

## WHITE PAPER

# Roadmap for Prosecutor Reform



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*Remember, this is not a numbers game for prosecutors. It's not 'the more convictions the better.' A wrongful conviction protects no one. And you are still innocent until proven guilty in this system. -- New York governor Andrew Cuomo<sup>1</sup>*

Wrongful convictions have become a blight upon our nation's criminal justice system. Over 1,200 persons have been exonerated to date, and the number increases weekly.<sup>2</sup> A 2007 analysis yielded a 2.3% false conviction rate.<sup>3</sup> A more recent study in Virginia found that among persons convicted of sexual assault, 15% were later excluded due to lack of a DNA match.<sup>4</sup> This means each year, thousands, or *tens of thousands* of innocent Americans are tragically branded as criminals and sent to prison.

One of the most important causes of wrongful convictions is misconduct by prosecutors and law enforcement officials. According to the National Registry of Exonerations, 43% of wrongful convictions arise from official misconduct.<sup>5</sup>

Prosecutor misconduct has been variously described as "rampant," "pervasive," "ingrained," and "endemic" in our nation's criminal justice system.<sup>6</sup> Official wrongdoing is believed to be particularly problematic for sexual assault and domestic violence cases.<sup>7</sup>

Victims of over-zealous prosecutors, along with their family members, suffer lifelong consequences. When the wrong person is convicted, the real perpetrator remains a threat to society. Taxpayers pay a price, as well. In Texas, 45 wrongful convictions were estimated to cost taxpayers \$8.6 million.<sup>8</sup> One analysis of 85 exonerations in Illinois found the wrongful convictions cost taxpayers \$214 million.<sup>9</sup>

And public confidence and trust in the criminal justice system erodes.

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<sup>1</sup> Gov. Andrew M. Cuomo, *NY Rising: State of the State* (Jan. 9, 2013), available at <http://www.governor.ny.gov/sites/default/themes/governor/sos2013/2013SOSBook.pdf>.

<sup>2</sup> National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Sept. 5, 2013).

<sup>3</sup> Samuel R. Gross, *Convicting the Innocent*, (University of Michigan Public Law Working Paper No. 103, Annual Review, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1100011](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100011).

<sup>4</sup> John Roman et al., *Post-Conviction DNA Testing and Wrongful Conviction*, Urban Institute 6 (2012), available at <http://www.urban.org/UploadedPDF/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.pdf>.

<sup>5</sup> National Registry of Exonerations, *UPDATE: 2012 National Registry of Exonerations, April 3, 2013* 17 (2013), [http://www.law.umich.edu/special/exoneration/Documents/NRE2012UPDATE4\\_1\\_13\\_FINAL.pdf](http://www.law.umich.edu/special/exoneration/Documents/NRE2012UPDATE4_1_13_FINAL.pdf).

<sup>6</sup> Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* 6 (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf>.

<sup>7</sup> See generally Center for Prosecutor Integrity, *Prosecutor Ethics in Domestic Violence and Sexual Assault Cases*, (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/DomesticViolenceSexualAssault.pdf>.

<sup>8</sup> Jennifer Emily & Steve McConigle, *Dallas County District Attorney Wants Unethical Prosecutors Punished*, Dallas Morning News, May 4, 2008.

<sup>9</sup> John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted, and Justice Denied*, Better Government Association (June 18, 2011), [http://www.bettergov.org/investigations/wrongful\\_convictions\\_1.aspx](http://www.bettergov.org/investigations/wrongful_convictions_1.aspx).

*Purpose of Report*

This White Paper presents 20 policies designed to assure prosecutor fulfillment of ethical standards. For each policy, the relevant ethical precept is presented in italics, followed by the specific recommendation.

The policy strategies fall into one of five categories:

- I. Education and Media
  - Public Education
  - Media
  - Continuing Legal Education
- II. Legal Framework
  - Campaigning for Political Office
  - Over-Criminalization
  - Legal Defense
  - Diversion Programs
  - Innocence Commissions
  - Prosecution Review Boards
- III. Office Policies
  - Policy and Procedure Manuals
  - Conviction Integrity Units
- IV. Adjudication
  - Petitioning of Charging Decisions
  - Open-File Discovery
  - Witness and Jailhouse Informant Agreements
  - Plea Bargaining Reform
  - Mandatory Judicial Reporting
- V. Justice for Victims
  - Exoneration or Sentence Reduction
  - Civil Lawsuits
  - Statute of Limitations
  - Post-Exoneration Compensation

This paper is intended for persons who wish to see honesty and fairness restored to our criminal justice system: lawmakers, legal oversight bodies, innocence groups, advocacy organizations, prosecutors, defense attorneys, taxpayers, victims of prosecutorial misconduct and their family members, and others.

These policies are at once *bold* and *achievable*. The result of their implementation will be fewer prosecutions, a reduced percentage of wrongful convictions, and a substantially lower number of unjust imprisonments, saving taxpayers billions of dollars each year.

In the end, justice will be served.

## I. EDUCATION AND MEDIA

A number of ethics-enhancing policies aim to educate prosecutors, media representatives, and the public at large:

- Public Education
- Media
- Continuing Legal Education

### 1. Public Education

*The chief prosecutor should educate the public about the programs, policies, and goals of his or her office and alert the public to the ways in which the public may be involved and benefit from those programs, policies, and goals.*<sup>10</sup>

According to a 2013 national survey sponsored by the Center for Prosecutor Integrity:<sup>11</sup>

- 42.8% of respondents say prosecutor misconduct is widespread
- 71.8% believe new laws are needed to curb prosecutor misconduct

But citizens are generally unaware of the specifics of needed policy reforms. Successful efforts to implement policies to assure ethical prosecutor behavior require broad-based understanding and support from the American public.

In the words of the former Ohio Attorney General Jim Petro, “The most effective reform would come by way of the voting booth rather than through the courts, and this required a citizenry that would insist that its legislators, judges, district attorneys, and other elected officials not only commit to justice but also gain a better understanding of how to achieve it.”<sup>12</sup>

### 2. Media

*A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.*<sup>13</sup>

Media representatives often evince strong interest in covering local crime stories. Media accounts may serve to undermine the defendant’s presumption of innocence. For example, the accuser is often referred to as the “victim,” even in cases where there is no

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<sup>10</sup> NDAA Standards, 2-16.3 Public Education.

<sup>11</sup> Press Release, Center for Prosecutor Integrity, *Most Americans Doubt Fairness of Criminal Justice System, Reveals Center for Prosecutor Integrity* (June 11, 2013).

<sup>12</sup> Jim Petro & Nancy Petro, *False Justice: Eight Myths that Convict the Innocent* 213-214 (2010).

<sup>13</sup> Model Rules of Prof’l Conduct R. 3.6.

objective evidence that a crime took place. Or media reports may reveal the name of the defendant, but not the accuser. The result can be prejudice to a defendant even before the trial begins.

Prosecutors have been known to give “off the record” information to the local press, and even to publicly criticize judicial decision-making. Prosecutors should not seek to obtain any legal advantage in a case by “leaking” information to the media or making inflammatory comments. Media representatives need to understand the problem of false allegations and wrongful convictions, and be mindful of their responsibility to present a balanced and fair account of criminal cases.

### **3. Continuing Legal Education**

*Training programs should be established within the prosecutor's office for new personnel and for continuing education of the staff.<sup>14</sup>*

Continuing Legal Education (CLE) programs need to address the ethical duties of prosecutors. CLE programs should highlight actual examples of prosecutor misconduct and their consequences for the wrongly prosecuted, their families, and society at large.

CLE is a mandatory requirement for practicing attorneys in all states except for Connecticut, Massachusetts, Maryland, Michigan, South Dakota, as well as the District of Columbia. The requirement generally ranges from 10 to 15 credit hours, with about 2-5 credit hours devoted to ethical and professional responsibilities.<sup>15</sup> No curriculum specific to the topic of prosecutorial ethics is known to exist at the present time.

## **II. LEGAL FRAMEWORK**

Several policies serve to define and strengthen the legal context for ethical practice:

- Campaigning for Political Office
- Over-Criminalization
- Legal Defense
- Diversion Programs
- Innocence Commissions
- Prosecution Review Boards

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<sup>14</sup> *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed., 3-2.6 (1993) [hereinafter, ABA Standards].

<sup>15</sup> See *Mandatory CLE*, American Bar Association, [http://www.americanbar.org/cle/mandatory\\_cle.html](http://www.americanbar.org/cle/mandatory_cle.html) (last visited Sept. 9, 2013).

#### 4. Campaigning for Political Office

In many jurisdictions, prosecutors are elected, not appointed to office. Hence, they become attuned to the political impact of their actions. But the electoral process may represent a poor mechanism for holding prosecutors accountable for their ethical conduct.<sup>16</sup>

Rules governing the conduct of prosecutors in this area are non-existent. In contrast, the Model Code of Judicial Conduct devotes substantial attention to judges who are running for political office.<sup>17</sup>

At a minimum, prosecutors should be required to follow the same rules of judges that ban the use of office staff and other government resources in a campaign, and the making public statements that could impact a pending case. If prosecutors make campaign claims pertaining to their conviction rates, they should also inform voters how they have upheld their role as ministers of justice in safeguarding the presumption of innocence, assuring equal treatment under the law, and promoting due process.

#### 5. Over-Criminalization

*As a representative of society as a whole, a prosecutor should take an active role in the legislative process when proposals dealing with the criminal justice system are being considered.*<sup>18</sup>

Over-criminalization is coming to be recognized as a problem in our criminal justice system.<sup>19</sup> An estimated 4,450 federal crimes are currently on the books, many of which are duplicative of other federal and state laws. Many contain definitions that are vague and overly-broad. And many lack any requirement for “guilty mind” (*mens rea*), long viewed as a fundamental element in the definition of a crime.

An important consequence of over-criminalization is over-prosecution, i.e., charging persons with a crime in the absence of probable cause. Tragically, a wrongful prosecution can result in a wrongful conviction.

To curb over-criminalization, lawmakers, with the support of prosecutor organizations and other stakeholders, need to assure laws contain crisp definitions of legal offenses, affirm *mens rea* requirements, strengthen standards of proof, and promote due process.

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<sup>16</sup> Ronald Wright, *How Prosecutor Elections Fail Us*, 6 Ohio St. J. Crim.L. 581, 583 (2009).

<sup>17</sup> See, e.g., Model Code of Judicial Conduct R. 4.1 (2011).

<sup>18</sup> National District Attorneys Association. *NDAA Standards. Commentary to The Prosecutor’s Responsibilities*, 3 (2009) [hereinafter *NDAA Standards*].

<sup>19</sup> See generally Paul Rosenzweig & Brian Walsh, *One Nation Under Arrest: How Crazy Laws, Rogue Prosecutors and Activist Judges Threaten Your Liberty* (Heritage Foundation 2010).

## 6. Legal Defense

*There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.<sup>20</sup>*

In principle, defense counsel should be able to serve as a first-line defense against unethical prosecutor conduct. In practice, however, defense attorneys seldom file ethics complaints, citing a desire to maintain good working relationships for future cases.

Part of defense reluctance to report stems from a pronounced resource imbalance. The average salary of a public defender may be as much as 30% less than that of the district attorney.<sup>21</sup> Resource limitations are known to impair the ability of defense counsel to conduct thorough investigations and compensate experts on the same scale as witnesses for the prosecution.

In addition, Public Defender offices could be funded in order to maintain a Habeas Corpus division dedicated to the investigation and litigation of post conviction claims of prosecutorial abuse and misconduct.

## 7. Diversion Programs

*Prosecutors should be cognizant of and familiar with all community-based programs to which offenders may be sentenced, referred as a condition of probation, or referred as a diversionary disposition.<sup>22</sup>*

Mental health and substance abuse problems lie at the root of many criminal offenses. Faced with overcrowded prisons and skyrocketing costs, state and local governments have looked to diversion programs to cut expenditures and provide appropriate services.

The prosecutor's office traditionally has played a gatekeeper role in determining the eligibility of an offender to participate in a diversion program. But, lacking mental health expertise, prosecutors have been known to deny services to those in need of such assistance.

The National Association of Pretrial Services Agencies recommends that "Broad, equitable, and objective diversion eligibility criteria, applied consistently at multiple points of case processing" be utilized.<sup>23</sup> In cases where the prosecutor rejects an

<sup>20</sup> American Bar Association Ten Principles of a Public Defense Delivery System 3 (2002), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

<sup>21</sup> Mary Sue Backus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *Hastings L.J.* 1031, 1062 (2006).

<sup>22</sup> *NDAA Standards* 2-11.1.

<sup>23</sup> National Association of Pretrial Services Agencies, *Promising Practices in Pretrial Diversion* 17 (2009), available at <http://www.pretrial.org/Docs/Documents/PromisingPracticeFinal.pdf>.



otherwise eligible participant, he must provide a rationale, and his decision should be subject to court review.

## 8. Innocence Commissions

*When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.*<sup>24</sup>

Innocence Commissions, sometimes referred to as Criminal Justice Reform Commissions, are independent bodies established to investigate the causes of and remedies to wrongful convictions. Innocence Commissions bring together a range of stakeholders from the criminal justice system, victims, and other interested parties.

The commissions periodically release reports on their findings recommending reforms to the criminal justice system. For example, in 2003, the Illinois legislature passed a law addressing many of the 85 recommendations made by a special commission created to study capital punishment and create safeguards against wrongful convictions.<sup>25</sup>

Innocence Commissions or other independent groups could also provide technical assistance to aggrieved citizens who wish to file ethics complaints or take other legal action. To date, Innocence Commissions have been established in 11 states: California, Connecticut, Florida, Illinois, Louisiana, Oklahoma, New York, North Carolina, Pennsylvania, Texas, and Wisconsin.

## 9. Prosecution Review Boards

Existing state disciplinary authorities are falling short in fulfilling their public mandate to discipline unethical prosecutors.<sup>26</sup> A Center for Public Integrity review of 2,012 cases of serious prosecutor misconduct identified fewer than 50 cases where sanctions of any type imposed.<sup>27</sup>

Part of the problem is these committees typically do not possess sufficient expertise to address the complexities of prosecutor malfeasance. The solution is to establish an independent Prosecution Review Board that is modeled on the judicial conduct bodies already established in each state.

The Prosecution Review Board should be comprised of prosecutors, judges, defense attorneys, and other individuals who represent a broad range of interests and

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<sup>24</sup> Model Rules of Prof'l Conduct R.3.8 (2008).

<sup>25</sup> *Criminal Justice Reform Commissions Case Studies*, The Innocence Project (2013), [http://www.innocenceproject.org/Content/Criminal\\_Justice\\_Reform\\_Commissions\\_Case\\_Studies.php](http://www.innocenceproject.org/Content/Criminal_Justice_Reform_Commissions_Case_Studies.php).

<sup>26</sup> See Fred C. Zacharias, *The Professional Discipline*, 79 N.C. L. Rev. 721 (2001).

<sup>27</sup> Neil Gordon, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct* (2007), <http://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment>.

understanding of the ethical duties of prosecutors.<sup>28</sup> All appellate findings of misconduct should be reported to the Board for investigation and possible imposition of sanctions.

### III. OFFICE POLICIES

Office policies designed to strengthen prosecutor ethics include:

- Policy and Procedure Manuals
- Conviction Integrity Units

#### 10. Policy and Procedure Manuals

*Each prosecutor's office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted.*<sup>29</sup>

*In the interest of continuity and clarity, such statement of policies and procedures should be maintained in an office handbook. This handbook should be available to the public, except for subject matters declared "confidential."*<sup>30</sup>

District Attorneys should develop written policies and procedures to guide prosecutor conduct and discretion.<sup>31</sup> The objectives of these policies and procedures should be to achieve a fair, consistent and effective enforcement of the law.

The manual should address topics such as:

- Compliance with Brady rules
- Plea bargaining procedures
- Internal investigational and disciplinary measures for allegations of prosecutor misconduct

To ensure transparency, policies and procedures should be made available to the public, except for information that would impair prosecutor function. The Minnesota County (Minn.) Attorneys Association has developed an example of such a policy manual.<sup>32</sup>

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<sup>28</sup> Angela Davis, *Arbitrary Justice* 125 (2007).

<sup>29</sup> ABA Standard 3-3.4(c).

<sup>30</sup> ABA Standard 3-2.5(b).

<sup>31</sup> ABA Standard 3-2.5.

<sup>32</sup> See Minnesota County Attorneys Association. *2012 Prosecutors Manual* (2012), available at <http://www.mcaa-mn.org/docs/2012/2012MinnesotaProsecutorsManual.pdf>.

## 11. Conviction Integrity Units

Conviction Integrity Units (CIUs) are internal offices designed to review post-conviction claims of innocence in accordance with the state's Code of Criminal Procedure. For example, the CIU may undertake a review when new evidence uncovers a different perpetrator.<sup>33</sup>

The CIU may oversee ongoing cases, investigations, and training. In addition, the CIU also reviews policies and procedures of prosecutors and investigators in the proper collection and testing of evidence including best practice interrogation techniques and recording protocols, case assessment, and disclosure obligations..

Conviction Integrity Units currently exist in the following jurisdictions:<sup>34</sup>

- Cook County, IL
- Dallas, TX
- Wayne County, MI
- New York City, NY
- Santa Clara County, CA

## IV. ADJUDICATION

*[A] prosecutor has a duty to refrain from improper methods calculated to produce a wrongful conviction... [While he] may strike hard blows, he is not at liberty to strike foul ones.*<sup>35</sup>

A number of ethics-enhancing policies apply to the adjudication phase of the criminal justice process:

- Petitioning of Charging Decisions
- Open-File Discovery
- Witness and Jailhouse Informant Agreements
- Plea Bargaining Reform
- Mandatory Judicial Reporting

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<sup>33</sup>See, e.g., *Conviction Integrity Unit*, Dallas County District Attorney's Office, <http://www.dallasda.co/webdev/division/conviction-integrity-unit/> (last visited Sept. 23, 2013).

<sup>34</sup>*Conviction Integrity Units: Righting the Wrongs or a Waste of Time?* Innocence Project of Florida (Sept. 18, 2012), <http://floridainnocence.org/content/?tag=conviction-integrity-units>.

<sup>35</sup>*Berger v. United States*, 295 U.S. 78, 88 (1935).

## 12. Petitioning of Charging Decisions

*A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.<sup>36</sup>*

*The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.<sup>37</sup>*

No prosecutorial action is more consequential than the decision to charge a person with a crime. Yet there are no direct mechanisms with which to hold prosecutors accountable for their charging decisions. Prosecutorial abuse includes both charging without probable cause and over-charging, that is, charging a defendant with essentially redundant crimes as a means to pressure the suspect to acquiesce to a plea agreement.<sup>38</sup>

To remedy this problem, the defendant should have the right to petition a court of competent jurisdiction to review the criminal charges lodged against him/her, and to have the benefit of an evidentiary hearing to determine if the facts reasonably support the crimes charged by the prosecutor. The court shall have the authority to modify, alter, reduce or eliminate the criminal charges.

Most states already have a procedure allowing for the filing of a Motion to Dismiss, but the grounds for this motion is based upon the legality of the charges, not the evidentiary sufficiency of the charges.

## 13. Open-File Discovery

*A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.<sup>39</sup>*

In the American criminal justice system, the prosecutor has far greater access to evidence than does the defendant. This informational imbalance can threaten the fundamental fairness of the criminal justice process.<sup>40</sup> In the landmark case, *Brady v. Maryland*, the U.S. Supreme Court ruled that a prosecutor who withholds exculpatory evidence violates due process “where the evidence is material either to guilt or to punishment.”<sup>41</sup>

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<sup>36</sup> ABA Standard 3-3.9.

<sup>37</sup> ABA Standard 3-3.9(f).

<sup>38</sup> *Supra* note 8.

<sup>39</sup> ABA Standard 3-3.11(a).

<sup>40</sup> Eleanor J. Ostrow, *The Case for Preplea Disclosure*, 90 Yale L.J. 1581, 1583-84 (1981).

<sup>41</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

But prosecutor failure to disclose relevant information to the defense is believed to be widespread and sanctions nearly non-existent.<sup>42</sup> This problem can be remedied by means of open-file discovery, by which the defense and prosecutor are provided access to the other's files. This evidence includes the defendant's statements, witness statements, investigating officers' notes, results of tests and examinations, and any other evidence obtained during the investigation.

Prosecutors in jurisdictions with open-file discovery have found that cases can be resolved earlier in the process because defendants can see the strength of the state's case. These prosecutors also experience fewer reversals and retrials.

#### 14. Witness and Jailhouse Informant Agreements

*A prosecutor should not compensate a witness, other than an expert, for giving testimony...*<sup>43</sup>

Prosecutor abuse has been documented in regards to securing favorable witnesses.<sup>44</sup> Some district attorneys have been known to go to a local jail in search of a willing witness. One former prosecutor reveals, "Odds are, if the inquiry is made to enough inmates, one will be willing to provide an appropriate [incriminating] statement. Such conduct is tantamount to subornation of perjury and should not be tolerated."<sup>45</sup>

All information related to cooperating witness or in-custody informant testimony should be disclosed prior to trial, and the prosecution should be required to disclose:<sup>46</sup>

- Criminal history of the witness
- Statements made by the accused to the in-custody informant
- Any incentives that the witness has, will, or may receive in exchange for testimony
- Whether and how often the witness has agreed to testify at prior criminal trials
- Whether the witness has recanted his or her testimony, or made statements inconsistent with the testimony to be presented at trial

Negotiations with informants could also be videotaped, to be made available to the defendant upon request.<sup>47</sup>

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<sup>42</sup> Richard A. Rosen, *Disciplinary Sanction's Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 695 (1987).

<sup>43</sup> ABA Standard 3-3.2(a).

<sup>44</sup> See The Justice Project, *Jailhouse Snitch Testimony: A Policy Review* (2007), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death\\_penalty\\_reform/Jailhouse%20snitch%20testimony%20policy%20brief.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Jailhouse%20snitch%20testimony%20policy%20brief.pdf).

<sup>45</sup> Joseph F. Lawless, *Prosecutorial Misconduct: Law, Procedure, Forms* 302 (1985).

<sup>46</sup> See, e.g., 752 Ill. Comp. Stat. 5/115-21(c) (2003).

<sup>47</sup> John F. Terzano, Esq. et al., *Improving Prosecutorial Accountability: A Policy Review*, The Justice Project (2009), <http://amlawdaily.typepad.com/JusticeProjectReport.pdf>.

## 15. Plea Bargaining Reform

*A prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.*<sup>48</sup>

*The prosecutor should disclose to the court any information in the prosecutor's files relevant to the sentence.*<sup>49</sup>

In the current criminal justice system, the great majority of criminal cases are adjudicated by means of a plea. Research on plea bargaining reveals the existence of prosecutor abuse,<sup>50</sup> particularly in the use of coercive methods to induce defendants to accept pleas. Additionally, defendants who reject their plea bargain and are subsequently found guilty by a jury typically experience much harsher penalties than those who accept pleas.<sup>51</sup> This serves as a *de facto* punishment for defendants who choose to exercise their right to trial by jury.

These two reforms can help reduce the incidence of plea bargain abuse:

- Restrict plea bargaining to certain types of less serious charges, e.g., potential sentences of less than five years, which would help to mitigate the effects of plea bargain abuse.
- Require the prosecutor to present to the judge factors regarding the disposition of the case to justify each plea, such as considerations delineated in the Department of Justice's Principles of Federal Prosecution<sup>52</sup>

## 16. Mandatory Judicial Reporting

*A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.*<sup>53</sup>

Professional codes often mandate the reporting of prosecutorial misconduct. In practice, judges withhold the names of offending prosecutors from their written decisions and fail to report findings of misconduct.<sup>54</sup>

<sup>48</sup> ABA Standard 3-4.1(c).

<sup>49</sup> ABA Standard 3-6.2.

<sup>50</sup> Bureau of Justice Assistance. *Plea and Charge Bargaining: Research Summary* (2011), available at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> Department of Justice, *Principles of Federal Prosecution* (2002), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcr.htm#9-27.420](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.htm#9-27.420).

<sup>53</sup> Model Rules of Prof'l Conduct R. 3.8.

<sup>54</sup> See, e.g., Adam Gershowitz, *Prosecutorial Shaming*, (Sept. 2008) available at <http://ssrn.com/abstract=1265738>; Cal. Comm'n on the Fair Admin. of Justice, *Final Report* 71, 73, 74 (Gerald Velman & Chris Boscia eds., 2008) available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>; Arthur Greenbaum, *The Automatic Reporting of*

In some states, judicial reporting requirements hinge on an evaluation of “harmless-error.” In California, for example, a judge is expected to notify the State Bar only when “a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.”<sup>55</sup> This harmless-error determination inappropriately focuses on the strength of the evidence, not the egregiousness of the prosecutor’s misconduct.<sup>56</sup>

States should strengthen their judicial reporting requirements to include *all* instances of violations of prosecutor ethics.

## V. JUSTICE FOR VICTIMS

*John Thompson of Louisiana was wrongfully convicted for armed robbery and murder, and sentenced to death. After exoneration, Thompson declared, “These people tried to eliminate me from the face of the earth. Do you get that? They tried to murder me...there have to be some kind of consequences.”*<sup>57</sup>

Sometimes prosecutor misconduct is detected prior to conviction; in many instances, however, it is only discovered after the defendant has been wrongfully convicted and imprisoned. These ethics-promoting policies are designed to assure that victims of prosecutor misconduct achieve some measure of justice, as well as to shed the light of public approbation on misbehaving prosecutors:

- Exoneration or Sentence Reduction
- Civil Lawsuits
- Statute of Limitations
- Post-Exoneration Compensation

### 17. Exoneration or Sentence Reduction

Appellate courts that discover prosecutor misconduct usually remand the case for a re-trial. But when a prosecutor is found to have engaged in wrong-doing, a number of troubling questions arise:

1. Did the prosecutor engage in other wrongful, still undetected actions that may taint the evidence?

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*Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 Ohio St. L.J. 437, 439-440 (2012).

<sup>55</sup> See California Mandatory Reporting Statute § 6086.7(a)(2).

<sup>56</sup> *Supra* note 52 at 10.

<sup>57</sup> Radley Balko, *The Untouchables: America’s Misbehaving Prosecutors, and the System that Protects Them*, Huffington Post, Aug. 1, 2013, [http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana\\_n\\_3529891.html](http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html).

2. If a new prosecutor tries the case, will that person be influenced by the same incentives as the first?
3. Did media coverage of the original guilty verdict bias future jury members?

In some cases, exoneration is the proper and just decision to take. In less egregious cases, sentence reduction may be the appropriate route.<sup>58</sup>

## 18. Civil Lawsuits

*Kenny Waters was convicted of a murder he did not commit, as a result of a prosecutor who withheld exculpatory evidence. Waters served a total of 19 years in prison, finally being released in 2001. He sued the Town of Ayer, MA which partially settled the case for \$3.4 million.<sup>59</sup> At a subsequent hearing in Federal court, damages were increased to a total sum of \$10.7 million.<sup>60</sup> The Kenny Waters case was later featured in the movie Conviction.*

The federal Civil Rights Act of 1871 created a federal cause of action for actions of civil liability committed by state officials, including prosecutors, which deprive citizens of their rights.<sup>61</sup>

But in a seminal 1976 case, the Supreme Court ruled prosecutors are immune from civil suits under this federal law when they act within their capacity as an “officer of the court.”<sup>62</sup> Subsequent decisions expanded absolute immunity to encompass prosecutor conduct associated with presenting evidence before a grand jury<sup>63</sup> and administrative functions.<sup>64</sup> Absolute immunity has been upheld even when the prosecutor acted in bad faith or with malice.<sup>65</sup>

States should enact a statute similar to the federal Civil Rights Act to confer only qualified immunity upon prosecutors who violate ethical requirements.

An alternative approach is for a victim of prosecutor misconduct to file a lawsuit under the theory of municipal liability. In 1978 the Supreme Court ruled that a municipal

<sup>58</sup> See Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutor Misconduct*, 97 Geo. L.J. 1509, 1511-12 (2009), available at <http://georgetownlawjournal.org/files/pdf/97-6/Starr.PDF>.

<sup>59</sup> Jonathan Saltzman, *Town of Ayer and insurers pay millions to estate of wrongly convicted man*, Boston Globe, July 14, 2009, available at [http://www.boston.com/news/local/breaking\\_news/2009/07/by\\_jonathan\\_sal\\_4.html](http://www.boston.com/news/local/breaking_news/2009/07/by_jonathan_sal_4.html).

<sup>60</sup> *Waters v. Town of Ayer*, No. 04-10521-GAO (D. Mass. 2009) (order on assessment of damages) available at <http://pacer.mad.uscourts.gov/dc/cgi-bin/recentops.pl?filename=otoole/pdf/waters%20v%20town%20of%20ayer%20damages%20order.pdf>.

<sup>61</sup> See 42 U.S.C. §1983 (2006).

<sup>62</sup> *Imbler v. Pachtman*, 424 U.S. 409, n.33 (1976).

<sup>63</sup> See *Burns v. Reed*, 500 U.S. 478 (1991).

<sup>64</sup> *Kemp v. Goldstein*, 555 U.S. 335 (2009).

<sup>65</sup> Margaret Johns, *Reconsidering Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 54 (2005).



government can be held liable if the plaintiff can demonstrate that a deprivation of a federal right occurred as a result of a policy of the local government's legislative body.<sup>66</sup>

## 19. Statute of Limitations

*Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice.*<sup>67</sup>

Twenty-one states have instituted a statute of limitations that limit the filing of a prosecutor misconduct grievance.<sup>68</sup> But the nature of prosecutorial misconduct is such that evidence of wrong-doing often is not discovered until long after the harmful actions took place and the case adjudicated.

Some states toll their statutes of limitation if the misconduct was not discovered due to concealment or fraud. Other states suspend the statute of limitations only if the misconduct could not be “reasonably” discovered at the time of the occurrence.

Statutes of limitation concerning disciplinary proceedings should be eliminated, lengthened, or at least started at the time of discovery and not at the time of occurrence.

## 20. Post-Exoneration Compensation

Given the state’s responsibility to assure ethical behavior of prosecutors, the government has a moral obligation to provide compensation to those who can prove actual innocence.<sup>69</sup> Compensatory statutes allow an unjustly convicted individual to seek redress for injuries without having to show malice or negligence by officials involved in the case.<sup>70</sup>

States should allocate money for the wrongfully convicted to compensate them for their time in prison, provide job training, and allow the wrongfully convicted to receive rehabilitative medical and psychological care.

Compensation statutes not only serve to restore justice to the wrongfully convicted, they also serve to remind taxpayers and lawmakers of the pivotal role that prosecutors play in avoiding wrongful convictions. At the present time the federal government, the District of Columbia, and 29 states have some form of compensation statutes.<sup>71</sup>

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<sup>66</sup> *Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658, 658 (1978).

<sup>67</sup> Model Rules for Disciplinary Enforcement R. 32 cmt. (2002).

<sup>68</sup> AL, AK, CA, CO, CT, FL, GA, LA, MA, MS, MO, NV, NH, NM, NC, PA, TX, UT, WV, WI, and WY.

<sup>69</sup> See generally Shawn Armbrust, *When Money Isn’t Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 Am. Crim. L. Rev. 157 (2004); Jessica R. Lonergan, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. Legis. & Pub. Pol’y 405 (2007-2008).

<sup>70</sup> Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 Ga. L. Rev. 665, 704 (2002).

<sup>71</sup> The following 21 states currently do not have compensation statutes: AL, AZ, AK, DE, GA, HI, ID, IN, KS, KT, MI, MN, NV, NM, ND, OR, PN, RI, SC, SD, WY

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