

## WHITE PAPER

# An Epidemic of Prosecutor Misconduct



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*The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous....While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.* – Former U.S. Attorney General Robert Jackson<sup>1</sup>

When persons envision the wheels of justice in motion, they picture a black-robed judge solemnly presiding over a prosecutor and defense attorney, a defendant, and impassive members of the jury.

Such a depiction may have been true a generation ago. But now the great majority of convictions are reached by means of a prosecutor-negotiated plea bargain—representing over 90% of all criminal cases.<sup>2</sup> Prosecutors make fateful decisions about whether to order an arrest, disclose evidence to the defense, propose the terms of a plea bargain, and make sentencing recommendations to the judge. Most important of all, prosecutors decide whom to charge and what crimes to charge them with.

District attorneys are called upon to play a dual role, serving both as advocates for victims as well as ministers of justice. The U.S. Supreme Court has explained:<sup>3</sup>

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

The overwhelming majority of lawyers who choose to become prosecutors are ethical. But powerful incentives – political ambitions, media pressures, and a culture of prosecutorial infallibility – can serve to induce prosecutors to act unethically.

This White Paper explores the question, How well are American prosecutors discharging their oath-bound duty to act as ministers of justice?

## PALL OF WRONGFUL CONVICTIONS

*Innocent men are never convicted. Don't worry about it, it never happens in the world. It is a physical impossibility.*<sup>4</sup>

Wrongful convictions were once presumed to be extremely rare, even non-existent in our criminal justice system, as this quotation reveals. But the advent of DNA analysis in the late 1980s opened up the possibility of post-conviction DNA testing, often serving to exclude the person convicted of the crime. To date, over 1,200 persons have been

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<sup>1</sup> Robert Jackson, *The Federal Prosecutor*, Address to the Second Annual Conference of United States Attorneys (April 1, 1940), <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor/>.

<sup>2</sup> Eric Smith et al., *State Court Processing of Domestic Violence Cases*, 4, Table 6, U.S. Department of Justice (2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/scpdvc.pdf>.

<sup>3</sup> *Brady v. Maryland*. 373 U.S. 83, 87 (1963).

<sup>4</sup> Edwin Bourchard, *Convicting the Innocent*, preface, p.v. (quoting an anonymous Worcester County, MA prosecutor) (1932).

exonerated following DNA analysis, witness recantation, confession by the actual offender, or by other means.<sup>5</sup>

Estimates of the extent of wrongful convictions vary. A 2007 analysis of persons sentenced to death from 1973 to 2004 yielded a 2.3% exoneration rate.<sup>6</sup> A more recent study of post-conviction DNA analyses in Virginia found that for 15% of persons convicted of sexual assault, the defendant was later excluded due to lack of a DNA match.<sup>7</sup>

Whether the actual percentage is closer to two or fifteen, this means that each year, *thousands, or tens of thousands, of innocent Americans are branded as criminals and sent to prison for an offense they did not commit.*

Innocence Project co-founder Peter Neufeld laments, “the number of people who are unjustly convicted in our system is extraordinarily high.”<sup>8</sup>

## TYPES AND CAUSES

For years, Americans assumed prosecutors were acting in a fair and honest manner. But in the late 1990s, the received wisdom came under challenge when the *Pittsburgh Post-Gazette*<sup>9</sup> and *Chicago Tribune*<sup>10</sup> ran separate exposés revealing widespread prosecutorial impropriety, which is defined in this White Paper as “misconduct by the relevant Rules of Ethical Conduct,”<sup>11</sup> violation of any law, or other conduct that prejudices the administration of justice, whether intentional or inadvertent.<sup>12</sup>

The year 2007 turned out to be a watershed as Americans were riveted by events in the Duke University lacrosse case, eventually resulting in the North Carolina State Bar’s decision to disbar District Attorney Michael Nifong for “dishonesty, fraud, deceit and misrepresentation.”

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

<sup>6</sup> Samuel R. Gross, *Convicting the Innocent*, University of Michigan Public Law Working Paper No. 103, Annual Review, (2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1100011](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100011).

<sup>7</sup> John Roman et al., *Post-Conviction DNA Testing and Wrongful Conviction*, Urban Institute, 6 (2012), <http://www.urban.org/UploadedPDF/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.pdf>  
Even in many cases in which a DNA match is present, the sexual encounter may have been consensual. So the 15% figure under-estimates the actual extent of wrongful convictions.

<sup>8</sup> Interview on Frontline, *What Jennifer Saw*, WGBH Educational Foundation (1997), <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/>.

<sup>9</sup> Bill Moushey, *Win at All Costs*, Pittsburgh Post-Gazette (Nov. 22 - Dec. 13, 1998), <http://old.post-gazette.com/win/default.asp>.

<sup>10</sup> Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, Chicago Tribune (Jan. 10-14, 1999).

<sup>11</sup> Definition comes from National District Attorneys Association, National Prosecution Standards, Third Edition, <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

<sup>12</sup> Many cases of inadvertent errors are known to be avoidable. For example, many Brady violations may be inadvertent in nature, but these errors can be prevented by means of open-file discovery policies.

## **Types of Misconduct**

Prosecutor misconduct can assume many forms, including:<sup>13</sup>

- Charging a suspect with more offenses than is warranted
- Withholding or delaying the release of exculpatory evidence
- Deliberately mishandling, mistreating, or destroying evidence
- Allowing witnesses they know or should know are not truthful to testify
- Pressuring defense witnesses not to testify
- Relying on fraudulent forensic experts
- During plea negotiations, overstating the strength of the evidence
- Making statements to the media that are designed to arouse public indignation
- Making improper or misleading statements to the jury
- Failing to report prosecutor misconduct when it is discovered

## **Culture of Prosecutorial Infallibility**

*I have never actually tried a case...where I had doubts about a defendant's guilt.*  
– Georgia prosecutor Robert James<sup>14</sup>

Prosecutors are subjected to a variety of powerful incentives that serve to reward zealous advocacy: the gratitude of victims, favorable media coverage, career promotions, appointment to judgeships, and the allure of high political office.

The most insidious incentive of all may be a culture of prosecutorial infallibility. This mindset gives rise to practices that can only be termed bizarre, such as prosecutors who reportedly wear neckties decorated with images of nooses or who throw a party after “winning” a death sentence.

One prosecutor inquired of candidates for employment if previous experiences in the law had provided them with a chance to “taste blood.” The prosecutor revealed he only intended to hire trial lawyers who had already “tasted blood” and liked it.<sup>16</sup>

In Louisiana, ADA James Williams once admitted, “There was no thrill for me unless there was a chance for the death penalty.” Williams reputedly kept a miniature electric chair on his desk, wired to a battery to deliver a jolt to anyone who might doubt his intentions.

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<sup>13</sup> Innocence Project, *Government Misconduct*, <http://www.innocenceproject.org/understand/Government-Misconduct.php>, (last visited Sept. 5, 2013).

<sup>14</sup> Robert James, *DA Seeks to Dismiss Murder Charge in Georgia Slaying*, San Francisco Chronicle, (July 26, 2013).

<sup>16</sup> Daniel Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35, 36 (2009).

## EXTENT OF MISCONDUCT

No one knows the exact extent of prosecutor misconduct. That's because many prosecutorial activities take place behind closed doors, rendering any misconduct difficult to detect. An inkling of the problem comes from the National Registry of Exonerations, which concluded 43% of wrongful convictions are attributable to official misconduct.<sup>17</sup>

Legal experts have long painted a picture of secrecy, tactical short-cuts, even arrogance itself.<sup>18</sup> The most telling critiques come from former prosecutors:

- Joseph F. Lawless, author of a standard reference book on prosecutor ethics, wrote, “The concept of fairness, once thought to be fundamental in a free society, is generally no longer found in the prosecutor’s office.”<sup>19</sup>
- Former Ohio attorney general Jim Petro has noted, “While innocent human error can lead to wrongful convictions, we also now know that many abuses, misrepresentations, and improper tactics are often involved.”<sup>20</sup>
- Former New York City Assistant District Attorney Bennett Gersham worries the problem may be worsening: “The last 15 years are most notable for a vast accretion of power by prosecutors, increased deference by courts to prosecutorial prerogatives, and a general failure of courts and disciplinary bodies to impose meaningful sanctions on prosecutors for misconduct.”<sup>21</sup>

Other legal experts offer similar perspectives:

- Harvard law professor Alan Dershowitz has opined that prosecutorial misconduct is “rampant.”<sup>22</sup>
- American University professor AJ Davis refers to the problem as “pervasive.”<sup>23</sup>
- Regarding the unethical practice of over-charging, California defense attorney Benjamin Theule alleges the practice is now “common.”<sup>24</sup>
- Civil rights attorney Harvey Silverglate believes over-charging has reached the point of becoming “ingrained” into the process.<sup>25</sup>

<sup>17</sup> National Registry of Exonerations, *UPDATE: 2012 National Registry of Exonerations*, (April 3, 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>18</sup> Albert Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 *Tex L. Rev.* 629, 631 (1972).

<sup>19</sup> Joseph F. Lawless, *Prosecutorial Misconduct: Law, Procedure, Forms* 5 (1985).

<sup>20</sup> Jim Petro & Nancy Petro, *False Justice: Eight Myths that Convict the Innocent* 228 (2010).

<sup>21</sup> Bennett Gersham, *Prosecutorial Misconduct*, preface to second edition (2d ed. 2008).

<sup>22</sup> *Id.* (forward by Alan M. Dershowitz).

<sup>23</sup> AJ Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 *Hofstra L. Rev.* 275, 278 (2007).

[http://law.hofstra.edu/pdf/academics/journals/lawreview/lrv\\_issues\\_v36n02\\_cc3.davis.36.2.pdf](http://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v36n02_cc3.davis.36.2.pdf).

<sup>24</sup> Benjamin Theule, *Prosecutorial Tactics: the Practice of Overcharging Defendants*, Benjamin Theule Criminal Defense (June 11, 2012), <http://www.theulelaw.com/prosecutorial-tactics-the-practice-of-overcharging-defendants/>.

<sup>25</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).

- In Texas, defense attorney John Floyd asserts, “Prosecutorial misconduct has been endemic in the state’s criminal justice system over the past five decades.”<sup>26</sup>

The public is awakening to the existence of the problem, as well. According to a 2013 national survey:<sup>27</sup>

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

### **Reaching the Highest Levels**

Prosecutor misconduct extends to the highest levels; indeed, the ethical state of affairs may be even more dire.

#### *National District Attorneys Association*

The National District Attorneys Association (NDAA) is the trade organization that represents the nearly 30,000 prosecutors and district attorneys across the country.

When it comes to proactively addressing the problem, the group is steadfastly non-committal. A search of the NDAA website using the search terms “prosecutorial misconduct” or “prosecutorial error” fails to identify a single office, program, or even publication that is devoted to rectifying this problem.

Some NDAA officials are working to narrow the scope of the definition of prosecutor misconduct to encompass “conduct that was known by a prosecutor to be improper and prejudicial but that the prosecutor nevertheless pursued with the intent to affect the outcome of the case.”<sup>28</sup> Of course, establishing prior knowledge and intent is an exceedingly difficult standard to meet.

Relying upon this narrow definition, the National District Attorneys Association has concluded that prosecutorial misconduct is “exceedingly rare.”<sup>29</sup> Indeed, the NDAA passed a resolution in 2010 admonishing judges who decide to use the phrase “prosecutorial misconduct” in its broader and more widely used sense.<sup>30</sup>

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<sup>26</sup> John Floyd & Billy Sinclair, *Fairness in Disclosure of Evidence Act Seeks to Address Growing Concern over Prosecutorial Misconduct and Wrongful Convictions*, John T. Floyd Law Firm (July 18, 2012), <http://www.johntfloyd.com/blog/the-heat-is-on-for-rogue-prosecutors>.

<sup>27</sup> Press Release, Center for Prosecutor Integrity, *Most Americans Doubt Fairness of Criminal Justice System, Reveals Center for Prosecutor Integrity* (June 11, 2013).

<sup>28</sup> Mathias Heck, *ABA Update On August 2008 Meeting* (2008), [http://www.ndaa.org/pdf/ABA\\_Pros\\_july\\_sept\\_08.pdf](http://www.ndaa.org/pdf/ABA_Pros_july_sept_08.pdf).

<sup>29</sup> Scott Burns, Comment to *The ‘Pinstriped Wall of Silence,’* The Crime Report (August 29, 2013), <http://www.thecrimereport.org/viewpoints/2013-08-the-pinstriped-wall-of-silence>.

<sup>30</sup> *Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct,”* National District Attorneys Association Board of Directors (April 10, 2010), [http://www.ndaa.org/pdf/prosecutorial\\_misconduct\\_final.pdf](http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf).

Even when it comes to upholding the legal principle of equal treatment under law, the Association falls short. The NDAA sponsors a National Center for the Prosecution of Violence Against *Women*, but offers no parallel program regarding violence against *men*.<sup>31</sup> This programmatic imbalance may have contributed to the fact that males have been found to be “consistently treated more severely at every stage of the prosecution process.”<sup>32</sup>

*Department of Justice*

The U.S. Department of Justice has been implicated in the problem, as well. Attorney Harvey Silverglate laments the fact that “too many ordinary, well-meaning, and innocent people get caught in the maw of the Department of Justice’s prosecutorial machinery.”<sup>33</sup> Former U.S. Attorney Joseph Digenova has revealed, “the Department [of Justice] is in real trouble. This is serious business. These career prosecutors believe that nobody can touch them. Nobody!”<sup>34</sup>

The problem can be traced back to the early 1990s when the U.S. Department of Justice asserted its prosecutors were not bound by the ethical codes of the states in which cases were prosecuted. The stalemate was not resolved until 1999 when Congress passed the Federal Prosecutor Ethics Act.

But requiring prosecutors to abide by state ethical codes did not eliminate the Department’s ethical woes. In 2009 a federal judge set aside the conviction of former Senator Ted Stevens of Alaska. Announcing his decision, Judge Emmett Sullivan took the prosecutors involved in the case to the ethical woodshed: “In nearly 25 years on the bench, I’ve never seen anything approaching the mishandling and misconduct that I’ve seen in this case.”<sup>35</sup>

Ethical lapses continue to the present time. When internet activist Aaron Swartz illegally downloaded computer files, Department of Justice prosecutors filed 13 charges that carried the possibility of 35 years behind bars and up to a \$1 million fine. Prosecutors then offered Swartz a deal to plead guilty to all charges and spend six months in jail.

Swartz’ subsequent tragic death led to this testy exchange between Senator John Cornyn of Texas and U.S. Attorney General Eric Holder:<sup>36</sup>

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<sup>31</sup> Letter to the National District Attorneys Association (January 2, 2013) <http://www.saveservices.org/wp-content/uploads/NDAAtr.pdf>.

<sup>32</sup> Stan Shernock & Brenda Russell, *Gender and Racial/Ethnic Differences in Criminal Justice Decision-Making in Intimate Partner Violence Cases*, *Partner Abuse* Vol. 3, No. 4 (2012).

<sup>33</sup> Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* 268 (2011).

<sup>34</sup> *Prosecutorial Misconduct*, *Public Broadcasting System Religion and Ethics Newsweekly* (July 13, 2012), <http://www.pbs.org/wnet/religionandethics/2012/07/13/july-13-2012-prosecutorial-misconduct/11821/>.

<sup>35</sup> *Sen. Ted Stevens’ Conviction Set Aside*, CNN (April 7, 2009), <http://www.cnn.com/2009/POLITICS/04/07/ted.stevens/index.html>.

<sup>36</sup> Bridget Johnson, *DOJ ‘Elevated Its Charges’ Against Swartz Because Internet Community Rallied on His Behalf*, PJ Media (Aug. 12, 2013) <http://pjmedia.com/blog/report-doj-elevated-its-charges-against-swartz-because-internet-community-rallied-on-his-behalf/>.



Cornyn: “Does it strike you as odd that the government would indict someone for crimes that would carry penalties of up to 35 years in prison and million dollar fines, and then offer him a three or four month prison sentence?”

Holder: “I think that’s a good use of prosecutorial discretion.”

Cornyn: “So you don’t consider this a case of prosecutorial overreach or misconduct?”

Holder: “No.”

ABA ethical Standard 3-3.9(f) requires, “The prosecutor should not bring or seek charges greater in number...than are necessary to fairly reflect the gravity of the offense.” The attorney general’s facile dismissal of the senator’s question raises the concern: Has over-charging become so routine that the Department of Justice director no longer regards the practice as unethical?

In addition, the Department of Justice has been less than forthcoming when it comes to disclosing its internal disciplinary procedures. When *USA Today* sought to learn how the DOJ handled 201 cases of misconduct by its prosecutors, the DOJ declined the request, offering this tendentious explanation: “The department will not reveal how many of those prosecutors were punished because, it said, doing so would violate their privacy rights.”<sup>37</sup>

One wonders which legal policy was instituted to afford privacy to a prosecutor who acts in an unethical manner, and how this rule serves the public interest.

## CONSEQUENCES OF MISCONDUCT

*Mistakes can happen. But if you don’t do anything to stop them from happening again, you can’t keep calling them mistakes.* – Exoneree John Thompson

A number of ethical standards govern the practices of the prosecutorial profession. Most influential is the ABA Model Rule 3.8, Special Responsibilities of a Prosecutor,<sup>40</sup> which is presented in Appendix A of this White Paper. ABA Model Rule 3.8 establishes the criteria by which to evaluate allegations of prosecutor misconduct, and has been implemented either verbatim or with minor modifications in virtually every state in the country.

Other relevant ethical standards include:

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<sup>37</sup> Brad Heath & Kevin McCoy, *Prosecutors’ Conduct Can Tip Justice Scales*, USA Today, (Sept. 23, 2010) [http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform\\_N.htm?csp=usat.me#](http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm?csp=usat.me#).

<sup>40</sup> Model Rules of Prof’l Conduct R. 3.8 (2008), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_3\\_8\\_special\\_responsibilities\\_of\\_a\\_prosecutor.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.html).

1. ABA Standards for Criminal Justice “The Prosecution Function” supplements the Model Rules. The prosecutorial Standards address General Standards, Organization of the Prosecution Function, Investigation for Prosecution Decision, Plea Discussions, Trial, and Sentencing.
2. The United States Attorneys’ Manual is an internal handbook which provides general policies and procedures relevant to the work of U.S. Attorneys’ offices.
3. The National Prosecution Standards, developed by the National District Attorneys Association, are crafted as a detailed, yet purely aspirational guide.

A review of these standards reveals they are broad in scope and detailed in their exposition. So the problem cannot be blamed on a lack of ethical guidance.

So what happens when ethical codes are violated? Nine studies have analyzed the professional consequences of prosecutor misconduct. Collectively, these studies examined prosecutorial misconduct conducted at the both state and national levels from 1963 – 2013. Of the 3,625 instances of misconduct identified, these studies reveal that public sanctions are imposed in only 63 cases -- less than 2% of the time (Appendix B).

Often these sanctions represented only a proverbial “slap-of-the-wrist.” For example in the nearly 50 cases identified in the Center for Public Integrity analysis, the most common sanction was to assess the prosecutor with the costs of the disciplinary hearings, occurring in 24 cases. In only 14 instances was a prosecutor suspended or disbarred from practice.

Indeed, when a prosecutor violates ethical precepts, judges and appellate courts seemingly bend over backwards to excuse the conduct. Even in the most reprehensible cases, judges typically do not refer the case for disciplinary action and ethics boards fail to apply sanctions. Courts rely upon fault-absolving notions like “harmless error,”<sup>44</sup> a doctrine that has been termed the “lie that the criminal justice system tells itself.”<sup>45</sup>

Reflecting on the current state of affairs, former ADA Robin Barton has bemoaned the “lack of outrage by other prosecutors, who should be condemning this conduct and calling for reforms to prevent similar behavior.”<sup>46</sup>

## TAXPAYER BURDEN

No one knows how much money is misspent each year as a result of prosecutor misconduct, which can involve an appeal, an appellate reversal, a retrial, investigational

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<sup>44</sup> Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, ProPublica (April 3, 2013), <http://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody>.

<sup>45</sup> Jim Dwyer et al., *Actual Innocence: When Justice Goes Wrong and How to Make it Right* 225 (2003).

<sup>46</sup> Robin Barton, *The ‘Pinstriped Wall of Silence,’* The Crime Report (August 28, 2013) <http://www.thecrimereport.org/viewpoints/2013-08-the-pinstriped-wall-of-silence>.

efforts to trace the real offender, possible civil lawsuits, and compensatory payments – as well as the emotional costs to victims who are forced to relive the tragedy.

In Texas, 45 wrongful convictions were estimated to cost taxpayers \$8.6 million.<sup>47</sup> One analysis of 85 exonerations in Illinois found the wrongful convictions had imprisoned innocent people for 926 years and cost \$214 million.<sup>48</sup>

### *Housing Costs*

The costs to house wrongfully convicted inmates can be staggering, as well. A Department of Justice-funded study of post-rape conviction DNA analyses in Virginia found in 15% of convictions, the DNA of the prisoner and perpetrator did not match.<sup>49</sup>

Nationwide, 160,800 prisoners who were convicted for rape or other sexual assault are currently under state jurisdiction.<sup>50</sup> Extrapolating the Virginia false conviction figure to a national sample, we conclude that 24,120 current inmates were wrongfully convicted and imprisoned.<sup>51</sup>

The average state corrections expenditure per inmate is \$28,323.<sup>52</sup> This translates into an annual expenditure of \$683 million.<sup>53</sup> This is an underestimate because the number does not include defendants wrongfully detained in local jails or in military or federal prisons, as well as the many detained persons who are still awaiting trial.

## **ONE IN ONE HUNDRED**

If we were to identify a single riveting fact that encapsulates the excesses of our current criminal justice system, it would be this:

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<sup>47</sup> Jennifer Emily & Steve McConigle, *Dallas County District Attorney Wants Unethical Prosecutors Punished*, Dallas Morning News, (May 4, 2008)

<sup>48</sup> John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted, and Justice Denied* (June 18, 2011), [http://www.bettergov.org/investigations/wrongful\\_convictions\\_1.aspx](http://www.bettergov.org/investigations/wrongful_convictions_1.aspx).

<sup>49</sup> *Supra* note 7.

<sup>50</sup> E. Ann Carson and William J. Sabol, *Prisoners in 2011*, Bureau of Justice Statistics, 9, Table 9 (2012), <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

<sup>51</sup> 160,800 prisoners x 0.15 false conviction rate = 24,120 prisoners wrongfully convicted.

<sup>52</sup> Tracey Kyckelhahn, *State Corrections Expenditures, FY 1982-2010*, Bureau of Justice Statistics, 4, Table 2 (December 10, 2012), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4556>.

<sup>53</sup> 24,120 persons x \$28,323 annual inmate expenses = \$683,150,760.

*Nearly one in 100 adult Americans is currently serving time behind bars, by far the largest proportion of any nation in the world.<sup>54</sup> By comparison, the United States has six times as many prisoners as Canada or China, even after total population is taken into account.<sup>55</sup>*

This deplorable state of affairs is the product of many factors. Lawmakers have passed too many laws with poorly-defined offenses. Law enforcement officials have made too many arrests that lack probable cause. The Supreme Court has failed to uphold appellate decisions of official wrong-doing.

But as the most powerful stakeholder in the criminal justice system, the prosecutorial profession must shoulder a major portion of the responsibility, and work proactively to remedy the abuses.

Each year, thousands of Americans are victimized by prosecutors who overcharge, withhold key evidence, and engage in a myriad of other forms of professional misconduct. When these persons later seek redress, they encounter denial, resistance, and delays. More often than not, their efforts to receive even an apology end in futile exasperation.

Fundamental reform is long over-due, and corrective policies have been delineated.<sup>56</sup> Prosecutors, lawmakers, concerned citizens, and others need to take action to restore the luster to Lady Justice.

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<sup>54</sup> Pew Center on the States, *One in 100; Behind Bars in America 2008*, (2008), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/one\\_in\\_100.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf).

<sup>55</sup> Albert Hunt, *A Country of Inmates*, N.Y. Times, (Nov. 20, 2011) [http://www.nytimes.com/2011/11/21/us/21iht-letter21.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/11/21/us/21iht-letter21.html?pagewanted=all&_r=0).

<sup>56</sup> Center for Prosecutor Integrity, *Roadmap for Prosecutor Reform* (2013). <http://www.prosecutorintegrity.org/wp-content/uploads/WhitePaper-RoadmapProsecutorReform.pdf>

Appendix A

**ABA Rule 3.8: Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
  - (1) the information sought is not protected from disclosure by any applicable privilege;
  - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
  - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,
  - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
  - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) 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.

Appendix B

**Analyses of Public Sanctions for Prosecutorial Misconduct**

	Scope	Criteria	Years	No. Cases of Misconduct	No. Public Sanctions Imposed
1	United States <sup>57</sup>	Homicide cases in which appellate courts reversed a conviction due to prosecutor misconduct	1963 - 1999	381	0
2	United States <sup>58</sup>	Cases in which prosecutor misconduct affected the fairness of pending criminal proceedings or infringed on the constitutional rights of defendants	1970 - 2003	2,012	Fewer than 50
3	United States <sup>59</sup>	Cases in which judges determined that federal prosecutors violated laws or ethics rules	1997 - 2010	201	1
4	Arizona <sup>60</sup>	Appellate court findings of prosecutorial misconduct	2004 - 2008	20	0
5	Arizona <sup>61</sup>	Death-penalty cases reviewed by the Arizona Supreme Court	2002 - 2013	16	2

<sup>57</sup> Maurice Possley & Ken Armstrong, *The Verdict: Dishonor*, Chicago Tribune (Jan. 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story?page=1>

<sup>58</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>.

<sup>59</sup> Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today (Sept. 23, 2010). [http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform\\_N.htm?csp=usat.me#](http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm?csp=usat.me#)

<sup>60</sup> Veritas Initiative. *Prosecutorial Oversight Forum. Court Findings of Prosecutorial Error and Misconduct in Arizona* (2012). <http://www.prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-arizona-2004-2008>

<sup>61</sup> Michael Kiefer. *Prosecutors Under Scrutiny are Seldom Disciplined*. Arizona Republic (Oct. 28, 2013). <http://www.azcentral.com/news/arizona/articles/20131027wintory-prosecutor-conduct-day-2.html>

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6	California <sup>62</sup>	State and federal appellate rulings of prosecutorial misconduct	1997 - 2011	707	6
7	New York <sup>63</sup>	Trial and appellate court findings of prosecutorial misconduct	2004 - 2008	151	3
8	Pennsylvania <sup>64</sup>	Appellate court findings of prosecutorial misconduct	2004 - 2008	46	0
9	Texas <sup>65</sup>	Trial and appellate court findings of prosecutorial misconduct	2004 - 2008	91	1
	TOTAL			3,625	63

<sup>62</sup> Kathleen M. Ridolfi, Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009* (2010),

<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs>.

<sup>63</sup> Veritas Initiative. *Prosecutorial Oversight Forum. Court Findings of Prosecutorial Error and Misconduct in New York State* (2012). <http://www.prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-new-york-state-2004-2008>

<sup>64</sup> Veritas Initiative. *Prosecutorial Oversight Forum. Court Findings of Prosecutorial Error and Misconduct in Pennsylvania* (2012). <http://www.prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-pennsylvania-2004-2008>

<sup>65</sup> Veritas Initiative. *Prosecutorial Oversight Forum. Court Findings of Prosecutorial Error and Misconduct in Texas* (2012). <http://www.prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-texas-2004-2008>