/ny_local/2010/09/30/2010-09-30_numbers_boast_by_ag_hopeful_lacks_real_conviction.html (average determined by calculating five boroughs’ individual conviction rate numbers).

allowed for wrongful conviction civil suits against prosecutors for more than twenty-five years.²⁰¹ Equally unpersuasive is the argument that honest prosecutors will become frequent targets of lawsuits when they prosecute and obtain lawful convictions in good faith only to later see the defendant exonerated. The doctrine of qualified immunity for state and federal officials, promulgated by the Supreme Court in *Harlow v. Fitzgerald*, stands to prevent claims against such good faith prosecutions.²⁰² Qualified, also known as “good faith” immunity, will shield honest prosecutors from such liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁰³

To create a more effective system of accountability among prosecutors, it is important that individual states and the federal government follow states that have passed legislation that provides civil remedies for the wrongfully convicted. In the federal courts, no longer should the wrongfully convicted rely on 42 U.S.C. § 1983 for relief,²⁰⁴ as Section 1983 was historically a remedial pathway for victims of Southern racism in the late 19th century and not unscrupulous prosecutors.²⁰⁵ The United States therefore needs to pass specific legislation allowing for direct federal remedies against prosecutors who violate constitutional rights in securing convictions against the innocent. While it is likely that multiple lawsuits would be filed against prosecutors in the wake of such legislation, the 40 percent of the exonerated who have never received any compensation for their time they spent wrongfully

²⁰¹ N.Y. CT. CL. ACT §§ 8-b(2), 8-b(5)(c) (McKinney 2007). New York’s total statewide crime rate has also decreased by 28 percent since 1999, boasting double-digit decreases in all categories of major crimes. NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 2008 NEW YORK STATE CRIME UPDATE 2 (2009).

²⁰² See *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982).

²⁰³ *Id.* at 818.

²⁰⁴ See Civil Action for Deprivation of Rights, 42 U.S.C.A. § 1983 (West 2006) (allowing for civil right of action against constitutional rights violations).

²⁰⁵ See *Wilson v. Garcia*, 471 U.S. 261, 275–76 (1985) (outlining the history of §1983 as part of the Civil Rights Act of 1871 and the unexpected and “wide diversity of claims that the new remedy would ultimately embrace”).

incarcerated²⁰⁶ would finally have the opportunity to receive compensation for the injustices committed against them. Consequently, the resulting media exposure of the instances of prosecutorial misconduct that bring these cases to bear and its ensuing cost to the taxpayers would result in a public call for more responsible prosecutorial procedures. This would serve to reward honest prosecutors and discipline the unethical, further facilitating a shift of prosecutorial culture and a greater internal system of checks for those prosecutors who might otherwise violate the law to obtain unfounded convictions. In the cases in which a defendant is wrongfully convicted as a result of ineffective assistance of defense counsel, the wrongfully convicted defendant would have a cause of action against that attorney. In faultless error cases in which neither the prosecutor nor the defense attorney is found to be culpable for the wrongful conviction, an automatic statutory compensation for those convicted of crimes later found to be innocent, such as the Tim Cole Act in Texas, which provides the wrongfully convicted with a lump sum payment of \$80,000 per year of incarceration as well as college tuition, would be appropriate.²⁰⁷

C. Independent Disciplinary Review

“When there is no penalty for failure, failures proliferate.”²⁰⁸

– George Will, Pulitzer Prize-winning columnist²⁰⁹

When investigative journalists for the Chicago Tribune began pouring over case records of overturned convictions, the single fact that appeared more consistently than all of the others was that the prosecutors responsible for wrongful convictions were never penalized for their actions.²¹⁰ One example of this is the case of

²⁰⁶ Roberts & Stanton, *supra* note 137.

²⁰⁷ See Hylton, *supra* note 137.

²⁰⁸ George Will, Op-Ed, *No Flinching from the Facts*, WASH. POST, May 11, 2004, available at <http://www.jewishworldreview.com/cols/will051104.asp>.

²⁰⁹ George Will, WASH. POST WRITERS GROUP, <http://www.postwritersgroup.com/will.htm> (last visited Oct. 3, 2010).

²¹⁰ See *Trial & Error: Part 1*, *supra* note 38. The Tribune failed to turn up

former St. Louis city prosecutor Nels C. Moss Jr., whose conduct was formally challenged twenty-four times while he served as a prosecutor there.²¹¹ Those challenges resulted in findings that he committed reversible misconduct in seven of those cases, and was found to have committed non-reversible “prosecutorial error” in seventeen others.²¹² Moss, while scolded on record by at least one judge for his conduct deliberately designed to “poison the minds of the jurors regarding the defendant’s character,” was never punished for his wrongdoing and remains a licensed attorney in Missouri.²¹³ In perhaps the most highly-publicized case of prosecutorial misconduct, former Durham County District Attorney Mike Nifong, who concealed exculpatory DNA evidence and continued to press charges against three Duke University students accused of rape, was ultimately fired, disbarred, and sentenced to one day in jail after the truth surfaced of his handling of that case.²¹⁴

The prosecutor is the most powerful actor in America’s criminal justice system.²¹⁵ The decision to initiate criminal

any information that any of the prosecutors were disbarred for their actions, despite the level of misconduct. *Id.* One prosecutor was fired but later appealed the decision and was reinstated. *Id.* Another was suspended for fifty-nine days. *Id.* In only two of the cases prosecutors were held criminally responsible, when two prosecutors were convicted separately of misdemeanor obstruction of justice and fined \$500. *Id.*

²¹¹ See Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct*, CENTER FOR PUB. INTEGRITY (June 26, 2003), <http://projects.publicintegrity.org/pm/default.aspx?act=main>. Moss responded to Weinberg in this article by stating that defendants complained when they were unsatisfied with an outcome and he pointed out that there were “numerous cases” that he did not pursue where the evidence did not match up. *Id.*

²¹² See *id.*

²¹³ *Id.*

²¹⁴ Julia Lewis, *Nifong Guilty of Criminal Contempt; Sentenced to One Day in Jail*, WRAL.COM (Aug. 31, 2007), <http://www.wral.com/news/local/story/1763323/>.

²¹⁵ See Robert H. Jackson, *The Federal Prosecutor*, 24 JUDICATURE 18, 18 (1940) (address of the former United States Attorney General) (“The prosecutor has more control over life, liberty and reputation than any other person in America”); see also Bennett L. Gershman, Symposium, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 448 (1992) (stating that the prosecutor is “the most

proceedings, convene grand juries, grant immunity, negotiate and permit plea bargains, pursue statutory enhancements for certain crimes and decide whether to bring charges, what charges to bring, and when to bring them all fall within the discretionary authority of the prosecutor.²¹⁶ While police departments have long had internal investigation bureaus and judges could be punished for “abuse of discretion” when determined to have acted improperly, prosecutors have long flown under the radar of accountability.²¹⁷ There is not a single prosecutor’s office that has yet to permit an independent review board to investigate complaints of misconduct, and while some states have passed laws that define standards for prosecutors, they are virtually never held to those standards.²¹⁸ While the American Bar Association, the Department of Justice, and several state prosecutors offices have promulgated standards of conduct specifically for prosecutors, there is no legal requirement for prosecutors to follow these rules and those who break them will only be held accountable within their offices.²¹⁹ Likewise, the federal constitution offers no guidance on the issue of prosecutors who betray their oath to uphold justice.²²⁰ The irony here is glaring: those who are tasked with holding the public accountable for its actions are themselves never held accountable.

A main reason for this gap in accountability is traced back to what proponents of prosecutorial immunity point to as a primary and acceptable substitution for independent review: accountability to the political electorate.²²¹ The idea that prosecutors are accountable to the electorate arose out of the Jacksonian populist democracy of the 1820s.²²² However, the lack of transparency in modern prosecutors’ offices due to private charging and negotiating practices has paired with other factors—such as media glamorization of prosecutors’ offices—to result in an ill-informed

pervasive and dominant force in criminal justice”).

²¹⁶ See Lupton, *supra* note 44, at 1279–83.

²¹⁷ See DAVIS, *supra* note 45, at 15–16.

²¹⁸ See *id.* at 16.

²¹⁹ *Id.* at 15–16.

²²⁰ See *id.* at 164.

²²¹ *Id.* In the United States, “more than 95 percent of the chief prosecutors are elected.” *Id.* at 166.

²²² *Id.*

public, eroding nearly all of the public's electoral influence as an effective check on prosecutors who would otherwise commit misconduct.²²³ In fact, some prosecutors found to have concealed evidence or pursued erroneous charges end up moving on to higher offices, despite their actions.²²⁴

The failure of the electoral system to act as an effective check on otherwise unfettered prosecutorial power became a major point of concern documented in six state-wide legal studies of the criminal justice system in the 1920s.²²⁵ The "Wickersham Report," issued in 1934 by the National Commission of Law Observance and Enforcement, further criticized the total lack of prosecutorial accountability, stating specifically that elections failed to result in qualified candidates securing office and did not act as a proper check on the discretion of the prosecutor.²²⁶ "The people of the United States have traditionally feared concentration of great power in the hands of any one person, and it is surprising that the power of the prosecutor has been left intact as it is today," wrote Earl H. DeLong and Newman F. Baker, two law scholars and

²²³ *Id.* at 167. Prosecutorial misconduct is rarely revealed to the general public and when it is reported, it is often ignored, as the public generally believes that misconduct is acceptable when used against people they deem to be guilty. *See id.* at 171–173.

²²⁴ For example, former DuPage County State's Attorney Jim Ryan pursued charges against an accused child murderer despite having material proof of another man's guilt. *See* Rick Pearson, *Jim Ryan Apologizes for Role in Nicarico Case*, CHI. TRIBUNE, Nov. 13, 2009, http://articles.chicagotribune.com/2009-11-13/news/chi-jim-ryan-apology-13nov13_1_role-in-nicarico-case-cruz-and-hernandez-death-penalty. Since, Ryan served eight years as Illinois Attorney General. RYAN & RYAN, ATTORNEYS AT LAW, Attorney Profile, <http://www.ryancrimlaw.com/Bio/JamesRyan.asp> (last visited Oct. 9, 2010). Current U.S. Senator Roland Burris, who was chosen to take President Barack Obama's vacated seat in 2008, also pursued erroneous charges in the Nicarico case in his role as then-Illinois Attorney General. Zorn, *supra* note 186. Peter Corning, a prosecutor who was accused of concealing evidence in the wrongful prosecution of an innocent man for the murder of a senior citizen, later left his job as prosecutor and was elected a local judge. *See Trial & Error: Part 1, supra* note 38.

²²⁵ Joan E. Jacoby, *The American Prosecutor in Historical Context*, THE PROSECUTOR (March–April 2005) ("Most were shocked by the extent of his power and dismayed by his inability to control the crime situation.").

²²⁶ *Id.* at 34.

members of the Wickersham Commission.²²⁷ Since then, groups seeking reform of modern prosecution have consistently pointed to the need for an effective check on prosecutorial power in response to revelations of the hundreds of overturned cases in recent decades due to prosecutorial misconduct.²²⁸

D. Effective Reforms

This Note argues that the most effective reform—whereby prosecutors could become true ministers of justice—would require a three-tiered approach. The first of these tiers would involve cooperative federal and state-level legislation requiring prosecutors to establish uniform workable and enforceable standards as well as systems to monitor prosecutors' adherence to these standards. This would include instituting a better record-keeping system designed to identify, log, and pass on to defense counsel any evidence that might tend to exculpate the accused. Prosecutors would be required to verify that they have reviewed all evidence available, and mark with their signatures whether evidence was turned over or denied to defense prior to trial. Given the extreme prevalence of falsified informant testimony in wrongful convictions,²²⁹ prosecutors would

²²⁷ Earl H. DeLong & Newman F. Baker, *Provisions of Law Organizing the Office Prosecuting Attorney*, 23 J. CRIM. L. & CRIMINOLOGY 926, 934 (1933).

²²⁸ See PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, *THE TYRANNY OF GOOD INTENTIONS* 173–85 (2000) (proposing a philosophical change through specified legislation designed to reign in the prosecutor's control over charging); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 763–72 (1996) (proposing instituting enforceable standards for prosecutors); JOHN F. TERZANO, JOYCE A. MCGEE & ALANNA D. HOLT, *THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW* (2009), <http://www.thejusticeproject.org/wp-content/uploads/pr-improving-prosecutorial-accountability1.pdf> (recommending a six-fold approach to reform, including instituting independent review boards, greater publication of instances of misconduct, and open-file discovery in criminal cases); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562–68 (1981) (suggesting required enforceable standards and greater record-keeping practices).

²²⁹ See WARDEN, *supra* note 121, at 3 (explaining that informant “snitch” testimony in exchange for more lenient sentences played a role in forty-six percent of the more than 100 death row exonerations since the 1970s).

be required to uniformly document all deals where informants testify against a defendant in exchange for leniency; prosecutors would then be required to turn that information over to defense.

The second tier of reforms would require the creation of independent review boards attached to all prosecutors' offices that would promptly investigate complaints filed by citizens and defense attorneys. This system would also institute individualized monitoring of prosecutors, including a publicly-accessible database in which the independent body would catalog meritorious complaints filed by defendants and the result of corresponding investigations into misconduct. When the Los Angeles Police Department's Rampart Division's widespread instances of abuse of authority were made public in the late 1990s, the community refused to accept a police force that saw itself as above the law.²³⁰ The city ultimately allowed for federal reform of the Los Angeles Police, which led to a greater system of monitoring police officers, facilitated the system for filing and investigating complaints, and allowed the police to catalogue the complaints.²³¹ These recommendations presuppose that the same would need to hold true for prosecutors. An independent review board would also have important data at its fingertips as a result of the systems for monitoring prosecutors previously suggested. This would enable a Board to apply more effective and informative scrutiny when allegations of misconduct arise. Relatively minor instances of misconduct could be logged in a prosecutor's file with that office and would not ordinarily be subject to disciplinary action. However, repeated instances of misconduct or one showing of major misconduct (such as concealing clear exculpatory evidence known to the prosecutor) would be met with internal disciplinary action, which could include censure, suspension, or termination.

The final tier of these reforms would deal with those exceptional cases in which a prosecutor acted knowingly, maliciously, and successfully to imprison a known-innocent defendant through abuse of his authority. The public has shown that it will not shy away from prosecuting corrupt cops who

²³⁰ See *Frontline: LAPD Blues* (PBS 2001).

²³¹ *Id.*

knowingly commit crimes;²³² as such, it is likely willing to prosecute corrupt prosecutors as well.

The most egregious cases of prosecutorial misconduct call for new, specific legislation that would allow for criminal prosecutions of prosecutors, who by virtue of their authority deliberately conceal material exculpatory evidence or put on knowingly false material testimony to secure convictions. Some in the legal community have criticized the notion of determining when prosecutors presented certain evidence in bad faith and securing a conviction against a prosecutor for failing to turn over evidence that she may not have realized was exculpatory.²³³ However, the uniform monitoring and complaint logging system proposed above would serve as protection for the accused prosecutor by allowing investigators to review that prosecutor's record and determine patterns of lawful and honest behavior that would bolster his or her credibility.

CONCLUSION

The American prosecutor's job is both challenging and necessary for the continuation of a society free from those who would cause it harm. However, there must be a check on the power of those with the authority to take the life or liberty of any member of our society. While a great number of prosecutors respect this power and take on this responsibility with honor and integrity, there are far too many others who lose track of the dire responsibility and duty to justice that the job of a prosecutor requires. The prosecutor struggles everyday to strike a balance between society's demands and those of justice. Only with additional, structured oversight to make sure that these men and women are living up to the oath that they swore to our society can our criminal justice system become a more effective institution to protect and exonerate the innocent and scrupulously punish the guilty.

²³² See *id.* (describing the arrest and prosecution of officers in the LAPD Rampart division); see also MOLLEN REPORT, *supra* note 39 (documenting instances of prosecution of corrupt NYPD officers).

²³³ See Tuite, *supra* note 61 (arguing that prosecutors acted in good faith).