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Prosecuting Misconduct

NEW YORK'S CREATION OF A WATCHDOG COMMISSION

*“[T]he duty of a prosecuting attorney is not to persecute but to prosecute, and that he should endeavor to protect the innocent as well as to prosecute the guilty. He should always be interested in seeing that the truth and the right shall prevail”*¹

INTRODUCTION

Prosecutors play a pivotal role in the U.S. criminal justice system. They are administrators of justice and advocates for the people.² The role of a prosecutor is to represent the People³ against a person charged with violating crimes of the United States, or those of a given state.⁴ Although in many ways a prosecutor is just like any other lawyer, their role differs significantly because their unique ethical duties extend beyond the role of an advocate and include an obligation to “seek justice.”⁵ This obligation entails both prosecuting criminals and protecting those who are innocently accused.⁶ Nonetheless, a prosecutor has the discretionary power to

¹ *Bailey v. Commonwealth*, 237 S.W. 415, 417 (Ky. 1922).

² See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS 58 (3d ed. 2014).

³ It is important to note there is a “striking dichotomy between the idea of a collective ‘people,’ and the lone defendant on the other side of the ‘v.’ . . . [I]t assumes that the prosecution and the police adequately represent, or at least are capable of adequately representing, the interests of a local ‘community.’” However, reality has shown that there is an “unequal distribution of political power” and “that the decisions of ‘the People’ are often not responsive to the interests of the poor populations of color” that are so often the ones involved in the criminal justice system. Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 253 (2019).

⁴ See *People v. Kelley*, 142 Cal. Rptr. 457, 476 (Cal. Ct. App. 1977). (“Accordingly, imposition of a broader standard of conduct on the prosecutor than on defense counsel is justified by the different functions these attorneys perform, in that while they both function as attorneys and agents, the prosecutor exercises the sovereign power of the State as principal.”).

⁵ Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor’s Ethical Obligation to “Seek Justice” in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1340 (2004).

⁶ LISA D. WILLIAMS ET AL., *SIZING UP THE PROSECUTION: A QUICK GUIDE TO LOCAL PROSECUTION* 3 (2010), <https://hls.harvard.edu/content/uploads/2008/07/prosecution2010.pdf> [perma.cc/75GT-G2Z6].

charge a defendant with a crime; a power that can “strip an individual of liberty, and even of life itself.”⁷ Prosecutors must therefore balance their immense power with a responsibility to serve justly, for a prosecutor’s “win” can mean a lifelong jail sentence for the guilty party.⁸

Prosecutors have a unique burden that derives from “exercis[ing] the sovereign power of the state by representing the best interests of the community.”⁹ The position of District Attorney (DA) is mostly an elected position, and their office hires assistant district attorneys (ADAs).¹⁰ A prosecutor is responsible for reviewing arrests made by police, deciding which charges to bring based off of the law, and is the “principal representative of the state before the courts.”¹¹ In many ways, a prosecutor’s job is like that of any other lawyer: to win their case and defeat their opponent. However, unlike a typical lawyer, a prosecutor is not expected to single-mindedly pursue the goal of obtaining a conviction if that is not in the interest of justice.¹² Herein lies the inherent tension of the prosecutor’s role: prosecutors need to act as zealous advocates for the public’s safety while also pursuing justice, two goals often in conflict, with the dilemma compounded by the fact that each prosecutor exercises immense individual discretion to achieve each goal.¹³ The juxtaposition between a

⁷ *Id.*

⁸ See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 962 (2009).

⁹ WILLIAMS ET AL., *supra* note 6.

¹⁰ Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/> [perma.cc/Q9EN-65XH] (“In all but four states, prosecutors are elected to office – about 2,400 of them – and many largely run unopposed in counties with strong political-party identification . . .”). See generally WILLIAMS ET AL., *supra* note 6, at 13 (describing the hiring process for ADAs).

¹¹ See *The American Prosecutor: A Search for Identity*, 79 MICH. L. REV. 919, 919 (1981) (reviewing JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* (1980)).

¹² A prosecutor “is a semi-judicial position . . . , while it is [their] duty to bring to justice those whom [they] believed to be guilty, it is equally [their] duty to protect the innocent and to refrain from prosecuting those against whom no sufficient or reasonable proofs can be found.” Letter read at the retirement dinner of Manhattan District Attorney William Travers Jerome (May 8, 1909) (on file with N.Y. Times); see also ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 2, at 57 (“The prosecutor, with the ultimate authority on whether a case will go forward, has a particular obligation to suspend judgment, protect the innocent, avoid missing crucial investigative avenues, and exercise discretion in the use of criminal sanctions for the conduct that is the subject of the investigation.”).

¹³ See JAMES R. ACKER & DAVID C. BRODY, *CRIMINAL PROCEDURE: A CONTEMPORARY PERSPECTIVE* 445 (3rd ed. 2013) (“The discretionary power exercised by the prosecuting attorney in initiation, accusation, and discontinuance of prosecution gives him more control over an individual’s liberty than any other public official.” (quoting *Prosecutor’s Discretion*, 103 U. PA. L. REV. 1057, 1057 (1955))).

prosecutor's discretionary power and ethical obligations is what so often leads to accusations of prosecutorial misconduct.¹⁴

Despite their ethical obligations, prosecutors have engaged in misconduct and it is of the utmost importance that there is sufficient regulation in place to curb this.¹⁵ Not surprisingly, public scrutiny plays a pivotal role in illuminating prosecutorial misconduct.¹⁶ From social media platforms to cable news stations, stories of over-criminalization, mass incarceration, racial disparities in convictions, and a multitude of other concerns regarding the criminal justice system are plastered in plain sight.¹⁷ DNA exonerations have helped to expose cases of wrongful convictions and problems associated with faulty eyewitnesses and police misconduct.¹⁸ The public is increasingly informed and exposed to these issues through popular shows such as Netflix's true crime docuseries, *Making a Murderer*, and best-selling books like Michelle Alexander's *The New Jim Crow*, further eliciting distrust and frustration with the criminal justice system.¹⁹ Most Americans now agree that the criminal justice system should be reformed.²⁰ The question, then, is whether prosecutorial misconduct is inherently systematic and has reached "epidemic" proportions, or whether it is uncommon and confined to isolated incidents in the grand scheme of the criminal justice system.²¹

¹⁴ See Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2130 (2010).

¹⁵ See CTR. FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 8 (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf> [perma.cc/F4G7-FF54].

¹⁶ See generally Keith A. Findley, *'Making a Murderer' Shows That Our Justice System Needs a Healthy Dose of Humility*, WASH. POST (Jan. 15, 2016), https://www.washingtonpost.com/opinions/the-lessons-from-making-a-murderer/2016/01/15/93d9698c-baf0-11e5-829c-26ffb874a18d_story.html?utm_term=.0537b3e6b746 [perma.cc/AL3C-H7SE] (discussing how shows like "Making a Murderer" put the issue of prosecutorial misconduct in the public eye); Burke, *supra* note 14, at 2119–30.

¹⁷ See Findley, *supra* note 16; Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U. L. REV. 623 (2017).

¹⁸ Burke, *supra* note 14, at 2122 (citing JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000)) ("Exonerations through DNA evidence have enabled lawyers to identify the factors that most commonly contribute to erroneous convictions: mistaken eyewitness interrogations, false confessions, flawed science, inadequate defense lawyering, reliance on unreliable informant evidence, and governmental error such as the failure to disclose exculpatory evidence to the defense.").

¹⁹ See Findley, *supra* note 16; MICHELLE ALEXANDER, THE NEW JIM CROW (10th anniversary ed., 2020).

²⁰ See Lantigua-Williams, *supra* note 10. According the American Civil Liberties Union Campaign for Smart Justice, "91 percent of Americans say that the criminal justice system has problems that need fixing." *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [perma.cc/LW3N-4MRD].

²¹ See CTR. FOR PROSECUTOR INTEGRITY, *supra* note 15, at 4.

The state of New York is directly confronting the question of prosecutorial misconduct as part of a multi-pronged criminal justice reform agenda.²² In general, criminal justice reform has long been a bipartisan political issue.²³ With the growing public backlash against the criminal justice system, state and local politicians are increasingly incentivized to make promises of reform.²⁴ This, in turn, led to the legislature creating a “watchdog” of sorts to reign in the prosecutors’ bad behavior.²⁵

In response to ongoing public concern over potential prosecutorial abuse, Republican Senator John DeFrancisco proposed Senate Bill S2412D, to establish the Commission on Prosecutorial Conduct (CPC, or Commission).²⁶ The purpose of this first-in-the-nation legislation was to create a watchdog commission on prosecutorial conduct that would attempt to regulate actions by the state’s sixty-two DA’s offices for “unprofessional, unethical, and unlawful” conduct.²⁷ The CPC has the power to issue subpoenas, compel witnesses to testify, conduct hearings, and request materials that are relevant to the ongoing investigation.²⁸ The development of the CPC evolved from the need to increase prosecutorial accountability, ideally by making the CPC’s decisions and supporting documents available to the public.²⁹ At one end of the spectrum, many in the legal community

²² See Joaquin Sapien, *Criminal Justice Legislation Will Force New York Prosecutors to Disclose More Evidence, Sooner*, PROPUBLICA (Apr. 8, 2019, 5:00 AM), <https://www.propublica.org/article/criminal-justice-legislation-will-force-new-york-prosecutors-to-disclose-more-evidence-sooner> [perma.cc/2XBR-XMU8].

²³ See Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html?login=smartlock&auth=login-smartlock> [perma.cc/6BV3-Y4KC]; Joseph Goldstein & J. David Goodman, *Criminal Justice Reforms Stall in a Liberal Capital: New York*, N.Y. TIMES (Aug. 21, 2016), <https://www.nytimes.com/2016/08/22/nyregion/criminal-justice-reforms-new-york.html> [perma.cc/9T7Q-W8N8].

²⁴ Cynthia Nixon ran for governor of NY against incumbent Governor Cuomo on a criminal justice platform, however, she lost the election. See Press Release, Cynthia for NY, Cynthia Calls On Cuomo To Sign Bill for Indep. Comm’n to Investigate Prosecutorial Misconduct (Aug. 13, 2018) (“New York must lead the way in creating a new system, one that brings much-needed fairness and balance between prosecutors and defendants. Governor Cuomo is dragging his feet because he’s afraid of taking on powerful prosecutors in the New York establishment.”).

²⁵ See Dan M. Clark, *Cuomo Signs Bill Creating Watchdog Commission for Prosecutor Conduct*, N.Y. L.J. (Aug. 20, 2018, 6:32 PM), <https://www.law.com/newyorklawjournal/2018/08/20/cuomo-signs-bill-creating-watchdog-commission-for-prosecutor-conduct/?slreturn=20180801141749> [perma.cc/Z76A-JRAM].

²⁶ S.B. 2412-D, Reg. Sess. 2017-2018 (N.Y. 2017); Jesse McKinley, *A New Panel Can Investigate Prosecutors. They Plan to Sue to Block It.*, N.Y. TIMES (Aug. 23, 2018), <https://www.nytimes.com/2018/08/23/nyregion/cuomo-prosecutors-oversight-commission.html> [perma.cc/YA9U-Q6PS].

²⁷ McKinley, *supra* note 26.

²⁸ See S.B. 2412-D Reg. Sess. 2017-2018 (N.Y. 2017).

²⁹ This idea mirrors the New York State’s Commission on Judicial Conduct which also makes all of its findings open to the public. See Clark, *supra* note 25.

believed that Senator DeFrancisco's bill was a positive step in the direction of criminal justice reform and would make New York a revolutionary front-runner in the field.³⁰ By contrast, the CPC was, and still is, adamantly opposed by the sixty-two New York DAs and the District Attorneys Association of New York (DAASNY).³¹ As of January 28, 2020, the legal battle that has halted the formation of the CPC ended in a ruling by Judge Weinstein finding the CPC unconstitutional.³²

Despite its explicit intention, however, the CPC does nothing to improve upon the currently-existing prosecutorial regulatory system. Rather than encouraging prosecutors to be more careful and law-abiding, this appointed "watchdog" panel is merely an ineffective use of state resources. This note argues instead that prosecutorial misconduct ought to be addressed through measures of internal regulation and alternative means of accountability, rather than through this external commission. The CPC is not conducive to criminal justice reform; it is synonymous to putting a band-aid over a wound that needs stitches. New York should improve upon the current system already in place and perhaps pursue criminal accountability, rather than continuing the fight to establish the CPC.

Part I of this note outlines prosecutorial misconduct, discusses why there is a need for reform, and explores the issue of prosecutorial accountability. Part II analyzes New York's current mechanisms for the regulation of prosecutorial conduct, the proposed CPC, and its status in light of ongoing legal challenges. Part III explains why the CPC is not the right way of handling prosecutorial misconduct and why the state legislature should learn from past mistakes to make future reforms successful. Finally, Part IV details possible alternative reform measures that the state should take in lieu of forming the Commission.

I. WHAT IS PROSECUTORIAL MISCONDUCT?

One of the most significant issues in the criminal justice system is prosecutorial misconduct. The traditional idea of

³⁰ See Corrine Ramey, *Cuomo Plans to Sign Bill Creating Commission Overseeing Prosecutors*, WALL STREET J. (Aug. 15, 2018, 8:19 PM), <https://www.wsj.com/articles/cuomo-to-sign-bill-creating-commission-overseeing-prosecutors-1534374805> [<https://perma.cc/L4QN-426M>] ("This really positions New York state as a leader on addressing this major contributing cause to wrongful convictions," said Rebecca Brown, policy director at the Innocence Project. "Other states are looking to New York to see what happens here.").

³¹ See McKinley, *supra* note 26; Verified Complaint for Declaratory and Injunctive Relief, *Soares v. State*, N.Y. Sup. Ct. (2018) (No. 2) [hereinafter *Complaint*].

³² See *infra* Part II; *Soares v. New York*, No. 906409-18, 2020 N.Y. Misc. LEXIS 1128, at *88–89 (N.Y. Sup. Ct. Jan. 28, 2020).

prosecutorial misconduct stems from a connection to deliberate wrongdoing, whereas a more novel approach encompasses both negligent wrongdoings as well as the failure to take reasonable measures to ensure fairness in criminal procedure.³³ This distinction can be boiled down to whether the term “misconduct” includes aggressive prosecution or solely the concept of intentional violations of the law.³⁴

A. *Defining Prosecutorial Misconduct*

Defining “prosecutorial misconduct” is difficult. Prosecutors generally understand the concept of misconduct as legal wrongs, whereas unintentional acts or discretionary decisions are considered prosecutorial “error.”³⁵ A popular resource for prosecutors encourages them to rebut accusations of prosecutorial misconduct as error:

Prosecutors often must face misperceptions and negative images of their activities communicated through the media. For example, allegations of “prosecutorial misconduct” too often surface as defense trial tactics that are superficially aired in the popular media. In truth, allegations of “prosecutorial misconduct” are rarely substantiated and are confused with occasional “prosecutorial error” which does not involve professional misconduct.³⁶

This passage strikes directly at the divisive issue of whether or not misconduct is “more episodic than epidemic.”³⁷ In general, “[t]he term, ‘prosecutorial misconduct’ is very broad . . . and could run the gamut from an inadvertent error to an intentional abuse.”³⁸ In a letter to New York State Senator John Flanagan, Frank Sedita (Erie County DA) addressed an argument about the misconception of the term “prosecutorial misconduct.”³⁹ Adamantly opposed to the idea of an epidemic in

³³ See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 70–72 (2016).

³⁴ See CTR. FOR PROSECUTOR INTEGRITY, *supra* note 15, at 2.

³⁵ Steve Weinburg, *A Question of Integrity*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://www.publicintegrity.org/2003/06/26/5525/question-integrity> [<https://perma.cc/Q8XE-H4Y9>].

³⁶ *Id.* (quoting PROSECUTORS RESEARCH INST., *THE PROSECUTORS DESKBOOK: ETHICAL ISSUES AND EMERGING ROLES FOR 21ST CENTURY PROSECUTORS* (2001)).

³⁷ Green & Yaroshefsky, *supra* note 33, at 60.

³⁸ Andrea Elliot & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price; Disciplinary Action Is Rare After Misconduct or Mistakes*, N.Y. TIMES (Mar. 21, 2004), <https://www.nytimes.com/2004/03/21/nyregion/when-prosecutors-err-others-pay-price-disciplinary-action-rare-after-misconduct.html> [<https://perma.cc/KHS7-RGUN>] (quoting Bronx DA Robert T. Johnson).

³⁹ See Letter from Frank A. Sedita, Erie Cty. Dist. Attorney, to Hon. John J. Flanagan, President & Majority Leader, N.Y.S. Senate (June 4, 2015), <http://www.daas>

prosecutorial misconduct, Sedita's position was that the term "prosecutorial misconduct" is used indiscriminately by the media and courts.⁴⁰ Sedita argued that the media's definition of the term includes "deliberate malfeasance, nonfeasance, or a simple mistake, devoid of any negligence or bad faith."⁴¹

Conversely, Judge Alex Kozinski argues that prosecutorial misconduct is inherent in a prosecutor's job:

I wish I could say that the prosecutor's unprofessionalism here is the exception, that his propensity for shortcuts and indifference to his ethical and legal responsibilities is a rare blemish and source of embarrassment to an otherwise diligent and scrupulous corps of attorneys staffing prosecutors' offices across the country. But it wouldn't be true. *Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.⁴²

Judge Kozinski's dissent from the majority opinion in *United States v. Olsen* sparked the expansion of "prosecutorial misconduct" to include overreaching, abuse of power, and lack of proportionality.⁴³ Generally, prosecutorial misconduct can be defined to include "*Brady* violations, overcharging, witness tampering, suborning perjury, *Batson* errors, improper arguments, and the introduction of improper evidence."⁴⁴ Justice Sutherland further defined prosecutorial misconduct in *Berger v. United States* as "overstepp[ing] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."⁴⁵

ny.com/wp-content/uploads/2015/06/Senator-Flanagan-Letter-Re-CPC-6-4-15.pdf [https://perma.cc/4F3X-DSFU] [hereinafter *Letter*] (on file with the DAASNY).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *United States v. Olsen* 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J., dissenting).

⁴³ *Id.*

⁴⁴ H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability and a Modest Proposal*, 63 CATH. U. L. REV. 51, 60 (2013).

⁴⁵ Justice Sutherland's opinion delimited a list of potential scenarios that could violate prosecutors' ethical norms.

[M]isstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.

B. *Types of Prosecutorial Misconduct*

It is important to distinguish between different types of prosecutorial misconduct because each type varies in severity. Certain misconduct claims arise out of the exercise of prosecutorial discretion, while others are more flagrant ethical and moral violations.⁴⁶ Although this is not an exhaustive list, the following examples represent the most prevalent forms of prosecutorial misconduct.

1. *Brady* Violations: Failure to Disclose Exculpatory Evidence

Brady doctrine violations are a frequently contested issue of prosecutorial power.⁴⁷ In 1963, the Supreme Court in *Brady v. Maryland* established what is now known as the *Brady* doctrine—a constitutional duty for the prosecution to disclose any evidence that could be material to the defendant’s sentencing or guilt.⁴⁸ *Brady* violations are thus the “suppression by the prosecution of evidence favorable” to the defendant in a case.⁴⁹

In *Brady*, the two defendants, John Brady and Donald Boblit, were found guilty of first-degree murder in separate trials and sentenced to death.⁵⁰ However, the prosecution had withheld a prior confession made by Boblit in which he admitted in writing to committing the act of murder.⁵¹ Brady appealed, and the Maryland Court of Appeals held that the prosecution’s suppression of the confession denied Brady of his right to due process under the Fourteenth Amendment. The court remanded the case as to the question of punishment.⁵²

⁴⁶ See generally Caldwell, *supra* note 44 (discussing different types of prosecutorial misconduct).

⁴⁷ See Dr. Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases*, INNOCENCE PROJECT (Oct. 2010), https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf [<https://perma.cc/G77S-S3D2>].

⁴⁸ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see, e.g., Jessica Brand, *The Epidemic of Brady Violations: Explained*, APPEAL (Apr. 25, 2018), <https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/> [<https://perma.cc/Y5MW-6PJ9>]; see also Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Conduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 4 U. ILL. L. REV. 1455, 1466 (2017) (“The duty to disclose material evidence exists independent of whether the defense has specifically requested it. Violation of this duty is misconduct regardless of whether the prosecutor was acting in good faith.”).

⁴⁹ *Brady*, 373 U.S. at 87.

⁵⁰ *Id.* at 84.

⁵¹ See Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES 1, 4 (Carol S. Steiker ed., 2005) (citing RICHARD HAMMER, BETWEEN LIFE AND DEATH 15–52 (1969)).

⁵² See *Brady*, 373 U.S. at 85.

The issue on appeal to the Supreme Court was the question of punishment, however, the Court also raised the question of the defendant's guilt.⁵³ Brady's argument rested on the fact that under the Fourteenth Amendment, he had a right to use Boblit's statement as a way to sway the jury.⁵⁴ The Supreme Court affirmed, holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."⁵⁵ Although the Court held that the evidence would not have exculpated Brady, it did find that it was material to his punishment, and Brady was subsequently granted a new sentencing hearing.⁵⁶

"Society wins not only when the guilty are convicted but when criminal trials are fair."⁵⁷ Although *Brady* created a new prosecutorial duty to disclose, it highlights the broad discretion a prosecutor enjoys when performing this duty. This is because the duty to disclose material evidence exists independently from whether the defense asks for it.⁵⁸ Ultimately, the discretion a prosecutor enjoys on the question of materiality protects them from future claims of *Brady* violations.⁵⁹

2. Witness Tampering and Overcharging

The prosecutorial practices of witness tampering and overcharging of criminal defendants are often identified as examples of prosecutors acting in "bad faith" or partaking in flagrant ethical violations.⁶⁰ Prosecutors cannot misrepresent information, communicate with the defendant without the presence of their counsel, conduct improper witness examinations, intimidate a witness, or "interfer[e] with defense counsel's access

⁵³ *Id.* at 85, 88–89.

⁵⁴ See Bibas, *supra* note 51, at 6.

⁵⁵ *Brady*, 373 U.S. at 87.

⁵⁶ See Bibas, *supra* note 51, at 6.

⁵⁷ *Brady*, 373 U.S. at 87. As the Supreme Court recognized, "the prosecutor should not be the 'architect of a proceeding that does not comport with standards of justice.'" Brand, *supra* note 48 (quoting *Brady*, 373 U.S. at 88).

⁵⁸ See Editorial Board, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), <https://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html> [<https://perma.cc/CUJ6-N7HC>].

⁵⁹ U.S. Supreme Court decisions in *Connick v. Thompson* and *Garcetti v. Ceballos* display the "weak enforceability of *Brady*-line authorities as mechanisms for criminal discovery reform." Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1330 (2012).

⁶⁰ See Caldwell, *supra* note 44, at 63–64.

to witnesses or defendants while preparing [their case].”⁶¹ In New York, for example, “[i]t is well established . . . that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender.”⁶² The amount of discretion afforded to prosecutors often conflicts with their ethical obligations when bringing charges.⁶³ For example, prosecutors cannot “overcharg[e],” or charge a greater offense than the actions of a defendant permits.⁶⁴ Overcharging is especially problematic if the prosecutor’s reason for overcharging is to incentivize the defendant into taking a plea bargain.⁶⁵ A prosecutor’s discretion as to how to charge a defendant is a matter of personal judgement, one that is supposed to align with the specific aspects of the crime and not as a tactic to force the hand of a defendant to take a lesser charge as a plea deal.

3. Suborning Perjury, Improper Argument, Introducing Improper Evidence, and Improper Jury Selection

Issues involving perjury, improper arguments, improper evidence, and improper jury selection are also important examples of prosecutorial misconduct. Prosecutors cannot make improper arguments including, but not limited to, misstating the law, endorsing a witness’s truthfulness, or appealing to religious establishments.⁶⁶ Prosecutors are also barred from introducing improper evidence.⁶⁷ This includes evidence that the prosecutor knows is inadmissible and uses anyway. Such a practice allows the jury to hear improper evidence, even if it is later stricken from the record.⁶⁸

Finally, another type of prosecutorial misconduct that often arises is improper jury selection. The Supreme Court held in *Batson v. Kentucky* that jurors cannot be chosen on the basis of

⁶¹ See Caldwell, *supra* note 44, at 63; AM. BAR. ASSOC., MODEL RULES OF PROF’L CONDUCT Rule 3.8 (2018).

⁶² Rory I. Lancman & Rachel Graham Kagan, *Prosecutorial Misconduct Commission Will Only Be as Strong as Underlying Disciplinary Rules – And That’s a Problem*, N.Y. L.J. (Dec. 12, 2018 2:35 PM), <https://www.law.com/newyorklawjournal/2018/12/12/state-prosecutorial-misconduct-commission-will-only-be-as-strong-as-its-und-erlying-disciplinary-rules-and-thats-a-problem/> [<https://perma.cc/69BU-LNJT>] (quoting *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988)).

⁶³ See *infra* Part I.

⁶⁴ See Caldwell, *supra* note 44, at 62.

⁶⁵ See *id.*

⁶⁶ See *id.* at 66.

⁶⁷ *Id.* at 66–68.

⁶⁸ *Id.* at 67 (“Prosecutors cannot knowingly elicit improper evidence by intentionally eliciting testimony that the trial court previously ruled inadmissible.”).

race.⁶⁹ The *Batson* Court held that the Constitution “forbids the prosecutor to challenge potential jurors solely on account of their race” because the Court feared that jurors of the same race as the defendant might be unable to listen to their case impartially.⁷⁰ “Since its *Batson* decision, the Supreme Court has extended this prohibition to the peremptory strikes based on jurors’ ethnicity and gender.”⁷¹

C. *New York’s History of Prosecutorial Misconduct*

Regardless of how misconduct is defined, many people believe that there is a need for an oversight board to hold prosecutors accountable to the public for their conduct, particularly when their misconduct has a discriminatory effect.⁷² Victims of prosecutorial misconduct are often poor and are people of color.⁷³ Furthermore, race is a large factor in misconduct-fueled convictions.⁷⁴ Consider that in the United States, 51 percent of people exonerated of criminal charges were black, yet African Americans make up only 13 percent of the population.⁷⁵

New York has a long history of wrongful incarceration. Since the 1980s, approximately three hundred people have been exonerated in New York with “official misconduct” stated as a factor contributing to their conviction.⁷⁶ Between 2004-2008, there were 151 cases in which New York trial and appellate courts found prosecutorial misconduct.⁷⁷ Public sanctions, such as disciplinary measures enacted on prosecutors by the New York State Grievance Committees, were imposed in only three instances.⁷⁸ In 2009, of fifty-three cases that resulted in wrongful convictions, one prosecutor was referred to a disciplinary

⁶⁹ See *Batson v. Kentucky* 476 U.S. 79, 89 (1986); see also Irina Y. Dmitrieva, *Batson Challenges in Civil Litigation: The Underestimated Potential*, BLOOMBERG L. REP. (2011), https://jenner.com/system/assets/publications/3729/original/batson_challenges_in_civil_litiga.pdf?1319031754 [<https://perma.cc/RVW6-SJVU>].

⁷⁰ *Batson*, 476 U.S. at 89.

⁷¹ Dmitrieva, *supra* note 69.

⁷² See Jan Ransom & Ashley Southall, *Prosecutors Sometimes Behave Badly. Now They May Be Held to Account*, N.Y. TIMES (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/nyregion/ny-prosecutors-cuomo.html> [<https://perma.cc/UJ5D-88HH>]; see also Green & Yaroshefsky, *supra* note 33, at 91 (showing that prosecutors’ discretionary decisions also contribute to racial disparities in criminal prosecutions).

⁷³ Thompson, *supra* note 17, at 645.

⁷⁴ *Id.*

⁷⁵ Cara Bayles, ‘Scot-Free’: What Happens When Prosecutors Behave Badly, LAW360 (Dec. 8, 2019 8:02 PM), <https://www.law360.com/articles/1225699> [<https://perma.cc/N398-43DH>].

⁷⁶ This data is from the National Registry of Exonerations. See Ransom & Southall, *supra* note 72.

⁷⁷ See CTR. FOR PROSECUTOR INTEGRITY, *supra* note 15, at 14.

⁷⁸ See *id.*

committee and another sanctioned internally.⁷⁹ In 2016, “148 misconduct findings came from New York cases.”⁸⁰ Not a single prosecutor was disciplined.⁸¹

Under the current system that regulates prosecutorial misconduct, it is challenging to hold prosecutors accountable for issues of misconduct.⁸² For example, Jabbar Collins spent sixteen years in prison before it was discovered that the main witness against him was pressured to lie about Collins’ role in the murder of a rabbi.⁸³ Even though the conviction was overturned and Collins received a \$10 million settlement from New York City, the prosecutor that handled that case was never held accountable.⁸⁴ This lack of accountability for prosecutorial misconduct is what ultimately led to New York’s creation of the CPC.⁸⁵

Prosecutorial misconduct has been identified as one of the main reasons for wrongful convictions by the 2009 Final Report of the New York State Bar Association’s Task Force on Wrongful Convictions (TFWC).⁸⁶ The CPC is seen as a step towards holding prosecutors accountable for their wrongdoings and perhaps as a deterrent for wrongful behavior.⁸⁷ Strong proponents of the CPC include Human Rights Watch (HRW).⁸⁸ HRW supports the CPC because it fosters transparency and thereby increases the chances that prosecutors will be held accountable for their misdeeds.⁸⁹ Although HRW policy suggests that increased transparency alone is not a cure for prosecutorial

⁷⁹ See Caldwell, *supra* note 44, at 60, 74 (citing the 2009 Task Force on Wrongful Convictions final report); see also Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 *FORDHAM L. REV.* 537, 541–42 (2011).

⁸⁰ See Lanman & Kagan, *supra* note 62 (citing to the INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* 12 (2016) (study results were from 2004-2008)).

⁸¹ *Id.*

⁸² See Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 *HOFSTRA L. REV.* 275, 281 (2007); see also AM. BAR. ASSOC., MODEL RULES OF PROF’L CONDUCT Rule 3.8 Cmt. (2018).

⁸³ See Stephanie Denzel, *Jabbar Collins*, NAT’L REGISTRY EXONERATIONS (Sept. 3, 2014) <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3115> [<https://perma.cc/63GY-SE9B>]; Stephanie Clifford, *Exonerated Man Reaches \$10 Million Deal with New York City*, N.Y. TIMES (Aug. 19, 2014), <https://www.nytimes.com/2014/08/20/nyregion/jabbar-collins-wrongfully-convicted-man-reaches-10-million-settlement-with-new-york-city.html> [<https://perma.cc/2CUR-37P3>].

⁸⁴ See Ransom & Southall, *supra* note 72.

⁸⁵ See S.B. 2412-D Reg. Sess. 2017-2018 (N.Y. 2017).

⁸⁶ See John Raphling, *Letter in Support of New York State Senate Bill S.2412D/Assembly Bill A.5285C to Governor Cuomo*, HUMAN RTS. WATCH (June 13, 2018 10:00AM), <https://www.hrw.org/news/2018/06/13/letter-support-new-york-state-senate-bill-s2412d/assembly-bill-a5285c-governor-cuomo> [<https://perma.cc/8YSN-M459>].

⁸⁷ *Id.*

⁸⁸ Raphling, *supra* note 86.

⁸⁹ *Id.*

misconduct, HRW advocates are hopeful that this commission, made up of defense lawyers, prosecutors, and legal professionals from the judicial branch, will make a dent in the issue.⁹⁰

II. NEW YORK'S COMMISSION ON PROSECUTORIAL CONDUCT

In New York, there are sixty-two counties, and therefore sixty-two elected DAs and hundreds of hired ADAs.⁹¹ All attorneys, including prosecutors, “are bound by the Rules of Professional Conduct and are subject to discipline by Grievance Committees, which conduct investigations on behalf of and report to the courts.”⁹² DAs can be “publicly censured, suspended, or disbarred” if the Grievance Committees find that they have engaged in misconduct.⁹³ New York prosecutors also each have their own set of prosecution protocols and ethical guidelines created by their respective DA's office.⁹⁴ If the CPC is enacted, New York State DAs will be the only attorneys in the entire country to be subject to investigation and potential discipline by two separate entities—Grievance Committees and the CPC.⁹⁵

New York criminalizes conduct that “obstructs, impairs, or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function.”⁹⁶ A separate crime in NY is witness tampering, broadly defined as any illegal conduct, including “wrongfully induc[ing]” an individual to stop them from testifying.⁹⁷ New York law also prohibits tampering with physical evidence.⁹⁸ Defendants have the opportunity to challenge prosecutorial misconduct and prosecutorial error in state courts through various methods including: a motion to set aside the verdict,⁹⁹ a motion to vacate the judgment,¹⁰⁰ an appeal as a matter of right, and an appeal as a matter of the court's

⁹⁰ *Id.*; The Innocence Project also wrote a letter in support of the creation of the CPC. Brendan J. Lyons, *Innocence Project Joins Fight for Prosecutorial Conduct Board*, TIMES UNION (Oct. 14, 2019 8:19 PM), <https://www.timesunion.com/news/article/Innocence-Project-joins-fight-for-prosecutorial-14520060.php> [<https://perma.cc/V3MF-4HN5>].

⁹¹ Each county is represented by a DA. *Letter*, *supra* note 39, at 2.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See* DIST. ATT'Y ASS'N OF THE STATE OF N.Y., “THE RIGHT THING”: ETHICAL GUIDELINES FOR PROSECUTORS 3 (2016), <http://www.daasny.com/wp-content/uploads/2016/02/2016-Ethics-Handbook.pdf> [perma.cc/EL4F-D9QH].

⁹⁵ *See Complaint*, *supra* note 31, at 13.

⁹⁶ N.Y. PENAL LAW § 195.05.

⁹⁷ N.Y. PENAL LAW § 215.10.

⁹⁸ N.Y. PENAL LAW § 215.40.

⁹⁹ *See* N.Y. CRIM. PROC. LAW § 330.30.

¹⁰⁰ *See* N.Y. CRIM. PROC. LAW § 440.10.

discretion.¹⁰¹ What defendants lack is the ability to directly challenge a prosecutor's conduct by filing a civil suit against them for their wrongdoing, either during their investigation or during the subsequent criminal trial.¹⁰²

Most states, including New York, have adopted a version of the Model Rules of Professional Conduct (MRPC) as a code of conduct for lawyers.¹⁰³ However, the language of the MRPC is often vague, often "making it difficult to sustain complaints against prosecutors before disciplinary authorities."¹⁰⁴ The National District Attorney's Association (NDAA) has a "higher charging standard" than the MRPC, but this is generally unenforceable unless deemed enforceable by the individual prosecutor's offices.¹⁰⁵ None of the New York state DA's offices have adopted these ethical standards as their office's policy.¹⁰⁶

A. *Legislative History and Current Status of the CPC*

Prosecutors play an integral part in America's inherently adversarial criminal justice system and, through their role, impact accused citizens' individual liberties.¹⁰⁷ Therefore, they have long been subjected to continuous scrutiny by the public, which in turn has led to public criticism of the legislature for not taking action.¹⁰⁸ In 2015, New York legislators proposed a bill to establish a state commission to deal with prosecutorial misconduct.¹⁰⁹ On June 19, 2018, the New York State Legislature passed Bill S. 2412-D, which amended the Judiciary Law and created Article 15-a.¹¹⁰ On August 20, 2018, New York State Governor Andrew Cuomo signed the bill into law, on the condition

¹⁰¹ See N.Y. CRIM. PROC. LAW § 450.10; see N.Y. CRIM. PROC. LAW § 450.15.

¹⁰² See Caldwell, *supra* note 44, at 87 ("The Supreme Court held that 42 U.S.C. § 1983 does not impose liability on prosecutors for a single *Brady* violation." (citing *Connick v. Thompson*, 563 U.S. 51 (2011))).

¹⁰³ See Davis, *supra* note 82, at 281–82; see also *Legal Ethics & Professional Responsibility Research: NY Code*, NYU LAW, <https://nyulaw.libguides.com/c.php?g=773845&p=5552012> [<https://perma.cc/3UHL-XU9H>] ("The New York Rules of Professional Conduct became effective in 2009. The current Rules are modeled after the ABA's Model Rules of Professional Conduct.").

¹⁰⁴ Davis, *supra* note 82, at 284.

¹⁰⁵ *Id.* (citing NATIONAL PROSECUTION STANDARDS 43.3 (Nat'l Dist. Att'ys Ass'n, 2d ed. 1991)).

¹⁰⁶ See Lancman & Kagan, *supra* note 62.

¹⁰⁷ See Burke, *supra* note 14, at 2119–20.

¹⁰⁸ *Id.*; Letter, *supra* note 39, at 2.

¹⁰⁹ S.B. 2412-D Reg. Sess. 2017-2018 (N.Y. 2017).

¹¹⁰ See S.B. 2412-D Reg. Sess. 2017-2018 (N.Y. 2017); Dan M. Clark, *Cuomo Signs Bill Creating Watchdog Commission for Prosecutor Conduct*, N.Y. L.J. (Aug. 20, 2018, 6:32 PM), <https://www.law.com/newyorklawjournal/2018/08/20/cuomo-signs-bill-creating-watchdog-commission-for-prosecutor-conduct/?slreturn=20180801141749> [perma.cc/Z76A-JRAM].

that the Legislature agree to fix certain “alleged defects.”¹¹¹ The DAASNY filed a verified amended complaint on April 1, 2019, and sought a declaratory judgment and injunctive relief that would strike down the amended Article 15-a as a violation of the New York State Constitution.¹¹² At the time of writing this note, a New York judge recently issued a decision rendering Article 15-a of the Judiciary Law a violation of the New York State Constitution, effectively halting the formation of the CPC.¹¹³ While this decision has not yet been appealed, the next sections will examine why the fight to enact the CPC is misguided.

B. The Structure and Functions of the CPC

Article 15-a, as amended on March 27, 2019, created the CPC, which is modeled on the state’s current judicial ethics commission, the Commission on Judicial Conduct (CJC).¹¹⁴ Under Article 15-a, the CPC is to be made up of “legislative, judicial, and executive appointees” that will hold immense power over state prosecutors, namely DAs and ADAs.¹¹⁵ Of the eleven members, four will be appointed by the Governor, one by each of the four legislative leaders, and the last three by the Chief Judge of the Court of Appeals, currently Chief Judge DiFiore.¹¹⁶ Article 15-a requires that the members of the CPC appointed by the Governor and the legislative leaders must be equally divided between those with a public defense background and those with a prosecutorial background.¹¹⁷ Two of the Chief Judge’s three appointees must be retired judges.¹¹⁸

The statute outlines the process for the CPC’s ability to investigate and review the conduct of both DAs and ADAs, “and to determine whether such conduct ‘departs from the applicable statutes, case law, [and] New York Rules of Professional Conduct 22 NYCRR 1200.00, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other

¹¹¹ Soares v. State, No. 906409-18, 2020 N.Y. Misc. LEXIS 1128, at *2 (N.Y. Sup. Ct. Jan. 28, 2020).

¹¹² *Id.* at *1.

¹¹³ *Id.* at *88–89.

¹¹⁴ *Id.* at *1–4, *17–18. Article VI, Section 22 of the New York State Constitution set up the CJC. The CJC is also an eleven-person panel, tasked with investigating and disciplining judges. The article that established the CJC contains language that is strikingly similar to the language in Article 15-a, and the two commissions are also quite similar in their structure. See *Complaint*, *supra* note 31, at 8.

¹¹⁵ *Complaint*, *supra* note 31, at 2.

¹¹⁶ Soares, 2020 N.Y. Misc. LEXIS 1128, at *3.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *3.

Government Lawyers).”¹¹⁹ The process for the CPC to begin and pursue an investigation starts with the authorization to receive or initiate complaints that “prob[e] into a prosecutor’s qualifications and fitness to perform his or her official duties.”¹²⁰ The CPC can make the determination as to a complaint’s validity, and decide whether to proceed with an investigation or dismiss the complaint.¹²¹ The Commission’s investigatory power allows them to subpoena witnesses, compel witness attendance, examine the witness under oath, and demand the production of any evidence that it “deem[s] relevant or material to an investigation.”¹²² Further, the Commission can request help from state courts, departments, boards, divisions, agencies, or any political division capable of assisting the commission in achieving its goals and carrying out its duties.¹²³ The CPC can offer immunity from prosecution to witnesses that appear before them if they deem it “necessary and proper.”¹²⁴

After an investigation and a subsequent hearing, the Commission “may determine that a prosecutor be admonished, or censured; and make a recommendation to the governor that a prosecutor be removed from office for cause.”¹²⁵ “For cause” includes “misconduct in office, as evidenced by the prosecutor’s departure from his or her obligations under appropriate statute, case law, and/or New York Rules of Professional Conduct,” as well as consistent failure to adequately perform his or her duties.¹²⁶ A DA’s office may tell the CPC if their investigation will “substantially interfere” with an active prosecution or investigation by their office, and this will then leave the CPC to exercise its own judgment in coming up with a plan to protect their investigation from interfering.¹²⁷

Article 15-a gives the CPC the discretion to make final determinations as to whether disciplinary sanctions should be imposed on a prosecutor; sanctioned prosecutors then have thirty days to seek review of the CPC’s decision by the presiding

¹¹⁹ *Id.* at *3 (quoting N.Y. JUD. LAW § 499-a).

¹²⁰ Ctr. for the Advancement of Pub. Integrity, *The New York Prosecutorial Misconduct Commission: What Comes Next?*, COLUM. L. SCH. (Nov. 2, 2018).

¹²¹ *See* N.Y. JUD. LAW § 499-f(1).

¹²² *See* N.Y. JUD. LAW § 499-d(1).

¹²³ *See* N.Y. JUD. LAW § 499-d(3).

¹²⁴ *See* N.Y. JUD. LAW § 499-d(2).

¹²⁵ *See* N.Y. JUD. LAW § 499-f(1).

¹²⁶ *Soares v. State*, No. 906409-18, 2020 N.Y. Misc. LEXIS 1128, at *6–7. “Eight members of the Commission constitute a quorum, and the votes of six members will be needed for such actions as authorizing investigations, approving dispositions and appointing referees.” *Id.* at *83; *see also* N.Y. JUD. LAW § 499-c(6).

¹²⁷ *Soares*, 2020 N.Y. Misc. LEXIS 1128, at *4–5.

justices of the Appellate Division.¹²⁸ If the prosecutor were to decide to appeal, then the presiding justices may “accept or reject the determined sanction; impose a different sanction including admonition or censure, recommend removal or retirement . . . or impose no sanction” after analyzing the CPC’s finding of fact and conclusions of law.¹²⁹ If the prosecutor decides not to appeal the CPC’s decision, then the Governor “independently determines” if removal is necessary.¹³⁰ The Appellate Division also has the power to indefinitely suspend a prosecutor and potentially dock their pay.¹³¹

III. WHY THE CPC IS NOT THE RIGHT STEP FORWARD

Prosecutors should be held accountable for their mistakes, as these mistakes often result in a miscarriage of justice.¹³² Currently, New York has a few different ways of handling prosecutorial misconduct.¹³³ Judges can sanction attorneys who appear before them for ethical violations, hold them in contempt, and regulate their conduct.¹³⁴ There are Grievance Committees that handle disciplinary actions against attorneys.¹³⁵ DAs can be removed by the Governor of New York and, more importantly, by the people during local elections.¹³⁶ Indeed, there are many ways that these systems can be improved;¹³⁷ however, the right course of action is not through the creation of the CPC. Instead of bringing substantive reform to actual problems of prosecutorial conduct, all Article 15-a does is add an extra layer of theoretical accountability.¹³⁸

¹²⁸ *Id.* at *7; *see also* N.Y. JUD. LAW § 499-f(7).

¹²⁹ *Soares*, 2020 N.Y. Misc. LEXIS 1128, at *8 (quoting N.Y. JUD. LAW § 499-f(8)).

¹³⁰ *Id.* at *7 (quoting N.Y. JUD. LAW § 499-f(7)).

¹³¹ N.Y. JUD. LAW § 499-f(9)(a)–(b).

¹³² *See* Lyons, *supra* note 90.

¹³³ *See* Daily News Editorial Board, *Sins of Commission: Gov. Cuomo Should Veto Prosecutorial Misconduct Panel*, N.Y. DAILY NEWS (Aug. 11, 2018 4:10 AM), <http://www.nydailynews.com/opinion/ny-edit-sins-of-commission-20180809-story.html> [<https://perma.cc/N94T-6NEA>].

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See* N.Y. CONST. art. XIII, § 13(a).

¹³⁷ *See infra* Part IV.

¹³⁸ *See* Daily News Editorial Board, *supra* note 133; Maura Ewing, *New York’s Prosecutorial Misconduct Review Panel Could Be Groundbreaking*, SLATE (Aug. 28, 2018), <https://slate.com/news-and-politics/2018/08/new-yorks-prosecutorial-misconduct-review-panel-could-be-groundbreaking.html> [<https://perma.cc/F3P2-B3GP>]; *Complaint*, *supra* note 31, at 2–3.

A. Soares v. New York

On April 1, 2019, David Soares, Robert Masters, and the DAASNY, filed an amended complaint against the State of New York and Governor Cuomo.¹³⁹ The complaint cited state constitutional issues with the proposed CPC, and also alleges that the proposed CPC will interfere with the functions of New York State's DAs.¹⁴⁰ Former Attorney General Barbara Underwood's office also released an opinion stating that while it is necessary to hold prosecutors accountable for their actions, the establishment of the CPC would be unconstitutional.¹⁴¹ On January 28, 2020, Judge Weinstein ruled that Article 15-a of the Judiciary Law violates the New York State Constitution, despite noting the need for "prevent[ing] future prosecutorial abuses of the kind that have led to the conviction of innocent defendants."¹⁴²

1. Constitutional and Enforcement Issues Raised in the DAASNY's Complaint

Both the Attorney General's statement and the DAs' complaint argued that the CPC would interfere with the powers of the state's sixty-two DAs and their ADAs, would violate the separation of powers between the state's executive, legislative and judicial branches, and would improperly expand the role of the state judiciary.¹⁴³ The DAs also claimed that the CPC would assign non-judicial duties to judges, amounting to a separation of powers violation that violates defendants' federal due process and equal protection rights.¹⁴⁴ The complaint also argued that the CPC's operation does not conform to the New York State Constitution's civil department structure.¹⁴⁵ Under Article 15-a, the DAASNY claimed that the CPC does not have standards of review and lacks basic procedural protections.¹⁴⁶ It believes that

¹³⁹ *Complaint, supra* note 31, at 1. David Soares is a Democrat and the District Attorney for Albany County. See McKinley, *supra* note 26.

¹⁴⁰ *Id.* at 1–3.

¹⁴¹ See Dan M. Clark, *Prosecutorial Misconduct Commission Might Not Survive Judicial Review, AG's Counsel Writes*, N.Y. L.J. (Aug. 13, 2018 3:08AM), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/08/13/prosecutorial-misconduct-commission-might-not-survive-judicial-review-ags-counsel-writes/> [https://perma.cc/9W5Y-QHLX].

¹⁴² Soares v. State, No. 906409-18, 2020 N.Y. Misc. LEXIS 1128, at *87 (N.Y. Sup. Ct. Jan. 28, 2020).

¹⁴³ See Clark, *supra* note 141; see also *Complaint, supra* note 31, at 13.

¹⁴⁴ See Clark, *supra* note 141; see also *Complaint, supra* note 31, at 18–19.

¹⁴⁵ See *Complaint, supra* note 31, at 23.

¹⁴⁶

this would make prosecutors the only practicing lawyers in New York that could be subject to discipline without due process.¹⁴⁷ The complaint also raised the point that the CPC subjects prosecutors to a duplicative and intrusive process.¹⁴⁸ As for the separation of powers argument, the DAs contend that Article 15-a violates this principle by not giving the Governor the right to remove members of the CPC.¹⁴⁹ This idea stems from the Supreme Court case, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, where the Court held that it was unconstitutional to have a non-executive process for the removal of executive branch officials.¹⁵⁰ Here, the DA's argument is that in the New York State Constitution, the Governor acts as the President to ensure that "laws are faithfully executed."¹⁵¹ Therefore, the panel's potential ability to remove a DA may violate the separation of powers principle since the Governor does not have the discretion to remove all of the members of the CPC.¹⁵²

2. Decision and Order of the Court

Although Judge Weinstein ruled in favor of the plaintiffs and held the CPC unconstitutional, he rejected many of their arguments in the process.¹⁵³ As for plaintiffs' due process claim, Judge Weinstein disagreed with the DAs and stated that there is a standard of conduct for which sanctions could be imposed, and further, the statute provided "the charged party with a variety of procedural protections."¹⁵⁴ In regards to the equal protection argument, Judge Weinstein explicitly stated that it is permissible to treat prosecutors separately from other lawyers:

Prosecutors have unique responsibilities that set them apart from other lawyers, the essential characteristic of which is the discretion

[U]nder the Uniform Rules of Attorney Discipline adopted by the Appellate Division of the Supreme Court, 'probable cause' must exist before formal disciplinary proceedings are initiated . . . and formal disciplinary charges may only be sustained, after a hearing, when 'a fair preponderance of the evidence' is found to support each essential element of the charges.

Id. at 19; see N.Y. COMP. CODES R. & REGS. Tit 22 § 1240.7(d)(2)(vi).

¹⁴⁷ See *Complaint*, *supra* note 31, at 19.

¹⁴⁸ *Complaint*, *supra* note 31, at 12–13.

¹⁴⁹ *Soares v. State*, No. 906409-18, 2020 N.Y. Misc. LEXIS 1128, at *47 (N.Y. Sup. Ct. Jan. 28, 2020).

¹⁵⁰ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010).

¹⁵¹ N.Y. CONST. art. IV, § 3; *Free Enter. Fund*, 561 U.S. at 484.

¹⁵² Under the New York State Constitution, the governor "may remove any elective . . . district attorney . . . within the term for which he or she shall have been elected." N.Y. CONST. art. XIII, § 13(a).

¹⁵³ *Soares*, 2020 N.Y. Misc. LEXIS 1128, at *88–89.

¹⁵⁴ *Id.* at *17.

he or she possess[es] as to whether and how to bring criminal charges. That power can result in an individual's loss of liberty for many years, and thus there is a rational basis for the Legislature to determine that the oversight imposed on prosecutors should be different from that for other attorneys.¹⁵⁵

Judge Weinstein also found that New York separation of powers concerns are not controlled by federal precedent, thereby eliminating the insulation argument as well.¹⁵⁶ However, Judge Weinstein did find that Article 15-a went against the New York State Constitution with the expansion of the Appellate Division's power to include the ability to "suspend prosecutors 'while there is pending a determination by the commission for his or her removal or retirement'" which is "outside their constitutional role within the separation of powers framework."¹⁵⁷ Judge Weinstein concluded his opinion stating that, while there are important policy concerns at issue in this dispute, "the role given by the statute to the presiding justices of the Appellate Division is not permitted under New York's constitutional framework" and further, "the Commission in its presently defined capacity interferes with and thereby diminishes the Appellate Division's constitutional and exclusive jurisdiction over attorney discipline."¹⁵⁸

B. *Reactions to the Court's Decision*

Many people argue that prosecutors have too much power and the CPC's slight diminishment of that power would have been a welcome change.¹⁵⁹ Prosecutors in New York "wield enormous power in the criminal justice system" and have immense leverage in the negotiation of plea deals.¹⁶⁰ That is why there has been such a strong response in regard to Judge Weinstein's decision. In particular, Tina Luongo of the Legal Aid Society, strongly opposed Judge Weinstein's decision.¹⁶¹ "Prosecutorial misconduct is a reality that our clients and our attorneys confront on a regular basis. . . . There must be an independent body to hold prosecutors

¹⁵⁵ *Id.* at *21–22 (internal citation omitted).

¹⁵⁶ *Id.* at *49–50.

¹⁵⁷ *Id.* at *81–82.

¹⁵⁸ *Id.* at *88.

¹⁵⁹ Peter A. Joy & Kevin C. McMunigal, *New York Creates Commission on Prosecutor Conduct*, 34 WASH. U. CRIM. JUST. 62, 64 (2019).

¹⁶⁰ *Id.* at 64.

¹⁶¹ Michael Riccardi, *Albany Judge Strikes Down Prosecutorial Watchdog as Unconstitutional*, N.Y. L.J. (Jan. 28, 2020, 7:28 PM), <https://www.law.com/newyorklawjournal/2020/01/28/albany-judge-strikes-down-prosecutorial-watchdog-as-unconstitutional/> [https://perma.cc/R5MB-TC96].

accountable when they break the law or act in bad faith. This decision will not stop the movement for accountability.”¹⁶²

This note does not make the argument that there is no need for regulation of prosecutorial misconduct, but rather argues that continuing the fight for the creation of the CPC is the wrong way to accomplish this objective. The CPC is expected to cost \$5.5 million to initiate.¹⁶³ The New York State Justice Task Force (Task Force) explicitly stated that they did not recommend having an external prosecutorial commission panel.¹⁶⁴ The Task Force reasoned that having a separate body is unnecessary, and it would be more efficient to improve upon the currently established structure by making the system more efficient and conducive to reform.¹⁶⁵ The first step towards making that happen should occur at a local, internal level, rather than through an external commission. The \$5.5 million the Legislature budgeted for the CPC should go towards additional funding for individual programs and internal restructuring of offices.

IV. PROSECUTORIAL REGULATION: ALTERNATIVE APPROACHES TO ACCOUNTABILITY

A. *Conviction Integrity Units and Individual Programs*

1. Conviction Integrity Units

Local prosecutors handle 95 percent of the criminal cases that are brought in this country, and “are well positioned to take reform into their own hands because of their broad discretion over whether and how to prosecute cases.”¹⁶⁶ Many prosecutor’s offices have developed some form of a Conviction Integrity Unit (CIU) as a way of correcting miscarriages of justice.¹⁶⁷ With the rising number of post-conviction appeals, largely due to the increased availability of DNA testing, CIUs have become important internal mechanisms that can expose past prosecutorial misconduct.¹⁶⁸ New

¹⁶² *Id.* (quoting Tina Luongo).

¹⁶³ Dan M. Clark, *DAs File Constitutional Challenge to NY Prosecutorial Conduct Commission*, N.Y. L.J. (Oct. 17, 2018), <https://www.law.com/newyorklawjournal/2018/10/17/das-file-constitutional-challenge-to-ny-prosecutorial-conduct-commission/> [<https://perma.cc/EN56-SPBE>]; see Daily News Editorial Board, *supra* note 133.

¹⁶⁴ See N.Y. STATE JUSTICE TASK FORCE, REPORT ON ATTORNEY RESPONSIBILITY IN CRIMINAL CASES 5 (Feb. 2017).

¹⁶⁵ *Id.*

¹⁶⁶ See Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [<https://perma.cc/L98X-QRRY>].

¹⁶⁷ See Thompson, *supra* note 17, at 667.

¹⁶⁸ See *id.* at 668.

York is home to two of the biggest and busiest DA's offices in the entire country—New York County (hereinafter, Manhattan) and Kings County (hereinafter, Brooklyn).¹⁶⁹ The Manhattan DA, Cy Vance Jr., established a Conviction Integrity Program, comprised of “a Conviction Integrity Committee, a Conviction Integrity Chief and an outside Conviction Integrity Policy Advisory Panel.”¹⁷⁰ The Brooklyn DA's Office also has a Conviction Review Unit (CRU) and “as of February 2020, Brooklyn's CRU has exonerated 28 people.”¹⁷¹ CIUs, like the CPC, have the ability to review past cases to uncover prosecutorial misconduct.¹⁷² Further, offices like Brooklyn offer internal training by their CRU staff to “all new ADAs on the kinds of errors that most commonly lead to wrongful convictions.”¹⁷³ CIUs have the potential to change the culture of a prosecutor's office for the better and to decrease the likelihood that prosecutors will engage in misconduct.¹⁷⁴ New York DAs' offices should expand funding for their CIUs or, at the very least, the Legislature should require each office to have a CIU.

2. Internal Structure

In order for prosecutorial misconduct to occur, there must be an environment that sustains or encourages this behavior. Like any office structure, the tone is set at the top and office culture is developed throughout. Ideally, a change in an individual office's organizational structure or a shift in the level of tolerance should help eliminate misconduct in New York prosecutors' offices.¹⁷⁵ “[I]f high-level officials within a prosecutor's office seek to change the

¹⁶⁹ “The Manhattan District Attorney's Office has one of the largest caseloads in the United States.” *Key Data and Trends*, N.Y. COUNTY DIST. ATTORNEY, <https://www.manhattannda.org/data/> [https://perma.cc/E8VR-GNSM]. “The Kings County District Attorney's Office serves the more than 2.5 million people of Brooklyn, and is one of the largest prosecutors' offices in the country.” *Legal Recruitment*, BROOKLYN DIST. ATTORNEY'S OFFICE, <http://www.brooklynnda.org/legal-recruitment/> [https://perma.cc/KS7H-5CWK].

¹⁷⁰ *Manhattan District Attorney Creates Wrongful Convictions Unit*, INNOCENCE PROJECT (Mar. 5, 2010), <https://www.innocenceproject.org/manhattan-district-attorney-creates-wrongful-convictions-unit/> [https://perma.cc/YQ4D-ESSF].

¹⁷¹ When Kenneth Thompson was elected District Attorney in 2014, he increased the CIU's budget to \$1.1 million per year and renamed it the “Conviction Review Unit” as he believed that it “lacked the integrity it purported to bear.” See Thompson, *supra* note 17, at 676; see also *Post Conviction Justice Bureau*, BROOKLYN DIST. ATTORNEY'S OFFICE, <http://www.brooklynnda.org/post-conviction-justice-bureau/> [https://perma.cc/FLB8-BTBQ].

¹⁷² See Thompson, *supra* note 17, at 676.

¹⁷³ *Post Conviction Justice Bureau*, *supra* note 171.

¹⁷⁴ *Id.* (“If prosecutors ignore credible claims of wrongful conviction, it undermines public confidence in the justice system. Conversely, when the Brooklyn DA's Office vigorously investigates claims of innocence, exonerates innocent people, admits mistakes, and apologizes, that sends a powerful message to the public that [they] can be trusted to pursue the truth, and not just guilty verdicts.”).

¹⁷⁵ Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2089–91(2010).

norms within it, line prosecutors are likely to be highly susceptible to making the shift. That norm shifting could, in turn, go a long way toward mitigating violations.”¹⁷⁶ Effective leadership can prove to be a powerful incentive in establishing higher ethical standards; making sure that prosecutor’s offices have strong, accountable leaders is a proactive step in preventing prosecutorial misconduct altogether.¹⁷⁷ This will only work, however, if people elect district attorneys that are progressive and willing to pursue charges against public officials or internal employees, if need be.¹⁷⁸

Given the sheer number of prosecutions in the United States, the presence of some degree of misconduct is inevitable. People are not reliable; human error can lead to cases of mistaken identification, forensic errors, lying witnesses, and police officers that are willing to—or mistakenly—perjure themselves. This concept of human fallibility is important to keep in mind when discussing the notion of self-policing prosecutorial misconduct.

Legal scholars have discussed the idea of the “rhetoric of fault” concerning the prevalence of prosecutorial misconduct.¹⁷⁹ Alafair S. Burke’s analysis in casting prosecutors as “outsiders” to the goal of reform highlights the fact that members of the Innocence Movement¹⁸⁰ often overlook the fact that a prosecutor’s wide range of discretion could ultimately help their own cause.¹⁸¹ Often, prosecutors are painted as lawyers who single-mindedly seek to deprive the disadvantaged of their liberty, but lawyers often become prosecutors because they seek to do justice in their communities. By popularizing a false narrative of “bad” prosecutors, this “rhetoric of fault” does not resonate with the average prosecutor who cannot imagine themselves as someone who is “inadvertently contribut[ing] to wrongful convictions.”¹⁸² If

¹⁷⁶ *Id.* at 2106.

¹⁷⁷ Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 431 (2010).

¹⁷⁸ Bayles, *supra* note 75.

¹⁷⁹ See Burke, *supra* note 14, at 2130. “The traditional rhetoric of fault assumes that prosecutors who contribute to wrongful convictions do so because they care insufficiently about claims of innocence and their roles as ministers of justice.” *Id.* at 2135.

¹⁸⁰ The “Innocence Movement” has been used to describe “a coalition of lawyers, activists, exonerated individuals, and others who have revealed the troubling reality and likely causes of erroneous convictions. The Movement’s core work has been exonerating wrongfully convicted individuals by proving their innocence and implementing legislative and other policy reforms designed to prevent future miscarriages of justice.” Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 780 (2018); see also *id.* at 780 n.1 (“[T]he Innocence Movement has helped hundreds of wrongly convicted people obtain freedom.” (quoting Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1085 (2011))).

¹⁸¹ See Burke, *supra* note 14, at 2130.

¹⁸² See *id.* at 2121. Because of the rhetoric of fault, “prosecutors who view themselves as ethical might conclude that the wrongful convictions movement is either focused on a small minority of indifferent prosecutors or falsely assuming that most

prosecutors are included in the reform, there is a much higher chance that change will occur.

Perhaps the creation of an internal regulation system in each district attorney's office throughout the states, such as an internal affairs bureau or an inspector general, could help with internal accountability. The NYPD has the Internal Affairs Bureau to help preserve the integrity of their police department as "[t]he department cannot successfully serve the public without maintaining the public's trust."¹⁸³

B. *Grievance Committee on Misconduct*

The CPC is further unnecessary because New York State courts already have Grievance Committees in place that have the power to investigate prosecutors, as well as censure, suspend, or disbar them.¹⁸⁴ In addition to instituting individualized programs at the district level, the Grievance Committees should be restructured to include a subcommittee to specifically handle issues of prosecutorial misconduct.¹⁸⁵ This hypothetical subcommittee, potentially named "Grievance Committee on Prosecutorial Misconduct," could provide the same level of assurance to those who want the state to play a more active role on the issue of prosecutorial misconduct, without the constitutional issues of the CPC. In New York, it is well established that the Appellate Division of the State Supreme Court governs the conduct of attorneys.¹⁸⁶ This proposed subcommittee would exist within this pre-existing system, the institutional knowledge of which would bolster the efficiency of the subcommittee. A fresh focus on criminal justice would be the only change this proposed subcommittee would bring to the current system.¹⁸⁷ Additionally, the proposed subcommittee effectively avoids the separation of powers issue that nullified the CPC.¹⁸⁸

prosecutors are indifferent . . . further isolating themselves from contrasting viewpoints that might neutralize decisional biases." *Id.* at 2135.

¹⁸³ *Internal Affairs*, NYPD, <https://www1.nyc.gov/site/nypd/bureaus/investigative/internal-affairs.page> [<https://perma.cc/DDC3-P8YU>].

¹⁸⁴ Bayles, *supra* note 75.

¹⁸⁵ See N.Y. STATE JUSTICE TASK FORCE, *supra* note 164, at 4.

¹⁸⁶ "In New York, the conduct of attorneys is governed by the Appellate Divisions of State Supreme Court and the Grievance Committees appointed by the respective Appellate Division. The committees are made up of both attorneys and non-attorneys, working with a court-appointed, state financed, full-time professional staff." *Attorney Grievance Committee*, N.Y. STATE UNIFIED COURT SYS., <http://ww2.nycourts.gov/attorneys/grievance/index.shtml> [<https://perma.cc/DLZ4-ZLFC>].

¹⁸⁷ *Id.*

¹⁸⁸ See *supra* Part II; The central constitutional issue discussed in Judge Weinstein's opinion revolves around the Appellate Division and its role in the CPC. Having a subcommittee of a Grievance Committee would not expand the role of the judiciary (as it is already something that is in practice) nor would it "interfere[] with and . . . diminish[]

Further, the Grievance Committee on Prosecutorial Misconduct would be well-versed on issues relating to criminal matters, as practicing prosecutors and defense attorneys know which current issues are relevant.

Further, the Task Force was correct in suggesting that there is a need for increased transparency in data relating to prosecutorial misconduct.¹⁸⁹ This conclusion is supported by a study from the Vera Institute.¹⁹⁰ To respond to this need, the Grievance Committee on Prosecutorial Misconduct should publish a biannual publication that includes the exact type of misconduct and the number of complaints received or reviewed, and the resulting determination.¹⁹¹ Each DA's office should have a staff member that acts as a liaison to the Grievance Committee, and each office should be made aware as to who, if any, of their prosecutors are being investigated by the Grievance Committee on Prosecutorial Misconduct.

C. *Doing Away with Immunity*

A major issue critics have with the current state of prosecutorial accountability is the fact that prosecutors effectively have civil immunity.¹⁹² The Supreme Court in *Imbler v. Pachtman* upheld “absolute immunity for prosecutors against private rights of action.”¹⁹³ Even more recently, in *Connick v. Thompson*, the Court broadened this immunity, finding that in order to seek relief under 42 U.S.C. § 1983, a plaintiff must prove “that action pursuant to official municipal policy caused their injury.”¹⁹⁴ After Jabbar Collins was exonerated, Judge Frederic Block of the Eastern District of New York, suggested that the veil of immunity “be judicially or legislatively lifted,” that state

the Appellate Division's constitutional and exclusive jurisdiction over attorney discipline” as it would be still be under the Appellate Division. *Soares v. State*, No. 906409-18, 2020 N.Y. Misc. LEXIS 1128, at *88 (N.Y. Sup. Ct. Jan. 28, 2020).

¹⁸⁹ See N.Y. STATE JUSTICE TASK FORCE, *supra* note 164, at 5.

¹⁹⁰ See *District Attorneys Discuss Vera Institute Findings on Racial Disparity in Criminal Cases (Video)*, HARV. L. TODAY (Dec. 8, 2014), <https://today.law.harvard.edu/district-attorneys-discuss-vera-institute-findings-racial-disparity-criminal-cases-video/> [<https://perma.cc/5LXX-8Q34>].

¹⁹¹ See N.Y. STATE JUSTICE TASK FORCE, *supra* note 164, at 5.

¹⁹² *Thompson*, *supra* note 17, at 657.

¹⁹³ *Id.*; see also MARANDA FRITZ & BRIAN LANCIAULT, THOMPSON HINE, PROSECUTORIAL IMMUNITY: THE DEBATE REIGNITED 3 (2019) (citing *Imbler v. Pachtman*, 424 U.S. 409 (1976)) (noting that the *Imbler* decision concluded that prosecutors, “when engaged in their roles as advocates in the courtroom, possess complete immunity, and where they stray outside that pure courtroom advocate role, [they] possess qualified immunity.”).

¹⁹⁴ *Connick v. Thompson*, 563 U.S. 51, 60 (2011). The Court further noted that a single *Brady* violation does not amount to a violation of “official municipal policies.” See *id.* at 68.

bars and courts enforce ethical canons against prosecutors, and that prosecutors who intentionally withhold Brady material be ‘prosecuted for obstruction of justice.’”¹⁹⁵ His argument that no one is above the law is fitting; if a prosecutor truly believes in seeking justice, then they should not be concerned with having criminal accountability as an option.¹⁹⁶ The ethical guidelines published by the DAASNY state that “[a] prosecutor’s worst nightmare is not losing a major case or watching a dangerous criminal go free, it’s convicting an innocent person.”¹⁹⁷ If the issue is with the lack of accountability, then perhaps reframing the conduct as a criminal act could elicit a different response.¹⁹⁸

CONCLUSION

The Commission on Prosecutorial Conduct was created to foster more transparency and accountability for prosecutors.¹⁹⁹ However, there are better ways to achieve this goal than through the creation of the CPC. Instead of appealing Judge Weinstein’s decision, the New York legislature should work with local district attorneys’ offices to increase CIUs, restructure internal regulation, and form a Grievance Committee on Prosecutorial Misconduct, specifically designed to increase prosecutorial accountability. Rather than using an external lens, such as the CPC, to identify and address misconduct, a uniform internal program should be instituted by individual DAs. This approach would have a great potential to remedy the systemic problem of prosecutorial misconduct.²⁰⁰

The CPC addresses misconduct as it is currently defined, but that definition does not go far enough to regulate prosecutorial conduct. Instead, to truly make headway in reforming the system of prosecutorial accountability, society must rethink what it means for a prosecutor to conduct themselves ethically and with an eye towards securing justice

¹⁹⁵ FRITZ & LANCIAULT, *supra* note 193, at 2 (quoting Block, J).

¹⁹⁶ “[P]rosecutors who intentionally withhold exculpatory evidence resulting in a wrongful conviction should be prosecuted for obstruction of justice. The good ones need not be concerned, but the bad ‘deplorable’ ones should know that there might be civil, and even criminal, consequences for misconduct.” Frederic Block, *Let’s Put an End to Prosecutorial Immunity*, MARSHALL PROJECT (Mar. 13, 2018), <https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity> [<https://perma.cc/87VG-EPRQ>].

¹⁹⁷ DIST. ATT’Y ASS’N OF THE STATE OF N.Y., *supra* note 94.

¹⁹⁸ Thompson, *supra* note 17, at 679.

¹⁹⁹ See Raphling, *supra* note 86.

²⁰⁰ James Doyle, *Can We Learn From Prosecutor Misconduct?*, CRIME REP. (Dec. 9, 2019), <https://thecrimereport.org/2019/12/09/can-we-learn-from-prosecutor-misconduct/> [<https://perma.cc/3DYG-F8HR>].

and then implement a system that will create an environment that incentivizes the prosecutor to do so.

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