

USING DETERRENCE THEORY TO PROMOTE PROSECUTORIAL ACCOUNTABILITY

by
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Prosecutors—the most powerful actors in the American criminal justice system—largely avoid accountability for misconduct. To promote fairer processes and results, prosecutors must be held to account for violations of defendants’ due process and fair trial rights and the related ethical rules that help protect those rights. An important thread of scholarly work makes clear the need for effective methods of ensuring prosecutorial accountability. Yet, empirical evidence consistently suggests that prosecutors almost universally evade accountability for infringing upon defendants’ rights. No method seems to address the problem effectively, whether it be internal or external professional discipline, criminal liability, civil liability, electoral accountability, or an even broader conception of accountability—case-specific remedies provided to criminal defendants who fell victim to prosecutorial misconduct. While many have concluded that these modes of accountability have not been up to the task, it appears that few critiques explicitly draw on a reservoir of powerful explanatory and potentially curative tools hidden in plain sight: deterrence theory.

The central theory underlying our criminal justice system’s methods of punishing lawbreakers provides crucial insights into how we might also promote prosecutorial accountability. This Article draws upon the deterrence theory of criminal justice to demonstrate ways in which current approaches to prosecutorial accountability fail to fulfill the key deterrent values of certainty and swiftness (celerity). In both design and operation, current approaches overlook the central importance of ensuring potential wrongdoers are on notice about sanctions for ethical and legal breaches, and instead deal with misconduct after-the-fact in an ad hoc manner.

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Evaluating existing modes of accountability from a deterrence perspective proves useful in three ways. First, it provides a theoretical account of the status quo's failure to hold prosecutors accountable. Regimes of prosecutorial accountability remain somewhat undertheorized, and their numerosity, design, and construction have resulted in both confusion and a disquieting accountability deficit. Deterrence is a useful perspective from which to understand the system's breakdown and identify paths to correct the course. Second, deterrence principles provide helpful language to describe modes of accountability and bridge the gaps between them. Someone studying the professional disciplinary regime, for example, may not be able to easily draw upon what happens in the electoral accountability regime. Deterrence can help fill the void. Third, deterrence offers a normative framework that can advance the discourse about solutions to address the system's failure.

INTRODUCTION.....	575
I. AN OVERVIEW OF THE CURRENT SYSTEM OF PROSECUTORIAL ACCOUNTABILITY	579
A. Defining Accountability	581
B. The Modes of Accountability	582
1. Criminal case review	583
2. Criminal liability.....	585
3. Civil liability.....	5856
4. Internal discipline.....	5868
6. External/professional discipline	589
7. Electoral accountability.....	591
C. A System in Disarray	592
D. The Result.....	595
II. AN OVERVIEW OF DETERRENCE THEORY.....	596
III. DETERRENCE IN THE PROSECUTORIAL ACCOUNTABILITY CONTEXT: REEVALUATING THE CHIEF MODES OF PROSECUTORIAL ACCOUNTABILITY	604
A. Criminal Case Review.....	604
B. Criminal Liability	606
C. Civil Liability.....	607
D. Internal Discipline.....	609
E. External/Professional Discipline.....	610
F. Electoral Accountability.....	612
IV. CAN WE REPAIR THE CHIEF MODES OF PROSECUTORIAL ACCOUNTABILITY USING DETERRENCE?.....	614
A. Key Insights	614
1. There is a widespread lack of celerity	614
2. Transparency matters	615
3. Methods for detection and apprehension must be scrutinized...	616
4. What matters is what matters to prosecutors	617
5. The lack of certainty cripples the system	619

B.	<i>Some Initial Solutions</i>	620
1.	<i>Consolidating the Locus of Responsibility</i>	620
2.	<i>Improving Criminal Case Review</i>	622
3.	<i>Improving External/Professional Discipline</i>	625
C.	<i>Critiques of Using Deterrence to Promote Prosecutorial Accountability (and Some Responses)</i>	629
1.	<i>Detection problems impede deterrence</i>	629
2.	<i>Deterrence will drive misconduct further underground</i>	630
3.	<i>Reproducing the very problems evident in the criminal justice system</i>	630
4.	<i>Why deterrence theory?</i>	631
	CONCLUSION	633

INTRODUCTION

Prosecutors are in the spotlight. Whether it was the wildly popular “Serial” podcast bringing attention to “fishy” prosecutorial activity in the murder case against Adnan Syed,¹ the Netflix series “Making a Murderer” revealing prosecutors’ unethical conduct in the prosecutions of Steven Avery and Brendan Dassey,² or one of the many recent stories about the “epidemic” of prosecutorial misconduct in the American criminal justice system,³ the public is on alert. Heightened and widespread public attention comes behind a significant wave of scholarly focus on abuses of prosecutorial authority over the past two decades.⁴ Advocates, too, have uncovered a system rife with misconduct.⁵ “Much of what is wrong with American criminal justice—its racial inequity, its excessive severity, its propensity for error—is increasingly blamed on prosecutors.”⁶ Prosecutors, once hidden inside the bureaucratic machinery of the system and largely beyond the grasp of critical media, have become regular headline makers—and not often in a way that flatters them.

¹ See *How ‘Serial’ Shined a Light on Our Troubled Justice System*, PBS (June 8, 2015), <http://www.pbs.org/newshour/bb/serial-shined-light-troubled-justice-system/>; see also Colin Miller, *The Serial Podcast, Episode 10: Was There Prosecutorial Misconduct with Jay’s Plea Deal?*, EvidenceProf Blog (Dec. 15, 2014).

² John Ferak, *Legal Experts Blast Avery Prosecutor’s Conduct*, POST-CRESCENT (Jan. 24, 2016), <http://www.postcrescent.com/story/news/local/steven-avery/2016/01/15/kratzs-pretrial-behavior-called-unethical/78630248/>.

³ Maura Dolan, *U.S. Judges See ‘Epidemic’ of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015), <http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html>; Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), http://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html?_r=0.

⁴ See, e.g., *infra* notes 20–32 and associated text.

⁵ See, e.g., Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009*, N. Cal. Innocence Project (2010).

⁶ David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 474 (2016).

A look at the available data validates the concerns that a few particularly high-profile cases have prompted. Earlier this year, the Innocence Project looked at cases from 2004 through 2008 in five states (Arizona, California, Pennsylvania, New York, and Texas) and identified 660 with judicial findings of prosecutorial misconduct.⁷ In 2010, the Northern California Innocence Project published a report documenting the results of an in-depth statewide review of prosecutorial misconduct, looking at the period from 1997 through 2009.⁸ Of approximately 4,000 cases reviewed, “NCIP’s examination revealed 707 cases in which courts explicitly found that prosecutors committed misconduct.”⁹ In another non-exhaustive study, USA Today identified more than 200 cases since 1997 in which federal prosecutors violated legal or ethical rules.¹⁰ And, these studies simply cannot capture anywhere close to the full extent of misconduct perpetrated in criminal courts around the country.¹¹ The high-profile cases, like the misconduct-riddled prosecution of Ted Stevens and the disbarment of Michael Nifong in the Duke Lacrosse scandal, as well as the hundreds of cases the above studies have identified, may be “the tip of the iceberg.”¹²

No matter how widespread prosecutorial misconduct is, it matters because it implicates the fundamental fairness of the criminal justice system. Not only does misconduct undercut the fairness of the process,¹³ but

⁷ See INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* (2016), <http://www.innocenceproject.org/prosecutorial-oversight-national-dialogue-wake-connick-v-thompson/>.

⁸ Ridolfi & Posseley, *supra* note 5.

⁹ *Id.* at 2. A 2003 study by the Center for Public Integrity identified more than 2,000 appellate cases since 1970 in which courts dismissed charges, reduced sentences, or reversed convictions due to prosecutorial misconduct. *See Methodology, The Team for Harmful Error, CTR. FOR PUB. INTEGRITY* (June 26, 2003), <https://www.publicintegrity.org/accountability/harmful-error>.

¹⁰ 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.

¹¹ Critically, a very high percentage of cases—well over 90%—result in guilty pleas. These cases generally do not receive meaningful judicial review, so it is impossible to determine how often prosecutorial misconduct occurred in most criminal prosecutions. *See, e.g.*, Hon. John L. Kane, *Plea Bargaining and the Innocent*, MARSHALL PROJECT (Dec. 26, 2014), <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent#.Grr8fKM50> (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the results of guilty pleas.”).

¹² Bennett L. Gershman, *New Commission to Regulate Prosecutorial Misconduct*, HUFFINGTON POST (May 20, 2014), http://www.huffingtonpost.com/bennett-l-gershman/new-commission-to-prosecutorial-misconduct_b_5353570.html; *see also* United States v. Jones, 609 F. Supp. 2d 113, 119 (D. Mass. 2009) (“The egregious failure of the government to disclose plainly material exculpatory evidence in this case extends a dismal history of intentional and inadvertent violations of the government’s duties to disclose in cases assigned to this court.”).

¹³ *See RIDOLFI & POSSLEY*, *supra* note 5, at 4 (“It undermines our trust in the reli-

it also calls into question the legitimacy of substantive outcomes. A significant amount of research reveals that misconduct is a powerful contributor to wrongful convictions.¹⁴ Even in cases in which a defendant's guilt for some criminal act is not in doubt, misconduct may lead to convictions for crimes that did not occur or to harsher sentencing outcomes.¹⁵ Regardless of the misconduct's impact on the outcome, the violation of a defendant's constitutional rights still produces dignitary harms.¹⁶ When prosecutors infringe upon individual defendants' rights without recourse, respect for the system's integrity corrodes—and ethical prosecutors suffer the consequences ushered in by those who fail to abide by the rules.

The studies and the major cases draw attention. But, why does the problem of misconduct persist? The simple answer is that prosecutors who have violated ethical rules have not been held accountable. If prosecutors faced consequences for unconstitutional and unethical actions, they would act more appropriately. Scholars have documented well the fact that the methods created to promote prosecutorial accountability have, to date, failed. This Article seeks to shift and deepen the inquiry. It takes a step back to look at a cornerstone theory of criminal punishment—deterrence—and draws upon it to understand better why the current modes of prosecutorial accountability remain ineffective.

At first glance, it may seem peculiar to look at a theory of punishment in this context. After all, our troubled criminal justice system relies upon these theories. Rightfully, the traditional theories of punishment—deterrence, incapacitation, and retribution (and to some extent rehabilitation)—have drawn substantial criticism for the problems they have engendered, including their contributions to our society's mass incarceration crisis.¹⁷ Given that deterrence has become almost inextricably

bility of the justice system and subverts the notion that we are a fair society.”).

¹⁴ See, e.g., Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403 (reviewing studies that show “prosecutorial misconduct has proven to be one of the most common factors that causes or contributes to wrongful convictions”); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC L. Rev. 275, 278 (2004) (“The Innocence Project reports that of the first seventy-four exonerations, prosecutorial misconduct was a ‘factor’ in forty-five percent of those cases.”).

¹⁵ Cf. Note, *The Prosecutor’s Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1004 (1986) (“A criminal defendant’s decision to plead guilty reflects his assessment of the strength of the state’s case against him. The prosecution’s failure to disclose evidence favorable to the defendant skews that calculation.”); *id.* at 1014 (“Reduced bargaining power resulting from nondisclosure distorts the ability of the plea bargaining process to produce factually accurate results.”).

¹⁶ See H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 54 (2013) (“prosecutorial misconduct is still unjust when it harms the guilty, who, regardless of their crimes, are entitled to the full protection of the Constitution”).

¹⁷ See generally Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203 (2012).

intertwined with notions of criminal justice,¹⁸ it may seem difficult to express reservations about that system while entertaining the idea that it is worthwhile to export some of deterrence's core insights into another realm.

This Article grapples with these issues. It suggests that, contrary to the first-blush view, it is odder that prosecutors have for so long operated outside the very principles their professional roles seek to vindicate. Indeed, in some important ways, deterrence theory offers more promise when translated into the prosecutorial accountability context because it works better when applied to well-informed actors working in a professional environment. Nonetheless, traditional critiques of deterrence still raise important questions about its potential contributions to prosecutorial accountability—especially the worry that inadequate detection of misconduct will continue to undercut the system substantially.

Evaluating existing modes of accountability from a deterrence perspective still proves useful in three ways. First, it provides a theoretical account of the status quo's failure to hold prosecutors accountable. Regimes of prosecutorial accountability remain somewhat undertheorized, and their numerosity, design, and construction have resulted in both confusion and a disquieting accountability deficit. Deterrence is a useful perspective from which to understand the system's breakdown and identify paths to correct the course. Second, deterrence principles provide helpful language to describe modes of accountability and bridge the gaps between them. Someone studying the professional disciplinary regime, for example, may not be able to easily draw upon what happens in the electoral accountability regime. Deterrence can help fill the void. Third, deterrence offers a normative framework that can advance the discourse about solutions to address the system's failure.

By introducing concepts drawn from the literature on deterrence—a core criminal justice goal that prosecutors seek to reinforce through their everyday work—this Article seeks to shift the conversation about prosecutorial accountability. The *need* for prosecutorial accountability is widely acknowledged. Scholars have established *the fact* that we do not hold prosecutors accountable. And, they have widely explored *how* specific methods created to hold them accountable have failed to achieve that end. But, less has been written about whether these ongoing, long-running failures reflect a deeper conceptual problem with the approaches we have taken. Thinking about deterrence illuminates this problem. This illumination does not propose an obvious and immediate solution. Instead, it suggests that it is time to begin a dialogue about the real goals of our accountability regimes. If there are valid reasons for setting aside traditional theories of punishment in the context of prosecutorial ac-

¹⁸ See generally Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, SENTENCING PROJECT (2010), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf>.

countability, we must bring them to the surface and discuss them openly.

In short, bringing deterrence to the table is a useful way to uncover the core challenges our system of prosecutorial accountability confronts. To surmount those challenges, the effort to change the system should be informed in part by the theory and principles highlighted here. The deterrence perspective this Article articulates does not represent a unified theory of prosecutorial accountability. It is not a panacea. Other theories—for example, those emerging from administrative law, organizational management, and police accountability—remain useful. Nevertheless, the deterrence view has explanatory power. It provides a helpful language with which to discuss prosecutorial accountability. It also offers a beneficial—if controversial—package of normative tools.

This Article has four parts. Part I provides an overview of the current system of prosecutorial accountability. It identifies the six primary modes of accountability, looks at how they work (or fail to work) together, and explores the resultant accountability deficit. Part II unpacks the deterrence theory of criminal punishment. Part III evaluates existing modes of accountability from the deterrence perspective developed in the preceding part. Part IV then asks whether deterrence can rescue current accountability regimes. It sets forth ideas for repairing or retooling the system and contends preliminarily with major critiques.

I. AN OVERVIEW OF THE CURRENT SYSTEM OF PROSECUTORIAL ACCOUNTABILITY

There is little doubt that prosecutors are the most powerful and influential actors in the American criminal justice system.¹⁹ They decide whether to bring criminal charges, what charges to bring, whether to engage in plea negotiations and, through these and other powers, they in a very real sense determine what punishment a criminal defendant will face.²⁰ Of course, judges and defense lawyers play important roles in the adversarial process, but prosecutors have the authority and duty to make the most important decisions.²¹ Many have observed that our country's

¹⁹ See Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC. 18, 18 (1940) (“The prosecutor has more control over life, liberty and reputation than any other person in America.”); Angela J. Davis, *Federal Prosecutors Have Way Too Much Power*, N.Y. TIMES (Jan. 14, 2015), <http://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/federal-prosecutors-have-way-too-much-power>.

²⁰ See, e.g., Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414–15 (2010) (“American prosecutors exercise almost limitless discretion in a series of decisions affecting individuals embroiled in the criminal justice system.”); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2125 (1998); Davis, *supra* note 19 (noting that “it is very clear that prosecutors control the criminal justice system through their charging and plea bargaining powers” where more than 95% of cases end with a guilty plea). But see Sklansky, *supra* note 6, at 488 (noting that defendants also exercise power in plea negotiations).

²¹ See Rachel E. Barkow, *Separation of Powers and Criminal Law*, 58 STAN. L. REV.

commitment to nearly unfettered prosecutorial discretion imbues prosecutors with pivotal influence in the administration of criminal justice.²²

Given their significance, it seems counterintuitive that prosecutors are also the least regulated actors in the criminal justice system.²³ While few other officials in the government operate outside the realm of checks and balances,²⁴ prosecutors by-and-large work unrestrained.²⁵ Without many formal, structural checks offered by other institutions—aside from occasional input from the public, which elects the heads of most district attorney offices and supplies jurors in some criminal trials²⁶—prosecutors appear to be uniquely positioned in the power structure.²⁷

Prosecutors have come to be seen as a causal source of many of the major problems in the criminal justice system.²⁸ Considering their ability to deprive criminally-charged individuals of liberty, and in some cases their lives, prosecutors must be held to account when they contravene legal and ethical rules designed to protect defendants.²⁹ This Article does not tackle admittedly crucial questions about the extent of prosecutorial

989, 1049 (2006) (describing how prosecutors have “almost unbridled discretion” to “make all the key judgments” in criminal cases).

²² See, e.g., Bennett L. Gershman, Symposium, *The New Prosecutors*, 53 U. PITTSBURGH L. REV. 393, 448 (1992) (stating that the prosecutor is “the most pervasive and dominant force in criminal justice”); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 87 (2011) (stressing the “enormous discretionary power” of prosecutors in the United States).

²³ Barkow, *supra* note 21, at 1025.

²⁴ *Id.* at 993–94 (“Although the administrative state has structural and process protections that can justify some flexibility in the separation of powers, those checks are absent in the criminal context.”).

²⁵ Prosecutors technically operate under the authority of the executive branch, but they also enjoy quasi-judicial immunities and status. *See id.* at 1003–04 n.63.

²⁶ *See* Sklansky, *supra* note 6, at 512 (discussing the theoretical availability of “two separate forms of oversight” over prosecutors, including public elections).

²⁷ *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869 (2009) (“In a government whose hallmark is supposed to be the separation of powers . . . prosecutors are a glaring and dangerous exception.”); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009).

²⁸ *See* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 7 (2013) (finding that “between half and the entire [black-white sentence-length] gap [of about 10%] can be explained by the prosecutor’s initial charging decision”); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1272 (2012) (concluding that prosecutors are responsible for much of recent prison growth because “felony filings per arrest have soared during the 1990s and 2000s”); Editorial, *152 Innocents, Marked for Death*, N.Y. TIMES (Apr. 13, 2015), <https://nyti.ms/1FBGdZe> (explaining that “prosecutorial misconduct is at the heart of an alarming number” of wrongful conviction cases).

²⁹ *See* Barkow, *supra* note 21, at 995 (“The state poses no greater threat to individual liberty than when it proceeds in a criminal action. Those proceedings, after all, are the means by which the state assumes the power to remove liberty and even life.”).

discretion,³⁰ but instead focuses on prosecutorial misconduct. Here, misconduct refers to prosecutorial actions that violate defendants' constitutional and other significant rights or violate ethical rules tied closely to those rights.³¹ It observes that a lack of prosecutorial accountability for violations of established rules undermines the idea that prosecutors will abide efforts to channel or curtail their discretion.³² It views meaningful accountability as an essential precursor to bigger moves to limit prosecutorial power.³³

After briefly setting out an understanding of "accountability," this Part will identify the currently-available modes of accountability, explain how they interact with each other, and evaluate the outputs that emerge from this haphazard system.

A. Defining Accountability

Accountability is again a major topic of public discussion, especially in light of significant ruptures between poor, minority communities and law enforcement officials that have been exposed repeatedly by the killings of African-Americans at the hands of police officers.³⁴ While many have an intuitive sense of what accountability means, few speak or write about the topic with specificity.³⁵ To provide greater clarity to the con-

³⁰ See, e.g., James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521 (1981); Bibas, *supra* note 27, at 978 ("Bar rules cannot capture the myriad complex factors that rightly or wrongly influence patterns of prosecutorial discretion across cases.").

³¹ There is a live debate about the appropriate definition of misconduct. See Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 313 n.5 (2015). This Article does not limit the scope of the term "misconduct" to intentional wrongdoing or prejudicial misconduct. Misconduct here also refers to constitutional violations attributable to prosecutors even where it is other law enforcement actors—the police for example—who fail to make mandated disclosures.

³² See Yaroshefsky, *supra* note 14, at 288 ("[T]he governing disciplinary structure offers sufficient standards and mechanisms to prohibit and sanction prosecutors for conduct that, if left unregulated, threatens the integrity of the criminal justice system.").

³³ See Angela J. Davis, *Reform of the Prosecution Function*, CHAMPION, Jan.–Feb. 2010, at 18, 19 ("[T]he profession should seek to remedy intentional prosecutorial misconduct before tackling the unintentional prosecutorial practices that result in disparities and other injustices in the system. Behavior that is recognized by the courts as misconduct is a much easier target . . .").

³⁴ See, e.g., Kami Chavis Simmons, *Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL'Y 137, 139 (2015); Jonathan M. Smith, *Closing the Gap Between What Is Lawful and What Is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 318 (2016) (describing a "national crisis in policing").

³⁵ See, e.g., Jerry Louis Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 117 (Michael Dowdle ed., 2006) ("The millions of words spilled on

cept, Professor Jerry Mashaw developed this valuable insight:

[I]n any accountability relationship, we should be able to specify at least six important things: who is liable or accountable to whom; what they are liable to be called to account for; through what processes accountability is to be assured; by what standards the putatively accountable behavior is to be judged; and, what the potential effects are of finding that those standards have been breached.³⁶

As this Part will address below in sub-part B, these six questions (who, whom, what, through what processes, by what standards, and potential effects) are generally answered differently by different modes of prosecutorial accountability because of the complex and boundary-blurring role prosecutors play in society.³⁷ The lack of specificity with which the modes answer some of these questions is a problem brought into sharp relief when they are analyzed from the deterrence perspective.

The accountability relationship conceived of here is primarily backward-looking: it involves an assessment of what happens when the person who is accountable breaches the relevant standard. While other notions of accountability view breaches as the outgrowth of organizational failures that demand some sort of collective responsibility, this Article focuses on individual prosecutors and professional/legal obligations that have been sufficiently individuated to give meaning to individual responsibility. To be sure, organizational culture and systemic failures often contribute to misconduct. Yet, accountability begins at the level of the individual.

B. *The Modes of Accountability*

This Article identifies six primary modes of prosecutorial accountability: criminal case review, criminal liability, civil liability, internal discipline, professional discipline, and electoral accountability.³⁸ Criminal

the subject of accountability are often confusing for quite a simple reason: authors are talking about different methods and questions of accountability without specifying with any precision either the particular accountability problem that engages their attention or the choices that they are making implicitly among differing accountability regimes.”).

³⁶ *Id.* at 118. Professor Mashaw’s taxonomy of accountability regimes identifies “three principal devices” in the public governance context: (1) “political regimes that operate through electoral processes and other forms of legitimating institutions,” (2) “administrative . . . regimes that operate through hierarchical control of subordinates,” and (3) “legal regimes that operate through the authoritative application of law to facts, often by formal adjudication.” *Id.* at 120. As the following sub-part will demonstrate, each type features in the prosecutorial accountability picture. The differing modes of accountability currently available answer the six questions differently, in part based on the nature of the regime they represent.

³⁷ See Sklansky, *supra* note 6, at 504 (“In addition to blurring the distinction between adversarial and inquisitorial forms of justice, and bridging the gap between the police and the courts, prosecutors straddle the divide between law and discretion.”).

³⁸ See, e.g., Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31

case review, criminal liability, and civil liability are explicitly legal regimes, governed by different systems of formal adjudication. Internal office-based discipline represents an administrative regime through which district attorneys control and shape the behaviors of their staffs. External professional discipline more closely approximates a legal regime than an administrative one, albeit with some departures from the formal adjudicatory processes that characterize the other more traditional modes. And, electoral accountability is a classic political regime.³⁹ The contours of each are described in turn below.

1. *Criminal case review*

The progression of a criminal case from trial through direct appeal and post-conviction review provides one means of ensuring that prosecutors observe their constitutional and professional obligations. In this context, judges presiding over proceedings initiated by the State against a particular criminal defendant have adjudicatory tools available to promote prosecutorial compliance with constitutional and statutory requirements designed to protect the defendant's rights and the proceedings' fairness. Prosecutors are thus accountable to defendants for directives that include, for example, due process obligations to disclose exculpatory evidence, discovery orders, and rules requiring the State to refrain from making prejudicial comments to the media.⁴⁰

The process by which prosecutors are held to account in criminal case review is generally not focused on the State's conduct, but instead on whether violations of a defendant's rights resulted in an unfair or unreliable determination of his guilt or sentence.⁴¹ This process of judicial review asks courts to determine not simply whether prosecutorial mis-

CARDOZO L. REV. 2089, 2094 (2010) (discussing external checks on prosecutorial misconduct and finding that despite these checks, prosecutors are rarely punished); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 65–72 (2005) (discussing modes of prosecutorial accountability, including criminal case review, professional discipline, criminal liability, and civil liability and finding that these modes have been ineffective).

³⁹ Other tools exist to hold prosecutors accountable, most notably the trial court's power to hold lawyers in contempt of court. This power may be exercised, for example, when prosecutors fail to obey court orders. This Article sets aside contempt both because there is little information about how much a role it currently plays in prosecutorial accountability and it lacks the process attendant to the six modes set forth in this Part. See Eric Fleisig-Greene, Note, *Why Contempt Is Different: Agency Costs and “Petty Crime” in Summary Contempt Proceedings*, 112 YALE L.J. 1223, 1225 (2003).

⁴⁰ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring the State to turn over exculpatory evidence); *Sheppard v. Maxwell* 384 U.S. 333 (1966) (holding that the trial judge's failure to protect defendant in murder prosecution from inherently prejudicial publicity which saturated community deprived defendant of a fair trial).

⁴¹ An exception may arise at or before trial, where, for example, courts may decide whether to exclude evidence that may have been the result of an improper search and seizure. For reasons identified above, see *supra* note 39, this Article sets aside trial court review in the criminal case review context.

conduct occurred, but also whether any misconduct actually violated a defendant's rights, and if it did, whether that violation undermines the verdict's validity.⁴² Legal rules create standards against which prosecutorial misconduct is judged. These rules are often complex. Because the fundamental inquiry focuses on the legitimacy of the outcome, prosecutorial wrongdoing will only result in accountability-promoting consequences when it implicates the conviction's integrity. To remedy a wrong, courts grant new trials or sentencing hearings.⁴³ In so doing, they impose the costs of misconduct on the prosecution (and others⁴⁴), who must decide whether to expend the resources to re-try the case, seek a negotiated resolution, or forego further adjudication.

Given the purpose of judicial review of a criminal conviction, it may not be surprising that courts provide defendants with remedies for prosecutorial misconduct in a low percentage of cases. Harmless error, materiality, and prejudice doctrines mean that even in cases in which a court finds a prosecutor engaged in misconduct, a reversal is unlikely absent an indication that the misconduct tainted the verdict.⁴⁵ Reversals happen in a relatively small subset of cases.⁴⁶ Criminal case review has not served as a

⁴² In the pre-trial context, the violation of constitutional rules can lead to the suppression of evidence. This typically occurs when police investigators—rather than prosecutors—violate a suspect's Fourth, Fifth, or Sixth Amendment rights. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 17 (1997).

⁴³ *Id.* ("This part of criminal procedure . . . is more like a species of tort law, defining liability rules for a given set of actors in the criminal justice system but using the threat of reversal in criminal litigation rather than damages or injunctive relief to enforce those standards.").

⁴⁴ See *infra* Part III(A).

⁴⁵ "Most circuits use a three-pronged test to evaluate the seriousness of misconduct and find harmless error if the misconduct was not severe, the trial court took effective curative measures, or if the weight of the evidence made conviction certain absent the improper conduct." Joy, *supra* note 14, at 426 n.137 (citing United States v. Gonzalez-Gonzalez, 258 F.3d 16, 22 (1st Cir. 2001); United States v. Shareef, 190 F.3d 71, 78 (2d Cir. 1999); Moore v. Morton, 255 F.3d 95, 113 (3d Cir. 2001); United States v. McWaine, 243 F.3d 871, 873 (5th Cir. 2001); United States v. Wadlington, 233 F.3d 1067, 1077 (8th Cir. 2000); United States v. Garcia-Guijar, 160 F.3d 511, 521 (9th Cir. 1998); United States v. Maynard, 236 F.3d 601, 606 (10th Cir. 2000); United States v. Creamer, 721 F.2d 342, 345 (11th Cir. 1983); United States v. Watson, 171 F.3d 695, 700 (D.C. Cir. 1999)).

⁴⁶ See Johns, *supra* note 38, at 67–68 ("[R]eversal is the exception, not the rule. . . . [E]ven when courts find prosecutorial misconduct, they generally affirm the conviction or sentence. Recent empirical studies illustrate this point. Specifically, the Center for Public Integrity studied 11,452 cases in which prosecutorial misconduct was alleged. The appellate courts granted relief in 2,012 cases but found that the prosecutorial misconduct amounted to harmless error in 8,709 cases. Similarly, between 1993 and 1997, the Illinois Supreme Court and Illinois Appellate Courts found 167 instances of prosecutorial misconduct but affirmed 122 of the convictions on the grounds that the misconduct was harmless.").

robust tool for ensuring prosecutorial accountability.⁴⁷

2. *Criminal liability*

Another mode of accountability is criminal liability. In some circumstances, prosecutorial wrongdoing may constitute criminal conduct for which a prosecutor could be charged, tried, and sentenced. In this context, a prosecutor who is being charged is accountable to the government—represented by other prosecutors—for contravening a criminal statute. This traditional legal regime relies on the criminal justice system to bring a prosecutor to account. As a criminal defendant, the criminally-charged prosecutor would possess the very constitutional and statutory protections that should have applied to the defendant whose case the prosecutor allegedly distorted. These protections, including the right to a trial by jury, impose meaningful constraints on the State that do not necessarily apply in other modes of prosecutorial accountability.

The legal rules codified in the relevant criminal law statutes and judicial interpretation of these statutes set out the standards against which the prosecutor's conduct is judged. The charging authority would need to prove each of the elements of the crime beyond a reasonable doubt in order to obtain a conviction at trial. It would also need to establish that the prosecutor had the necessary intent and was not merely negligent. If criminal charges against a prosecutor result in a plea bargain or a conviction at trial, then the effect is either a punishment available under the statute or the sentence agreed upon in the terms of a deal. Punishment may include imprisonment for a term-of-years or less severe sanctions.

Criminal liability has not proven to be a meaningful mode of prosecutorial accountability in fact. In its decision granting prosecutors absolute civil immunity for prosecutorial actions, the Supreme Court highlighted the availability of criminal sanctions for misbehaving prosecutors: “We emphasize that the immunity of prosecutors . . . does not . . . place them beyond the reach of the criminal law.”⁴⁸ The relevant federal statute the Court cited technically permits the criminal prosecution of individuals for the willful deprivation of constitutional rights.⁴⁹ However, that statute has almost never been utilized to address prosecutorial misconduct.⁵⁰ Enforcement of similar state laws is equally sparse.⁵¹ In the words

⁴⁷ See *infra* Part III(A).

⁴⁸ Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976).

⁴⁹ See 18 U.S.C. § 242 (2012).

⁵⁰ See Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 520 (2011) (“In fact, in the 150 years since its adoption in 1866, it appears that only one prosecutor has been convicted under this statute.”).

⁵¹ See Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 318 (2010) (“While state penal laws contemplate the prosecution of prosecutors who violate *Brady*, they are so infrequently enforced that the possibility of prosecution barely warrants a mention.”).

of Professor James Liebman, “[P]rosecution for malfeasance is all-but-unheard-of and always unsuccessful in the rare instances in which it occurs . . .”⁵² Indeed, despite the well-established link between prosecutorial misconduct and wrongful conviction, it appears that only one prosecutor has ever gone to jail for deliberate constitutional violations.⁵³

3. Civil liability

The third legal accountability regime is one in which prosecutors may be held civilly liable for misconduct. Civil liability generally entails financial responsibility for damages. In this regime, prosecutors are accountable to previously-charged criminal defendants who file civil lawsuits alleging that prosecutors deprived them of their constitutional rights. The liability determination may be made by a judge or a jury.

The standard by which the prosecutor’s actions will be judged is typically set forth by statute. The widely applicable federal statute under which most civil suits against prosecutors are filed is 42 U.S.C. § 1983.⁵⁴ This post-Reconstruction era law creates a unique “species of tort liability.”⁵⁵ Like the legal rules governing criminal liability, § 1983 has spawned

⁵² James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2122 (2000); see also David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. Online 203, 217 (2011) http://www.yalelawjournal.org/pdf/1018_hpkwev93.pdf (“criminal sanctions for prosecutors who violate *Brady* are exceedingly rare”); Brandon Buskey, *How to Prosecute Abusive Prosecutors*, N.Y. TIMES (Nov. 27, 2015), <https://www.nytimes.com/2015/11/27/opinion/how-to-prosecute-abusive-prosecutors.html> (“The federal government has not in recent memory pursued a judge under Section 242, and it has only rarely enforced this law against prosecutors.”). But see *Ex-Prosecutor Gets 10 days in Jail Over Michael Morton Case*, DALL. MORNING NEWS (Nov. 8, 2013), <http://www.dallasnews.com/news/local-news/20131108-ex-prosecutor-gets-10-days-in-jail-over-michael-morton-case.ece> (discussing Ken Anderson’s ten-day jail sentence for his wrongdoing in the Michael Morton case).

⁵³ See Mark Godsey, *For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man*, HUFFINGTON POST (Nov. 8, 2013), http://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a_b_4221000.html (“What makes today’s plea newsworthy is not that Anderson engaged in misconduct that sent an innocent man to prison. . . . What’s newsworthy and novel about today’s plea is that a prosecutor was *actually punished* in a meaningful way for his transgressions.”); TX: *Morton’s Prosecutor is First to Be Imprisoned for Prosecutorial Misconduct; Sets a Powerful Precedent*, OPEN FILE BLOG (Nov. 10, 2013), <http://www.prosecutorialaccountability.com/2013/11/10/tx-mortons-prosecutor-is-first-to-be-imprisoned-for-prosecutorial-misconduct-sets-a-powerful-precedent/> (“Anderson’s incarceration for prosecutorial misconduct is historic . . .”).

⁵⁴ “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .” 42 U.S.C. § 1983 (2012).

⁵⁵ *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

a complex set of doctrines.⁵⁶ If a plaintiff prevails in a civil lawsuit against a prosecutor, the result is monetary damages.

While many individuals have attempted to utilize this mode of prosecutorial accountability, the results have been discouraging to plaintiffs. Various doctrinal developments have sapped the regime of its potency. Most importantly, the Supreme Court held in *Imbler v. Pachtman* that prosecutors possess absolute immunity for their prosecutorial actions.⁵⁷ This decision drastically limited plaintiffs' prospects for holding prosecutors liable in an individual capacity and altered subsequent theories of liability.⁵⁸ Plaintiffs began advancing claims of municipal liability for district attorneys' failure to train line prosecutors on how to respect defendants' constitutional rights, but the Supreme Court effectively "foreclose[d]"⁵⁹ that possibility in *Connick v. Thompson*.⁶⁰

Although scholars and commentators have called into question the *Imbler* decision on both historical and public-policy grounds,⁶¹ absolute immunity now combines with the Supreme Court's "favorable-termination rule" to preclude civil suits in a wide range of cases.⁶² In light

⁵⁶ See Bd. of Cty. Comm'r's of Bryan Cty. v. Brown, 520 U.S. 397, 430 (1997) (Breyer, J., dissenting) (discussing how 1983 cases have "produced a highly complex body of interpretive law"); Susanah M. Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved from Extinction?*, 55 FORDHAM L. REV. 1, 2 (1986) (noting "confusion and [a] lack of uniformity" that "frustrates the purposes of section 1983").

⁵⁷ *Imbler*, 424 U.S. at 430.

⁵⁸ It pushed plaintiffs to try different tactics. For example, they asserted claims against prosecutors for their investigatory police-like actions rather than traditional prosecutorial actions. *See, e.g.*, *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (articulating a functional approach to determine whether absolute or qualified immunity applies to a prosecutor's actions). And, they looked to municipal liability theories. *See also* David Rittgers, *Connick v. Thompson: An Immunity that Admits of (Almost) No Liabilities*, CATO SUP. CT. REV., 2010–2011, 203, 211 ("The unwarranted application of absolute immunity to prosecutors has forced wrongly convicted plaintiffs to pursue municipal liability for prosecutors' misdeeds.").

⁵⁹ Keenan et al., *supra* note 52, at 204 ("Connick is significant because it forecloses one of the few remaining avenues for holding prosecutors civilly liable for official misconduct.").

⁶⁰ *Connick v. Thompson*, 563 U.S. 51 (2011).

⁶¹ See Bidish Sarma, *After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, ACSBLOG (July 19, 2016), <https://www.acslaw.org/acsblog/after-40-years-is-it-time-to-reconsider-absolute-immunity-for-prosecutors> (cataloguing the historical and public-policy arguments levied against *Imbler*).

⁶² Note, *Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 868, 869 (2008) (noting that "[c]ourts have used [the *Heck v. Humphrey* favorable termination] rule to dismiss a substantial number of § 1983 cases brought by imprisoned criminals"); *see Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994) ("We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a

of all of the legal developments pertaining to prosecutorial civil liability over the past few decades, some believe that “the possibility of civil liability has been all but removed.”⁶³

4. Internal discipline

Internal discipline is an administrative accountability regime that relies on leaders of district attorneys’ offices to punish misconduct and thus influence the behavior of line prosecutors. In this regime, staff attorneys who have been subjected to complaints of misconduct or who contravene internal office policies are accountable to their bosses. Both the process by which accountability is assured and the standard against which prosecutors’ conduct is judged are office-specific.⁶⁴ Each district attorney can come up with his or her own approach. Similarly, each office can determine what effect a breach of norms or rules will have in any particular situation.

Very little public research describes how most prosecutors’ offices handle accountability issues internally.⁶⁵ Indeed, scholars have called these offices “black box[es],” observing that “the very lack of external regulation . . . makes it possible for prosecutors to do their daily work without explaining their choices to the public.”⁶⁶ There is a severe lack of transparency,⁶⁷ and there are indications that many offices have no formal disciplinary protocols in place.⁶⁸ Based on information gathered about a few particular offices in the course of civil lawsuits, one attorney concluded that “prosecutors’ offices appear far less equipped than other large organizations, including police departments, to manage and discipline employees.”⁶⁹ These case studies led to the conclusion that “[t]hree major District Attorneys’ Offices in ‘progressive’ New York City lack any formal disciplinary rules or procedures, despite being large organizations

state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus”).

⁶³ Radley Balko, *The Untouchables: America’s Misbehaving Prosecutors, and the System That Protects Them*, HUFFINGTON POST (Aug. 1, 2013), http://www.huffingtonpost.com/entry/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.

⁶⁴ Prosecutors’ offices enjoy wide discretion in setting their own policies. See generally Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

⁶⁵ See Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 43 (2009).

⁶⁶ Miller & Wright, *supra* note 64, at 129.

⁶⁷ Yaroshefsky, *supra* note 14, at 290 (“This lack of transparency only serves to increase cynicism about the process”).

⁶⁸ *Innocence Project Research Illustrates Lack of Accountability for Prosecutors Who Commit Misconduct*, INNOCENCE PROJECT (Feb. 6, 2012), <https://www.innocenceproject.org/innocence-project-research-illustrates-lack-of-accountability-for-prosecutors-who-commit-misconduct/> (“most prosecutor’s offices don’t even have internal systems for dealing with misconduct”).

⁶⁹ 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, 543 (2011).

employing hundreds of prosecutors and support staff.”⁷⁰ In the federal system, the Justice Department’s internal body responsible for disciplining federal prosecutors—the Office of Professional Responsibility—has been heavily criticized for its ineffectiveness.⁷¹ Little distinguishes local jurisdictions’ attempts to internally manage misconduct from the federal ones.⁷² Internal discipline may be destined to fail to be a meaningful mode of prosecutorial accountability.⁷³

5. External/professional discipline

External discipline, or professional discipline, is a mode of accountability in which representatives of the profession can discipline wayward prosecutors under the authority provided to them by the state bar or state judiciary. This mode looks most like a legal accountability regime in which prosecutors are accountable to the bar itself for complying with professional rules of ethics and conduct. In nearly every jurisdiction, these rules track in large part the American Bar Association’s Model Rules of Professional Conduct.⁷⁴

Most jurisdictions also have a process that reflects another model code developed by the American Bar Association, called the Model Rules

⁷⁰ *Id.* at 572.

⁷¹ See Alex Kozinski, Preface, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., at iii, xxxii (2015) (a sitting Ninth Circuit Judge writing that “[i]n my experience, the U.S. Justice Department’s Office of Professional Responsibility (OPR) seems to view its mission as cleaning up the reputation of prosecutors who have gotten themselves into trouble”); see also Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 23 (2009) (describing a letter from federal district court Judge Wolf to then-Attorney General Holder in which he noted that he “had raised the issue of pervasive prosecutorial misconduct with both Attorney General Gonzales and Attorney General Mukasey, among others, but received no response from the Department of Justice”); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 87 (1995) (noting that “the OPR has retained its reputation as unduly protective and has continued to draw criticism”).

⁷² Yaroshefsky, *supra* note 14, at 290.

⁷³ See, e.g., Kozinski, *supra* note 71, at xxxii (“Prosecutors need to know that someone is watching over their shoulders—someone who doesn’t share their values and eat lunch in the same cafeteria.”); Green, *supra* note 71, at 85 (“One might reasonably anticipate, in the absence of evidence to the contrary, that attorneys in the [OPR] lack neutrality and detachment when judging the conduct of fellow members of the [DOJ], both because they identify and sympathize with their colleagues and because they want the Department to appear to be relatively free of wrongdoing.”).

⁷⁴ See Keenan et al., *supra* note 52, at 222 (“The Model Rules of Professional Conduct, first promulgated in 1983 and substantially revised in 2002, have proven especially influential. Every state save California has adopted attorney ethics codes that substantially mirror the Model Rules.”). Federal prosecutors are generally subjected to the same rules as the state in which they operate. See Citizens Protection Act of 1998, 28 U.S.C. § 530(B) (2012); see also Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 651 (“the CPA imposes state ethics rules on federal prosecutors”).

for Lawyer Disciplinary Enforcement.⁷⁵ The process involves several moving parts: a centralized intake system; a prosecutorial attorney responsible for investigating misconduct and deciding whether to admonish a lawyer or put him on probation or to proceed with formal charges; a team of individuals responsible for presiding over formal hearings and making recommendations; and a board and/or judicial entity providing oversight and making final decisions.⁷⁶ Ultimately, a state's judiciary resides atop the professional discipline apparatus.⁷⁷

The standards against which prosecutorial actions are judged can be found in the ethical rules of conduct and in the case law that emerges from judicial review of disciplinary recommendations that proceed through the formal charging and adjudicatory process.⁷⁸ Insofar as effects of rule-breaking are concerned, “[a]n attorney who violates his or her ethical obligations is subject to . . . [potential] sanctions, suspension, and disbarment.”⁷⁹

Like the other modes, external/professional discipline has not meaningfully contributed to improving prosecutorial accountability. The Supreme Court, while granting prosecutors absolute immunity from civil liability in *Imbler*, emphasized the role professional discipline could play: “[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”⁸⁰ Reality has turned this prediction on its head: prosecutors may stand unique in how successfully they have resisted professional discipline.⁸¹ “Study after study has documented

⁷⁵ See Keenan et al., *supra* note 52, at 234 (“most state disciplinary systems follow a model code developed by the ABA . . . the Model Rules for Lawyer Disciplinary Enforcement”).

⁷⁶ *Id.*

⁷⁷ Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 462 n.7 (1996) (“Today, it is understood that federal courts and most state courts supervise and discipline lawyers pursuant to inherent judicial authority ‘to admit, suspend and disbar lawyers who practice within the jurisdiction of the court.’” (quoting Bruce A. Green, *Doe v. Grievance Committee, On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 531–31 (1989))).

⁷⁸ See *id.* (“courts may establish standards of conduct for lawyers either through rulemaking or on an ad hoc basis in the course of adjudication”).

⁷⁹ *Connick v. Thompson*, 563 U.S. 51, 66 (2011).

⁸⁰ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

⁸¹ See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 755 (2001) [hereinafter Zacharias, *Professional Discipline*] (“prosecutors are disciplined rarely, both in the abstract and relative to private lawyers”); see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 105 (1991) [hereinafter Zacharias, *Can Prosecutors Do Justice?*] (“In trying to maintain the bar’s professionalism, discipliners naturally prefer to focus their limited resources on attorney misconduct driven by personal self-interest or greed.”); see also ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 143–45 (2007).

the ways that professional disciplinary organizations have failed to [discipline prosecutors]. These studies effectively cover every decade since *Imbler* came down.”⁸² Most telling is a 1999 report by then Chicago Tribune reporters Maurice Possley and Ken Armstrong.⁸³ They identified 381 homicide cases from around the country in which courts reversed convictions because of *Brady* violations—violations of the duty to disclose exculpatory evidence to the defendant. None of the prosecutors involved in any of those cases were publicly sanctioned. “Not one was barred from practicing law. Instead, many saw their careers advance, becoming judges or district attorneys. One became a congressman.”⁸⁴ Professional discipline for prosecutors, as one expert famously put it, is a paper tiger.⁸⁵

6. *Electoral accountability*

Electoral accountability is a political regime of prosecutorial accountability that applies where the heads of district attorney offices are publicly elected officials (who have the power to hire, train, fire, and otherwise manage their staff). The elected official herself is thus accountable to voters in the electorate. Each qualified voter can decide how to cast his or her ballot without constraint—so the incumbent district attorney is accountable for effectively everything her office does that the public may scrutinize or support. The mode of accountability utilizes a sporadic election as the process through which voters hold district attorneys accountable.

The standards for determining a breach has occurred cannot be coherently captured because each voter can decide for himself what standards to deploy. The possible effect of a breach is the loss of a potential vote, or, if there is an opponent in the election, a ballot cast for someone else. Elected district attorneys are thus in theory held democratically accountable.

Although not all district attorneys are elected rather than appointed, the vast majority make it into office on behalf of voters.⁸⁶ Despite their

⁸² Sarma, *supra* note 61 (reviewing the studies).

⁸³ Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html>.

⁸⁴ *Id.*

⁸⁵ Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 693 (1987); see also Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 899 (1995) (“The practical reality is that few prosecutors are ever disciplined by these regulatory entities.”); Keenan et al., *supra* note 52, at 220.

⁸⁶ See Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1604 (2010) (“Chief prosecutors in the federal criminal justice system—the ninety-three United States Attorneys—are appointed, but this is the exception in the United States, and the more than 2,300 prosecutors in the state systems are typically elected. The exceptions are Alaska, Connecticut, Rhode Island, and New Jersey, where the elected attorney general appoints the local chief prosecutors.”); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2008) (“In the United States, we typically hold prosecutors accountable

apparent promise, these elections do not serve accountability purposes well for a variety of reasons. To start, they are not quite as democratic as most other elections. Prosecutorial elections are historically low-information, low-turnout affairs.⁸⁷ Often times, there are no opponents to vote for;⁸⁸ even when other candidates materialize, incumbents win so often that “retention rates . . . would make a candidate for the Supreme Soviet blush.”⁸⁹ Moreover, because prosecutorial elections involve so many issues beyond misconduct, there is no clear line from misconduct (likely committed in the ranks by line prosecutors and not the head of the office) to a district attorney being voted out of office.⁹⁰ In these and other ways,⁹¹ the electoral regime provides little accountability for misconduct.⁹²

C. A System in Disarray

The six primary modes of prosecutorial accountability do not operate independently. It is not that that these modes act in concert; instead, the driver of one mode will often rely upon the existence of another mode to deflect responsibility. Examples abound. In criminal case review, courts regularly distinguish between the remedies available to a defendant and the obligations owed by the prosecutor.⁹³ In the civil liability context, the Supreme Court referred to criminal liability and professional

for their discretionary choices by asking the lead prosecutor to stand for election from time to time.”).

⁸⁷ See Bibas, *supra* note 27, at 961 (“prosecution is a low-visibility process about which the public has poor information”); see also Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 78 (2011) (“Poor information flow between prosecutors and the public renders the political check ineffective.”).

⁸⁸ Wright & Miller, *supra* note 86, at 1606 (“Sitting district attorneys face challenges less often than candidates in state legislative elections. About 85% of prosecutor incumbents run unopposed, a much higher rate than for state legislators.”).

⁸⁹ *Id.*

⁹⁰ *Id.* at 1594.

⁹¹ Cf. Wright, *supra* note 86, at 583 (“In sum, prosecutor elections fail for two reasons. First, they do not often force an incumbent to give any public explanation at all for the priorities and practices of the office. Second, even when incumbents do face challenges, the candidates talk more about particular past cases than about the larger patterns and values reflected in local criminal justice.”).

⁹² But see Leon Neyfakh, *Big Wins for Black Lives Matter*, SLATE (Mar. 16, 2016), http://www.slate.com/articles/news_and_politics/crime/2016/03/the_prosecutors_in_the_tamir_rice_and_laquan_mcdonald_cases_lose_their_primary.html. There is evidence that increased public attention on prosecutors will drive better turnout and generate the dissemination of more information upon which voters can rely. See generally David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017).

⁹³ See, e.g., Fuentes v. T. Griffin, 829 F.3d 233, 260 (2d Cir. 2016) (Wesley, J., dissenting) (“for better or for worse—the Supreme Court has told us that no greater remedy is available under *Brady* for a prosecutor’s intentional violation of constitutional standards than for an inadvertent one”).

discipline as more effective modes of promoting prosecutorial accountability.⁹⁴ Those words spawned agreement in lower courts around the country that reiterated the same message.⁹⁵ Yet, criminal liability is functionally nonexistent.⁹⁶ Professional disciplinary bodies avoid taking action against prosecutors for a range of reasons, including their reluctance to interfere with defendants' ongoing criminal appeals, to contravene a separation of powers, or to step into a political thicket.⁹⁷ In addition, elections simply implicate too many issues and interests to bear the weight of holding prosecutors accountable for misconduct.⁹⁸

District Attorneys and federal prosecutors regularly hold out internal discipline as an effective accountability tool that renders the other modes unnecessary.⁹⁹ Yet, internal disciplinary systems, where they actually exist, offer very little transparency.¹⁰⁰ Where information has been gathered about them, that evidence suggests they function poorly and fail to hold prosecutors to account.¹⁰¹ Considering the lack of transparency, one would do well to treat claims that these internal mechanisms suffice with caution.

The mess created by the overlapping roles six different modes play in promoting prosecutorial accountability raises three key observations. First, this appears to be an arena in which the diffusion of responsibility produces a system that is, overall, ineffective.¹⁰² Whether the sources of

⁹⁴ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

⁹⁵ See, e.g., *Schloss v. Bouse*, 876 F.2d 287, 292 (2d Cir. 1989) ("our legal system provides a number of other means to hold accountable a prosecutor"); *Ehrlich v. Giuliani*, 910 F.2d 1220, 1222 (4th Cir. 1990) ("While shielding prosecutors against personal liability for their actions may increase the risk of abuse, the Supreme Court noted in *Imbler* the existence of other means of disciplining prosecutors.").

⁹⁶ See *supra* Part I(B)(2).

⁹⁷ See *Zacharias, Professional Discipline*, *supra* note 81, at 761–62.

⁹⁸ See *supra* Part I(B)(6).

⁹⁹ See, e.g., Brief for the United States as Amici Curiae Supporting Petitioner at 32, *Van de Kamp v. Goldstein*, 555 U.S. 335 (No. 07-854), 2008 WL 2703844 ("Prosecutorial offices also often have their own internal mechanisms to address prosecutorial misconduct and ensure that prosecutors, including supervisors, meet the highest standards of ethical misconduct."); Brief for the Nat'l Ass'n of Assistant U.S. Attorneys and Nat'l Dist. Attorneys Ass'n as Amici Curiae Supporting Petitioner at 2, *Pottawattamie Cty v. McGhee*, (No. 08-1065), 2009 WL 2191078 ("prosecutors who engage in misconduct are already subject to discipline by a variety of institutions, including the prosecutors' offices themselves.").

¹⁰⁰ See, e.g., *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards*, PROJECT ON GOV'T OVERSIGHT (Mar. 13, 2014), <http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html>.

¹⁰¹ See *supra* Part I(B)(4).

¹⁰² See Keenan et al., *supra* note 52, at 221 (noting that "overlapping policing mechanisms create confusion about the appropriate locus of disciplinary authority"); Yaroshesky, *supra* note 14, at 297 (noting that scholars argue "diffuse regulatory systems result in lack of discipline"); Green, *supra* note 71, at 91 ("Standards of prosecutorial conduct are underenforced precisely because each of the various disciplinary authorities can justify relying on others to carry the load."). For a brief recounting of

that diffusion are legitimate, they operate powerfully.¹⁰³ Diffusion in this context does not happen unconsciously; actors explicitly point to others in the system and wash their hands of responsibility.

Second, the lack of a coherent theory for prosecutorial accountability makes it difficult to pinpoint critiques and channel efforts at a single institution or mode. Indeed, this Article looks at each of the six primary modes, but acknowledges that a conceptual cleanup in the field may help productively funnel reform efforts towards the most appropriate targets.¹⁰⁴ As explored below in Part IV(B)(1), deterrence theory may help advance that project.

Third, the state of disarray clarifies that each mode has goals other than or in addition to holding prosecutors accountable for misconduct. Those goals often either distract or dilute the attention decision-makers may give to prosecutorial misconduct. In resource-constrained environments, other goals regularly take priority. This observation is worth unpacking further. In reviewing the cases of criminal defendants, courts look primarily at the reliability of the conviction. Their goal is to adjudicate the defendant's various claims for relief; oversight of prosecutors is at most a secondary and incidental responsibility. If criminal liability were a viable mode of accountability, it would focus narrowly on a prosecutor's conduct. This regime would elevate prosecutorial accountability as the main goal. However, a number of issues—prosecutorial self-protection, resource-allocation, discretion, or a lack of independence—undercut the prospect altogether. One goal of civil liability is to provide for personal accountability, but that regime also serves the goals of compensating victims and highlighting problematic practices and policies. With absolute immunity intact, individual accountability can no longer be considered a realistic goal.¹⁰⁵ It has been transplanted by office-level responsibility; a goal that continues to slip away.¹⁰⁶

The goals of an office's internal disciplinary program are set by the head of the office and her policymakers. While one can imagine a District Attorney setting individual accountability of prosecutors as the main goal, the reality suggests that politics dictate other priorities. An aggressive internal accountability regime may undermine other common goals and policies, like obtaining a high conviction rate and prevailing in high-profile trials. Again, the lack of transparency makes it impossible to iden-

the psychological phenomenon of the diffusion of responsibility, see Adam M. Gereshowitz, *Essay, The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & Pol. 669, 697–700 (2001).

¹⁰³ See Green, *supra* note 71, at 72 (“the diffusion of responsibility among different mechanisms compounds the problem”).

¹⁰⁴ See *id.* at 94 (“Insofar as different disciplinary bodies share responsibility to enforce particular standards of prosecutorial conduct, some understanding should be reached about the role each will play.”).

¹⁰⁵ See *infra* note 184 and associated text.

¹⁰⁶ See generally Keenan et al., *supra* note 52.

tify objectively an internal regime's purported goals and just as difficult to determine whether they are fulfilled.

Disciplinary organizations responsible for regulating the profession have a number of goals as well. Generally, they seek to protect the public. But, that overriding goal can be operationalized in a range of ways and does not necessarily entail a goal of punishing prosecutors.¹⁰⁷ These bodies use the apparent availability of other modes of prosecutorial accountability to justify the decision to pursue lawyers other than prosecutors who are responsible for professional and ethical violations.¹⁰⁸ As Professor Ellen Yaroshefsky explains, “[t]he primary reason for the ‘hands off’ approach is the belief that internal controls and judicial oversight effectively and adequately regulate prosecutorial misconduct.”¹⁰⁹ The legal ethics expert Professor Zacharias persuasively proposed that disciplinary bodies prioritize greedy lawyers (instead of prosecutors).¹¹⁰ Finally, as discussed earlier, electoral accountability is overwhelmed by a proliferation of goals, and prosecutorial misconduct likely ranks pretty low on the list.

Built on the work of various decision-makers that have myriad goals, the current system of prosecutorial accountability looks more like an afterthought rather than a considered, well-designed enterprise. It does not take a forecasting expert to guess what the system’s output looks like.

D. The Result

The overall picture is bleak. Meaningful accountability may best be described as rare. It is rare for courts to grant defendants new trials for prosecutorial misconduct. It is extraordinarily rare for law-breaking prosecutors to face criminal liability. It is extremely rare for courts to subject prosecutors to civil liability. It is rare to encounter evidence that District Attorneys discipline employees who have violated defendants’ rights. It is rare for disciplinary bodies to sanction prosecutorial misconduct. And, it is rare for an electorate to vote an incumbent out of office because of misconduct committed on his watch.

Perhaps the rarity of accountability would not strike someone as

¹⁰⁷ Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 684 (2003) (“Disciplinary proceedings occur . . . without any apparent effort on the part of disciplinary prosecutors to follow policies patterned after any particular theory of sanctions. Disciplinary courts likewise have made little effort to analyze the issues in the terms of the criminal law, preferring instead to treat professional responsibility issues as *sui generis* and resolvable by resort to the generalized ‘protect the public’ rationale.”).

¹⁰⁸ See Zacharias, *Professional Discipline*, *supra* note 81, at 762 (noting that additional “categories of alternative remedies for prosecutorial misconduct . . . may encourage disciplinary agencies to save their resources for other cases”).

¹⁰⁹ Yaroshefsky, *supra* note 14, at 289.

¹¹⁰ See, e.g., Zacharias, *Professional Discipline*, *supra* note 81, at 757 (“disciplinary authorities tend to focus on intentional misconduct by lawyers whose actions are self-serving or governed by greed”).

troubling if it was clear that prosecutorial misconduct itself were rare. However, the evidence suggests that the level of misconduct is both very difficult to assess and higher than suggested by conventional estimates. Of course, some of the most important forms of misconduct—including *Brady* violations—remain hidden, sometimes indefinitely.¹¹¹ Even accepting an inability to count unknown violations, misconduct is widespread.¹¹² With no effective accountability mechanisms in place, prosecutors work in an environment in which misconduct is tolerated (if not sometimes implicitly endorsed).¹¹³

The system for holding prosecutors accountable combines a hodge-podge of decision-makers who have varying goals and interests, and permits them to pull in any direction. Looked at in isolation, each mode of accountability appears to under-enforce constitutional and ethical rules prohibiting prosecutorial misconduct. Viewed collectively, these modes reflect a deep-seated diffusion of responsibility. Those most affected by misconduct appear least able to demand accountability, while decision-makers positioned to promote accountability have incentives to focus on other goals. Prosecutorial accountability is a slippery pursuit.

II. AN OVERVIEW OF DETERRENCE THEORY

An overview of deterrence theory is appropriate before drawing on it to analyze the current system of prosecutorial accountability. Deterrence is a justification for punishment premised on the theory that the threat of punishment can deter individuals from breaking the law. One expert defines deterrence simply as “the omission of a criminal act because of the fear of sanctions or punishment.”¹¹⁴ In a comprehensive and excellent

¹¹¹ Barkow, *supra* note 38, at 2093–94 (“The biggest problem is that most violations are never discovered in the first place. Defendants often have no way of knowing whether a prosecutor is in possession of exculpatory evidence that should be disclosed under *Brady*. In most cases, it is entirely fortuitous that a violation comes to light.”).

¹¹² See *supra* notes 8–12 and associated text; see also Keenan et al., *supra* note 52, at 211–12 (“What little evidence we do have indicates that prosecutorial misconduct is a serious problem. A 2003 study by the Center for Public Integrity, for instance, found over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals. Another study of all American capital convictions between 1973 and 1995 revealed that state post-conviction courts found ‘prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty’ in one in six cases where the conviction was reversed. Other scholars and journalists have also documented widespread prosecutorial misconduct throughout the United States.”).

¹¹³ See Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 *Sw. L.J.* 965, 975 (1984); Kozinski, *supra* note 71, at xxii (“[T]here are disturbing indications that a non-trivial number of prosecutors—and sometimes entire prosecutorial offices—engage in misconduct that seriously undermines the fairness of criminal trials.”).

¹¹⁴ Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*,

book on the topic, Professor David M. Kennedy explains: “[t]he framework for deterrence is simple and familiar. Offenders and potential offenders, like other people, seek reward and seek to avoid loss. If particular acts carry penalties, then those acts will become less attractive.”¹¹⁵ When one thinks of the theories underlying the American criminal justice system, deterrence is foundational.¹¹⁶ Indeed, “[i]t is reasonable to argue that a belief or expectation that sanction threats can deter crime is at the very heart of the criminal justice system.”¹¹⁷

Deterrence’s historical roots reside in the works of two prominent Enlightenment-era philosophers—Cesare Beccaria and Jeremy Bentham.¹¹⁸ Beccaria is widely recognized as the leading thinker in modern penology and Bentham is hailed as the father of utilitarianism. Beccaria identified humans’ self-interest as the root of criminal behavior.¹¹⁹ He set out the idea that governments, cognizant of their need for the consent of those governed, had the authority to punish wrongdoing so long as punishment was proportionate.¹²⁰ Bentham elaborated on the nature of human self-interest, identifying a concept of utility built on “the twin goals of the attainment of pleasure and the avoidance of pain.”¹²¹ A criminal act was thus one taken in pursuit of the attainment of pleasure; the existence of a countervailing punishment could affect the decision if the pain was sufficient to negate the pleasure. The notion that the prospect of criminal punishment can influence individual behavior is embedded in utilitarianism.

With these roots, it is clear that deterrence theory is premised on the idea that humans can rationally consider and make decisions based upon the consequences of their actions.¹²² “Virtually any human activity can be understood as resulting in both benefits and costs, and persons are pre-

100 J. CRIM. L. & CRIMINOLOGY 765, 766 (2010).

¹¹⁵ DAVID M. KENNEDY, DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION 1 (2009).

¹¹⁶ See Paternoster, *supra* note 114, at 766.

¹¹⁷ *Id.*; see also KENNEDY, *supra* note 115, at 1 (“Deterrence is at the heart of the criminal-justice enterprise” and “deterrence is particularly at the heart of the *preventive* aspiration of criminal justice.”); MODEL PENAL CODE § 1.02 (AM. LAW INST. 1985) (“(2) The general purposes of the provisions governing the sentencing and treatment of offenders are: (a) to prevent the commission of offenses . . . (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense . . .”).

¹¹⁸ See, e.g., Paternoster, *supra* note 114, at 767 (“There are two standard, but nonetheless productive, sources to consult for an understanding of the intellectual history of deterrence theory. The first is an essay, *On Crimes and Punishments (On Crimes)*, written in 1764 by . . . Cesare Beccaria, and the second is Jeremy Bentham’s *An Introduction to the Principles of Morals and Legislation (Introduction to the Principles)*, published in 1789.”).

¹¹⁹ See, e.g., *id.* at 768.

¹²⁰ *Id.*

¹²¹ *Id.* at 770.

¹²² See KENNEDY, *supra* note 115, at 15–23.

sumed to be rational enough to weigh the costs and benefits of any action and any reasonable alternative courses of action.”¹²³ The course of action resulting in the greatest net benefit is the one deterrence theorists would expect an individual to take. (In this way, deterrence proponents are linked closely to those who support the rational choice theory for understanding individual economic behavior.¹²⁴) As Professor Paternoster summarized it, “[d]eterrence theorists presume . . . that human beings are self-interested, rational, and reasoning creatures.”¹²⁵

When punishment is applied after a criminal act, the prospect of that punishment failed to deter the act in that specific instance. Nevertheless, deterrence theory posits that imposition of the punishment in that instance will help deter future law-breaking. Because of the difference between those who never break the law and those who do, theorists distinguish between two types of deterrence: general deterrence and specific deterrence.¹²⁶ General deterrence describes the crime-inhibiting effect a threat of punishment has on individuals who have not yet offended. Specific deterrence, on the other hand, describes the deterrent impact that the imposition of a punishment may have on an individual who has committed a criminal offense.

Three key concepts help explain how successfully a punishment will serve as a deterrent: the certainty that the punishment will apply; the severity of the punishment; and the celerity (swiftness) with which the punishment is imposed. A very basic summary of these concepts conveys the gist: the more certain, the more severe, and the swifter a punishment, the more effectively it will deter.¹²⁷ Research is still being done about the relative importance of each of these cost-related variables. Nevertheless, at this time, “[t]he important deterrence variables are, then, certainty, severity and celerity.”¹²⁸

To behave rationally, individuals must possess the relevant information at the relevant time. In the criminal justice context, this means potential offenders need to know what acts constitute crimes, what sanctions attach for particular criminal acts in which they may participate, how certain it is that the prescribed punishment will follow a crime, and how swiftly the punishment will be imposed. Information is critical because “[a] law can have no deterrent influence upon a potential criminal

¹²³ Paternoster, *supra* note 114, at 782.

¹²⁴ See Ronald L. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 J. CRIM. L. & CRIMINOLOGY 653, 654–55 (1990).

¹²⁵ Paternoster, *supra* note 114, at 782.

¹²⁶ *Id.* at 766.

¹²⁷ *Id.* at 783 (“There are three properties of legal punishment that are related to its cost, the (1) certainty, (2) severity, and (3) celerity (or swiftness) of punishment. Other things being equal, a legal punishment is more costly when it is more certain (more likely than not to be a consequence of crime), severe (greater in magnitude), and swift (the punishment arrives sooner rather than later after the offense).”).

¹²⁸ *Id.* at 784.

if he is unaware of its existence.”¹²⁹ If a legislature changes the punishment for a particular crime or law enforcement agencies decide to police certain crimes more vigorously, marginal deterrence will only follow if and when those changes are communicated—one way or another—to the population of potential offenders.¹³⁰

The claim that information must be disseminated to produce deterrence reveals a basic but deep reality about deterrence: it turns not on objective truths but individual perceptions. Decision-making will occur regardless of whether someone is misinformed or well-informed. Though a deterrence theorist may presume that an individual will exhibit some baseline level of rationality, it does not follow that the individual has perfect information. Because deterrence turns on an individual’s risk assessment, what matters is not necessarily the sanction itself or an objective calculation of certainty, severity, and celerity. What matters is the individual’s subjective perception of the variables that inform his views of benefits and costs.¹³¹ Research into the relationship between objective and subjective properties of punishment and the ways in which individuals form their perceptions is critical to understanding whether, how, and to what extent deterrence works. Communication about sanctions is one way to bridge the gap between objective realities and subjective perceptions.

The basic principles of deterrence outlined above have been refined and reevaluated over the years in light of a great deal of scholarly research the theory has engendered. For example, research has brought in new insights about the relative salience of certainty, severity, and celerity. At the outset, Beccaria opined that the certainty of sanction was more important than severity: “[t]he certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity . . .”¹³² Research supports Beccaria’s view. According to a leading deterrence expert, “evidence in support of the deterrent effect of various measures of the certainty of punishment is far more convincing and consistent than for the severity of punishment.”¹³³ Interestingly, certainty is more complicated than a simple determination of whether someone will receive a particular punishment. The type of certainty that generally ac-

¹²⁹ *Id.* at 776 (internal citation omitted).

¹³⁰ See *id.* at 803 (“For something like increased incarceration or increased law enforcement to have a general deterrent effect, would-be offenders would have to be aware of the heightened risk.”).

¹³¹ See *id.* at 780 (describing how “scholars began to understand deterrence as a social psychological theory of threat communication and to realize that if the objective properties of punishment are important, it is only because they affect crime through individual perceptions”).

¹³² *Id.* at 769 (quoting Beccaria).

¹³³ Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUSTICE 199, 201 (2013).

cepted research has demonstrated can have a deterrent effect is an offender's certainty that he will be apprehended. This type of certainty should be distinguished from the certainty that a particular sentence will be given. "Consequently, the conclusion that certainty, not severity, is the more effective deterrent is more precisely stated as *certainty of apprehension* and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent."¹³⁴

Certainty is tied to another critical idea in deterrence: the experiential effect. This term refers to the "observation that, as time passes, many people come to lower their estimates of the risks of offending . . . as offenders commit crimes and escape sanction, or see others do so, they adjust their risk estimates downward."¹³⁵ Individuals' perceptions about the risks may be incorrect, but they nonetheless tend to perceive less risk if they recognize that apprehension or conviction is relatively rare.

While certainty is taking on an elevated degree of importance, severity appears to be declining in relevance. Recent scholarship indicates that there is a consensus that punishment severity is not tied closely to effectiveness of criminal justice policy.¹³⁶ A comprehensive review of years of research and multiple studies has led many criminologists to conclude that "[t]here is no plausible body of evidence that supports policies based on this premise [that harsh sentences deter] . . ."¹³⁷ Sentencing severity may be less influential in deterrence terms because of a phenomenon called temporal discounting in which people discount rewards and costs that appear distant in time. Research indicates that "increases in sentence length may matter a great deal when the starting point is low, but may matter much less when the starting point is already high."¹³⁸ This helps explain why offenders report that a two-year incarceration sentence is 87% more punitive than a one-year sentence but a 20-year sentence is only 25% more severe than a 10-year one.¹³⁹ At some point, the marginal deterrence added by increasing the severity of an applicable sentence fades to next-to-nothing.¹⁴⁰ Yet, severity remains important in the overall crimi-

¹³⁴ *Id.* at 202; *see also id.* at 206 ("The most important set of actors affecting certainty is the police. Absent detection and apprehension, there is no possibility of conviction or punishment.").

¹³⁵ KENNEDY, *supra* note 115, at 11.

¹³⁶ Nagin, *supra* note 133, at 201 ("[T]here is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs.").

¹³⁷ Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUSTICE 143, 146 (2003).

¹³⁸ KENNEDY, *supra* note 115, at 34.

¹³⁹ *See id.* at 34–35.

¹⁴⁰ Interestingly, severity may also be tied to certainty through an inverse sentencing effect: "High penalties, instead of increasing conviction rates, may decrease them. As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught." Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1185 (2004).

nal punishment scheme because the failure to provide for steeper penalties for more serious crimes could contribute to the commission of “crimes of greater magnitude.”¹⁴¹

While there is abundant literature examining research into the certainty and severity variables, celerity has been studied much less.¹⁴² Indeed, some have questioned the fundamental premise that a delay in punishment would decrease a potential offender’s perceived cost of violating a law. The countervailing idea is that an individual facing a punishment would perhaps prefer to “get it over with” rather than wait.¹⁴³ With a dearth of empirical evidence, it is difficult to draw broad conclusions about celerity and how it should be understood in the broader deterrence context.¹⁴⁴

Research has also established that formal legal sanctions are often not the only costs a potential offender may factor into a cost-benefit analysis of crime. Extralegal sanctions matter, too. In fact, they may matter more than legal sanctions.¹⁴⁵ Extralegal sanctions include a wide range of costs including embarrassment, shame, and social stigma. If someone believes their loved ones would disapprove of their conduct, those feelings influence behavior. In many instances, extralegal sanctions “arise from the social stigma attendant to being formally sanctioned.”¹⁴⁶ When that is the case, some have argued that it is appropriate to attribute the deterrent effect to the sanction even though the cost could be characterized as extralegal (like the cost of hiring an attorney or trying to find a place to work that will hire someone with a criminal conviction).¹⁴⁷ The literature makes clear that extralegal sanctions are critical to understanding how individuals make utilitarian calculations.¹⁴⁸

Though scholars have learned a great deal about deterrence over the past few decades, many questions remain unanswered. For example, crucially, little is known about how individuals form perceptions about ob-

¹⁴¹ *Id.* at 1173.

¹⁴² Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865 (2001) (“Going back to Beccaria, punishment imminence (‘celerity’) has been accorded co-equal status with certainty and severity in theory, yet empirical tests of the celerity effect are scant.”).

¹⁴³ Paternoster, *supra* note 114, at 816 (“[I]f George Loewenstein is correct, persons do not view delayed punishment more favorably but want to get their punishment over as quickly as possible. If true, then celerity would have an inverse weight, such that delayed punishment is perceived to be more costly than more immediate punishment.”).

¹⁴⁴ *Id.* at 818 (“we know virtually nothing about celerity”).

¹⁴⁵ See *id.* at 817.

¹⁴⁶ Nagin & Pogarsky, *supra* note 142, at 884.

¹⁴⁷ See, e.g., KENNEDY, *supra* note 115, at 33 (describing the view that extralegal sanctions are properly part of a deterrence regime).

¹⁴⁸ KENNEDY, *supra* note 115, at 34 (“even in deterrence, much more than law and legal sanction, and the level of legal sanction, is at work”).

jective properties of punishment.¹⁴⁹ More broadly, there are questions about the relevant unit of analysis. Traditionally, “deterrence theory focuses on the individual offender and on the individual offense.”¹⁵⁰ However, evidence indicates that groups can play an important and determinative role in criminal offending. Indeed, group norms can overcome legal norms, compelling individuals who operate contrary to the group to suffer significant extralegal costs that may outweigh the costs of violating the legal norms.¹⁵¹ Professor Kennedy points out that additional study should look at group influences, particularly because law enforcement officials in many places have already devised effective strategies based on group behaviors and incentives.¹⁵²

With a working understanding of deterrence in place, one is prepared to ask the obvious question: does deterrence work? The answer is a qualified yes. Deterrence undoubtedly plays an important role in the criminal justice system, but its role is not pure. The system erects substantial obstacles that undermine deterrence’s effectiveness. Professor Paternoster has summarized the overall issue:

There are . . . three features about legal punishment that prevent it from being an even more effective deterrent: (1) legal punishments are generally very uncertain, (2) they are only imposed long after the crime has been committed and so have low celerity, and (3) the pleasures of crime are immediate and so carry greater weight than the delayed costs of crime in the would-be offender’s calculus.¹⁵³

Deterrence does not exclusively inform the system and it does not operate unbridled. The criminal justice system has other imperatives—including, for example, a criminal defendant’s due process rights—and the confluence of purposes dilutes the system’s ability to serve deterrent goals optimally. In Professor Paternoster’s words, the criminal justice system may not be “culturally positioned to exploit the rationality of offenders” to the fullest extent.¹⁵⁴

While deterrence theory certainly has its critics, “the world is soaked in deterrence n, something that easily escapes notice because of its utter ordinariness.”¹⁵⁵ One may point to limits to the assumption that individuals behave rationally, but deterrence theorists effectively counter that the problems reflected in the criminal justice system are not necessarily proof

¹⁴⁹ See Paternoster, *supra* note 114, at 804–05 (“In fact, one of the ‘dirty little secrets’ of deterrence is that there really is not much evidence in support of a strong correlation between the objective and subjective properties of punishment. Perhaps the more unfortunate fact is that although this may be one of the most crucial links in the deterrence process, it is the one that we know the least about.”).

¹⁵⁰ KENNEDY, *supra* note 115, at 105.

¹⁵¹ See *id.* at 83–85.

¹⁵² See *id.* at 105–07.

¹⁵³ Paternoster, *supra* note 114, at 777.

¹⁵⁴ *Id.* at 821.

¹⁵⁵ KENNEDY, *supra* note 115, at 9.

of theoretical shortcomings but instead evidence of practical realities that may, somewhat counterintuitively, reinforce the theory's explanatory power. If, for example, someone claims that the overwhelming size of the prison population in the United States constitutes evidence that offenders were obviously not deterred, a deterrence theorist can point to informational gaps. If the system failed to communicate effectively potential sanctions to would-be offenders, those individuals cannot make a rational judgment.¹⁵⁶ The result is not an indictment of deterrence but instead of the system's communication tools. Moreover, deterrence turns on individual perception and risk preferences: “[w]hat matters in deterrence is *what matters to offenders and potential offenders.*”¹⁵⁷ There is a radical subjectivity inherent to the theory. One individual may not view the prospect of 25 years in prison as a great cost, especially if the probability of arrest and punishment is low (or seems low). That subjectivity complicates the analysis.

Whatever one makes of the theory, research demonstrates that deterrence effects exist.¹⁵⁸ As Professor Kennedy explains, “[t]he strong case—‘deterrence does not work’—is clearly false. . . . The weaker case—that deterrence does not work very well . . . or is not worth the various costs of producing it—is still a live option.”¹⁵⁹ This Article does not necessarily endorse deterrence above all other theories of punishment, particularly in the criminal justice context. Based on a review of the available literature, Professor Paternoster’s conclusion rings true: “empirical evidence . . . support[s] the belief that criminal offenders . . . are responsive to the incentives and disincentives associated with their actions, but that the criminal justice system . . . is not well constructed to exploit this rationality.”¹⁶⁰ Even if deterrence as a theory of criminal justice has some deficiencies¹⁶¹—as all theories do—it may nevertheless serve as an effective tool to explain the failure of our regimes of prosecutorial accountability.

III. DETERRENCE IN THE PROSECUTORIAL ACCOUNTABILITY

¹⁵⁶ Paternoster, *supra* note 114, at 810 (“The research to date, though sparse, does suggest that would-be offenders are not well-informed about the actual risks of sanctions.”).

¹⁵⁷ KENNEDY, *supra* note 115, at 23.

¹⁵⁸ See *id.* at 12.

¹⁵⁹ *Id.*

¹⁶⁰ Paternoster, *supra* note 114, at 765.

¹⁶¹ See, e.g., Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 309 (2009) (“Deterrence is a costly, but at best minimally effective approach to promoting compliance with the law. The high costs of deterrence arise because authorities have to create and maintain a credible threat of punishment for wrongdoing.”); *id.* (citing studies showing deterrence had minimal effects).

CONTEXT: REEVALUATING THE CHIEF MODES OF PROSECUTORIAL ACCOUNTABILITY

While deterrence has firm footing in the foundations of the American criminal justice system, this theory of punishment has not been deployed much in the prosecutorial accountability context. This is a bit surprising. After all, deterrence offers a coherent explanation for how various punishments can both generally discourage members of a group from violating rules and specifically deter individuals who ultimately run afoul of those rules. Prosecutors—whose actions are governed by constitutional and statutory constraints as well as professional rules—may seem logical targets of a deterrence regime designed to induce compliance with those laws and rules. Given that prosecutors have a public charge to enforce criminal laws founded on theories of deterrence, one may expect them, too, to be subjected to similar external influences. However, this is not the case. “[Q]uite simply, the lessons of criminal theory have not penetrated the professional responsibility field.”¹⁶²

If we want to better understand why the accountability deficit is so immense, and why prosecutors are neither generally nor specifically deterred from misconduct, learning from criminal law is essential. Principles of deterrence provide valuable insights into the failings of the current modes of prosecutorial accountability. This Part draws upon those principles to evaluate each of the six modes in turn.

A. *Criminal Case Review*

The “punishment” a misbehaving prosecutor may suffer in the criminal case review context is the reversal of a conviction or sentence. But, “[c]ourts hesitate to impose remedies for misconduct that benefit potentially guilty defendants.”¹⁶³ Criminal case review would better promote prosecutorial accountability if reviewing courts were free to focus more on the prosecutor’s conduct. However, the mode’s primary goal—assessing the integrity of the conviction—has led to a proliferation of doctrines that water down the consequence of prosecutorial misconduct. Harmless-error, materiality, and prejudice requirements render it difficult for defendants to persuade courts that the punishment sought for prosecutorial misconduct is appropriate. Moreover, some doctrines build in deference to the prosecution. The *Brady* materiality doctrine, for example, places a great deal of front-end discretion in the prosecutors’ hands,¹⁶⁴ where even well-intentioned prosecutors may be influenced by

¹⁶² Zacharias, *supra* note 107, at 683–84.

¹⁶³ Zacharias, *Professional Discipline*, *supra* note 81, at 771.

¹⁶⁴ See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that “the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of ‘reasonable probability’ is reached”).

psychological biases that lead to non-disclosure in the absence of an intent to harm the defendant's right.¹⁶⁵ The constitutional standard creates ambiguity upon which prosecutors can capitalize. From a deterrence perspective, these doctrines reduce substantially the certainty that punishment will follow. Thus, they sap the remedy of its deterrent potential.

These dynamics may illustrate a particular manifestation of the inverse sentencing effect, whereby the harshness of a punishment undercuts the certainty it will apply.¹⁶⁶ In this example, a reviewing court's concern appears to be less about the negative effect the punishment may have on the prosecutor responsible for the misconduct or the punishment's proportionality and more about the perceived windfall granted to someone convicted of a crime.¹⁶⁷ Or, viewed another way, the reviewing court may be concerned that parties unconnected to the misconduct will bear the burden of the punishment. After all, “[r]eversals . . . impose the cost of retrial on the public, the parties and witnesses, and the court system . . .”¹⁶⁸ Certainty is thus sacrificed to limit the punishment's collateral damage.

The extent to which the “punishment” in the criminal case review context actually affects the prosecutor who committed misconduct is unclear. The legal and extralegal sanctions may partially impact the prosecutor and her office, but that cost is often shared by another prosecuting agency that took over the case after trial.¹⁶⁹ This helps explain why “the deterrence potential of reversal is suspect.”¹⁷⁰

¹⁶⁵ See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593 (2006); see also Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDozo L. REV. 1943, 1950 (2010).

¹⁶⁶ See *supra* note 140.

¹⁶⁷ Scholars have also described this as the remedial deterrence effect. See Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1515–16 (2009) (“These examples illustrate a broader phenomenon documented by a wealth of scholarship in criminal procedure and other fields: if the remedy for a rights violation is undesirable, courts will find ways to avoid granting it, such as narrowing the underlying right. Daryl Levinson calls this phenomenon ‘remedial deterrence,’ . . . the high cost of remedies deters courts from vindicating rights.”).

¹⁶⁸ *Id.* at 1516.

¹⁶⁹ See Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 92–93 (2005) (“Moreover, the practice of the vast majority of states is to assign the handling of appeals and post-conviction proceedings to an office separate from the primary prosecuting agency. Hence, the costs of reversal are generally not experienced by the prosecutor (or even the agency) responsible for the misconduct.”).

¹⁷⁰ *Id.* at 93; see also Johns, *supra* note 38, at 68 (“Even when the appellate court reverses a conviction on grounds of prosecutorial misconduct, the prosecutor who engaged in the misconduct generally escapes any repercussions The offending prosecutor is rarely identified by name. Moreover, the loss on appeal is charged not to the original local prosecutor who committed the misconduct, but to the unfortunate lawyer in the state attorney general’s office who inherited the case for purposes of the appeal.”).

Criminal case review also fails to produce the sort of swift outcomes likely to bolster deterrent effects. Many important forms of prosecutorial misconduct remain hidden for long periods and are discovered fortuitously—if at all—in the post-conviction process.¹⁷¹ Thus, in many cases, years have elapsed between the time of the misconduct and the time a reviewing court may issue a decision handing down punishment. The time lag significantly diminishes the punishment's impact. In many cases, prosecutors have moved on to different jobs and have already accumulated professional gains, which the reversal of an old prosecution does little to alter.¹⁷²

B. *Criminal Liability*

From a deterrence perspective, the theoretical availability of criminal liability for certain forms of intentional misconduct seems powerful. The punishment—potential incarceration and a criminal record for job-related misconduct—is self-evidently very severe. It is a legal sanction that ushers in grave extralegal sanctions as well. Most probably, it would curtail future job opportunities in the same field (and likely would trigger some official professional sanction, too). Criminal liability poses a punishment that appears more severe than other accountability regimes.¹⁷³

A high degree of severity, however, is not likely to entail deterrent effects in the absence of evidence that the punishment will actually apply. Only one prosecutor has ever received a prison sentence (of ten days) for prosecutorial wrongdoing that fell under the ambit of a criminal statute.¹⁷⁴ That infinitesimal number turns the certainty variable on its head, signaling that if there is any certainty, a potential rule-breaking prosecutor can be certain she will not be charged criminally.¹⁷⁵

¹⁷¹ See, e.g., *Kyles v. Whitley*, 514 U.S. 419 (1995) (original conviction in 1984, reversed on habeas review in 1995).

¹⁷² See, e.g., *Dunahoe*, *supra* note 169, at 60–62 (discussing the phenomenon of the transitory prosecutor).

¹⁷³ It must be acknowledged again that what matters is not our own assessment of the punishment but the assessment of the person facing the sanction. See *supra* note 157. Nonetheless, because the criminal liability regime appears likely to trigger collateral consequences that represent some of the punishments imposed by other regimes and will produce many of the same extralegal sanctions, it is almost certain to be considered the most severe available punishment in the current accountability system.

¹⁷⁴ See *Ex-Prosecutor Gets 10 Days*, *supra* note 52 and associated text. This single instance also suggests that criminal liability is unlikely to ever be delivered swiftly. Anderson was punished over 25 years after his misconduct. Moreover, prosecutors may have advantages as litigants, particularly as individuals with a deep understanding of how the adversarial system in a particular jurisdiction works. These advantages may level the playing field a bit, making a speedy resolution less likely unless such a resolution—perhaps a favorable plea—was in the offending prosecutor's interests.

¹⁷⁵ One might be tempted to believe that making a \$10,000 fine a potential sanction for a parking violation would deter meter mistakes. But, if everyone knew with

While many have speculated about why it is so uncommon to see criminal charges filed against prosecutors for egregious misconduct,¹⁷⁶ it may be an instance where group norms override alternative courses of action.¹⁷⁷ There may be a strong norm in prosecuting agencies against using the power to prosecute against one of their own—similar to the blue code of silence observed in some police forces.¹⁷⁸ Given that the decision not to file criminal charges falls within the prosecutor’s realm of discretion, those who make the decision are not themselves subject to any potential punishment for declining to pursue criminal liability. This potential explanation, like the other explanations offered,¹⁷⁹ needs to be researched to be proven. Regardless, the widespread knowledge that criminal liability will not follow prosecutorial misconduct means that the regime generates no deterrent value.

C. Civil Liability

In the civil liability regime, the prospective punishment for a rule-breaking prosecutor is responsibility for financial damages. While this punishment may seem significant on its face, prosecutors found liable would almost surely not have to pay out of pocket. Instead, the widespread indemnification of prosecutors around the country indicates that the government—not the individual prosecutor—would bear the cost of the punishment.¹⁸⁰ Indemnification blunts the purported deterrent effect of prospective civil liability. Perhaps the government decision to indem-

absolute certainty that the jurisdiction would simply not impose the punishment, the punishment’s severity would lose its deterrent force.

¹⁷⁶ See generally Godsey, *supra* note 53.

¹⁷⁷ To be clear, the range of misconduct susceptible to criminal sanctions is far smaller than the full universe of misconduct. Criminal liability can and only seeks to address a relatively narrow subset of prosecutorial wrongdoing. By design, the regime does not purport to address misconduct in all its forms.

¹⁷⁸ See Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 64 (2000) (“Generally, the code of silence refers to the refusal of a police officer to ‘rat’ on fellow officers, even if the officer has knowledge of wrongdoing or misconduct.”).

¹⁷⁹ See Dunahoe, *supra* note 169, at 86 (noting the possible concern of over-deterrence); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 879 (1997) (“Prosecutors simply will not prosecute other prosecutors.”); George A. Weiss, *Prosecutorial Accountability After Connick v. Thompson*, 60 DRAKE L. REV. 199, 220 (2011) (noting that “a conviction requires [proof of a prosecutor’s] intent to deprive the victim of his civil rights” and the burden to prove intent may be difficult to meet); Andrew Smith, Note, *Brady Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1970–71 (2008) (“persuading federal authorities that there is a sufficient federal interest in bringing charges against local prosecutors with an already thinly stretched budget is unlikely.”).

¹⁸⁰ See generally John P. Taddei, Note, *Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits*, 106 NW. U. L. REV. 1883 (2012).

nify prosecutors is a response to perceived over-deterrence, and the government wants to ensure that its prosecutors remain aggressive in their roles. However, factoring in the realities of absolute immunity and the severe limitations on municipal theories of civil prosecutorial liability, one sees that indemnification liberates individual prosecutors while the District Attorney's office (or other government body holding the indemnification policy) incurs no additional liability.¹⁸¹

If immunity were not so protective of prosecutors, there may be individualized extralegal sanctions that accompany a finding of civil liability for prosecutorial misconduct. These sanctions could include internal professional embarrassment, demotion or career-advancement delays, and broader reputational costs if others learned about the finding. Yet, the regime—separate and apart from absolute immunity—makes it difficult for defendants whose rights were violated by a prosecutor to actually get into court as civil plaintiffs, let alone prevail.¹⁸²

Civil suits also fail to provide a level of celerity likely to affect prosecutorial behavior. With the *Heck* favorable-termination rule, a defendant generally cannot pursue a civil suit until after obtaining a favorable ruling on the underlying criminal case—a process that could take several years.¹⁸³ The civil litigation itself could take a significant amount of time to unfold from that point. Consider, for example, the suit in *Connick v. Thompson*, which lasted nearly eight years before resulting in the Supreme Court's decision to overturn the jury's \$14 million verdict.¹⁸⁴ This regime is incapable of delivering swift results.

¹⁸¹ Whether a liability that was actually incurred by the office would influence behavior is itself an open question. The answer depends on at least two questions. First, is the liability truly being paid out of the district attorney's office's budget? That depends on the particular arrangements in a given jurisdiction, and the reality may be complicated. Second, even if the district attorney's office itself is on the hook, does the office respond in the expected way to financial incentives? This is a difficult question to answer. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347 (2000) ("Because government actors respond to political, not market, incentives, we should not assume that government will internalize social costs just because it is forced to make a budgetary outlay. The only way to predict the effects of constitutional cost remedies is to convert the financial costs they impose into political costs."); see also Starr, *supra* note 167, at 1518.

¹⁸² See, e.g., Starr, *supra* note 167, at 1518 ("Criminal defendants do not make appealing civil plaintiffs and may also have a hard time quantifying damages. In light of the dubious prospects of recovery, most might not bother to sue, especially given the high costs of litigation, the poverty of most criminal defendants, and the lack of appointed counsel for civil suits.").

¹⁸³ See *supra* note 62.

¹⁸⁴ See *Connick v. Thompson*, 563 U.S. 51, 90 (2011) (Ginsburg, J., dissenting).

¹⁸⁵ See, e.g., Dunahoe, *supra* note 169, at 99 ("Like appeals, civil suits are generally heard many years after the alleged misconduct took place. Thus, the punishment does not come contemporaneously with the violation, as deterrence theory requires for optimal effect.").

D. Internal Discipline

A well-designed internal discipline regime could, in theory, effectively deter prosecutorial misconduct. Very little research has been conducted, however, about whether and how District Attorneys' offices actually implement internal disciplinary programs. This is an arena ripe for additional inquiry. Media reports suggest that a handful of prosecutors found by a court to have committed misconduct have been suspended by their employers in recent years.¹⁸⁶ Far less common are reports that prosecutors lose their jobs after such findings.¹⁸⁷ While little can be said about this regime because little is known or shared, the pervasive lack of transparency itself informs the deterrence analysis. If the outcomes of internal disciplinary actions are not made known to the public or to a disciplined prosecutor's prospective future employers (or even his co-workers¹⁸⁸), the regime loses its capacity to trigger extralegal sanctions on top of the formally-imposed punishment. This could limit substantially the punishment's perceived severity, and thereby decreases its deterrent potential. Where internal disciplinary policies and practices are actually informal, unwritten, or non-existent, punishments imposed in such a system have little potential to deter because potential offenders cannot be dissuaded by prospective costs of which they remain unaware.¹⁸⁹ Unlike other regimes, however, the internal disciplinary regime possesses structural advantages—namely, nimbleness and a much greater capacity to detect misconduct—that could make it a highly effective mode of prosecutorial accountability.¹⁹⁰

¹⁸⁶ See, e.g., Anne Blythe, *Wake Prosecutor Whose Father was Kidnapped Put on Leave After Misconduct Findings*, NEWS & OBSERVER, (June 29, 2016), <http://www.newsobserver.com/news/local/crime/article86663947.html> (noting recent decision of a district attorney in North Carolina to suspend prosecutor found responsible for misconduct).

¹⁸⁷ James D. Wolf, Jr., *Deputy Prosecutor Fired in Porter County*, POST-TRIB. (July 26, 2016), <http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-porter-prosecutor-out-st-0727-20160726-story.html> (noting recent firing of Indiana prosecutor found responsible for withholding exculpatory evidence).

¹⁸⁸ Bruce A. Green, *Regulating Prosecutors: Let There Be Light*, 118 YALE L.J. POCKET PART 156, 160 (2009), <http://www.yalelawjournal.org/forum/regulating-federal-prosecutors-let-there-be-light> ("Furthermore, when kept secret, [internal disciplinary] work fails to effectively deter future prosecutorial misconduct or to educate . . . prosecutors about where the disciplinary lines are drawn.").

¹⁸⁹ See, e.g., Yaroshefsky, *supra* note 14, at 297 ("If discipline is to serve as a deterrent to prosecutorial misconduct, the process and its results cannot be secret."); Green, *supra* note 71, at 89 ("The private sanction will have the effect of depriving future prosecutors of guidance as to what the disciplinary committee believes to be improper conduct. It will also ensure that the disciplinary process provides little deterrence of subtle forms of prosecutorial misconduct.").

¹⁹⁰ See *infra* Part IV(B)(1).

E. External/Professional Discipline

Disciplinary outcomes including reprimands, censures, treatment requirements, training requirements, suspension, and disbarment handed down by a state bar constitute punishments in the professional discipline regime. On the certainty dimension, professional disciplinary bodies have failed to make credible these threats. Prosecutors are disciplined less frequently than other practicing attorneys are.¹⁹¹ And, the percentage of prosecutors disciplined even in the subset of cases in which professional misconduct had already been clearly established to a court is disconcertingly small.¹⁹²

State disciplinary bodies generally take cases based on referrals and formal complaints.¹⁹³ In the prosecutorial misconduct context, it appears that this need for an initial report or complaint undercuts the prospects for accountability. Group norms and competing professional incentives appear to influence the defense attorneys and judges (and even the fellow prosecutors) who are situated to initiate disciplinary inquiries. Defense attorneys—especially repeat players in the system—fear hurting both their clients and themselves by damaging relationships with prosecutors.¹⁹⁴ Judges, too, appear generally to avoid referring misconduct to disciplinary bodies.¹⁹⁵ Prosecutors privy to another prosecutor's wrongdoing will typically, at most, report the misconduct internally and allow the office's disciplinary regime to respond.¹⁹⁶ The result is that almost no affirmative disciplinary complaints are lodged against prosecutors in many jurisdictions.¹⁹⁷

The certainty variable is also affected by the standards used to determine whether a violation of professional ethics occurred. These standards are often unclear.¹⁹⁸ Take, for example, Rule 3.8(d) of the ABA Model Rules of Professional Conduct. Until the American Bar Associa-

¹⁹¹ See *supra* note 81.

¹⁹² See, e.g., *supra* notes 82–85 and associated text.

¹⁹³ See Rosen, *supra* note 85, at 716.

¹⁹⁴ See Rosen, *supra* note 85, at 735 (“Prosecutors, by their willingness to allow discovery, by their power in the plea bargaining process, and in innumerable other ways, can seriously affect the life of a defense attorney. Sensible defense attorneys will thus understandably hesitate to jeopardize a practice by filing complaints that will have little chance of resulting in the meaningful discipline, might harm their clients, and might well adversely affect their practices.”).

¹⁹⁵ See *id.*; Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1439 (2004) (“a review of both federal district and appellate decisions reveals that judges do not perceive their role in regulating attorney conduct as an ethical mandate; nor do they appear to consider it a necessary component of their judicial duties”).

¹⁹⁶ See *supra* notes 71–73 and accompanying text.

¹⁹⁷ See, e.g., Rosen, *supra* note 85, at 731 (noting that “[t]hirty-five states reported that no formal complaints had been filed for *Brady*-type misconduct” in the studied time period).

¹⁹⁸ Dunahoe, *supra* note 169, at 79 (“professionalism standards are vague”).

tion clarified that the prosecutor's ethical duty to disclose exculpatory evidence was broader than that required under *Brady*, "some courts . . . 'incorrectly assume[ed that] it merely mirrored the *Brady* obligation.'"¹⁹⁹ Unclear standards produce uncertainty about results and give prosecutors subject to disciplinary review a real opportunity to avoid punishment.²⁰⁰

While disciplinary bodies have a wide range of available punishments at their disposal, the actual outcomes in the few reported cases of prosecutorial misconduct that resulted in discipline do not generally register as severe.²⁰¹ As explored more below, it is somewhat striking that the professional disciplinary regime provides prosecutors with no indications about what level of punishment they can expect for ethical violations.²⁰² If precedent is the primary means of communicating expectations to potential offenders, then prosecutors have little to fear in terms of formal sanctions, except perhaps in some extraordinary circumstances. "Prosecutors, above all other lawyers, know the difference between a slap on the wrist and real punishment."²⁰³

Professional discipline is not a mode of accountability that offers swift results. Often, disciplinary bodies wait until the conclusion of post-conviction proceedings in a criminal case before even considering involvement in associated disciplinary issues.²⁰⁴ "Yet if disciplinary proceedings are held in abeyance until the completion of the criminal proceedings, many years may pass."²⁰⁵ Indeed, the inability to deliver celerity may inform a disciplinary body's decision of whether to proceed with an investigation or disciplinary recommendation at all. If the prosecutor responsible for the alleged misconduct is no longer employed in that role, the possibility of specific deterrence has disappeared.²⁰⁶

¹⁹⁹ Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1327 (2011).

²⁰⁰ See, e.g., Rosen, *supra* note 85, at 720–22 (explaining how the prosecutors responsible for the misconduct that led to the Supreme Court's decision in *Miller v. Pate*, 386 U.S. 1 (1967), avoided disciplinary charges).

²⁰¹ See, e.g., *id.* at 731 ("the sanctions most often imposed [are] too lenient"); Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, HUFFINGTON POST (Feb. 11, 2016), http://www.huffingtonpost.com/entry/prosecutor-misconduct-justice_us_56bc e00fe4b0c3c55050748a (noting that a prosecutor's disbarment "remains an outlier to the broader trend" of lenient to non-existent punishment).

²⁰² See *infra* Part IV(A)(2).

²⁰³ Rosen, *supra* note 85, at 736.

²⁰⁴ Zacharias, *Professional Discipline*, *supra* note 81, at 762 ("[T]here are timing issues related to parallel criminal proceedings involving the alleged professional misconduct. Disciplinary authorities may be loath to review a prosecutor's conduct while appellate proceedings are pending, for fear of interfering, or being perceived as interfering, in the appellate process.").

²⁰⁵ *Id.*

²⁰⁶ See *id.* ("Individual prosecutors who commit misconduct may no longer be prosecutors by the time the appeals of their cases are complete. In such cases, the need for specific deterrence of the individual prosecutor's zeal will have dissipated.

Like internal disciplinary systems, professional disciplinary bodies keep a great deal of their work secret.²⁰⁷ Their anti-transparency measures thus also cut against deterrence goals.

F. Electoral Accountability

Evaluating the efficacy of elections in promoting prosecutorial accountability from a deterrence perspective is difficult. Elections focus on a multitude of issues far beyond accountability for misconduct. Moreover, the elected head of the office does not necessarily practice the same way most prosecutors do day-to-day, instead generating policies and operating in a behind-the-scenes capacity with respect to specific prosecutions. While the elected District Attorney can certainly be responsible for the type of misconduct described in this Article,²⁰⁸ the typical case involves an unelected line prosecutor. The district attorney—through policymaking, supervision, training, hiring, firing, and promotion—of course has considerable influence over how an office operates. With that level of authority, one can certainly imagine a particular district attorney bearing a high degree of responsibility and losing an election at least in major part because he failed to curb rampant misconduct in the ranks.²⁰⁹

The “punishment” in this context is the loss of a vote—which, cumulatively across the electorate, could result in the loss of the position.²¹⁰ Considering all of the inputs in an election, certainty eludes this accountability regime. Observers have trouble envisioning a district attorney so fearful of political fallout from prosecutorial misconduct in the office that he rigorously ensures line prosecutors follow the rules.²¹¹ Indeed, the prevailing view of prosecutors is that they cater to a pro-carceral and tough-on-crime electorate that values aggressiveness more than respect for professional ethics and defendants’ constitutional

Again, the bar has less incentive to proceed.”).

²⁰⁷ See, e.g., Zacharias, *supra* note 107, at 683 (“Disciplinary proceedings occur, for the most part, secretly . . .”).

²⁰⁸ See Bar Complaints: State of Louisiana v. Michael Anderson, PROSECUTORIAL ACCOUNTABILITY, <http://www.prosecutorialaccountability.com/places-of-interest/new-orleans/filed-bar-complaints/> (including bar complaints against New Orleans District Attorney Leon Cannizzaro for alleged misconduct relating to improper discussion of the case with the press).

²⁰⁹ Cf. Ray Stern, *Andrew Thomas and Lisa Aubuchon Disbarred—Read Panel’s Opinion Here*, PHX. NEW TIMES (Apr. 10, 2012), <http://www.phoenixnewtimes.com/news/andrew-thomas-and-lisa-aubuchon-disbarred-read-panels-opinion-here-6651303> (explaining how Andrew Thomas, the former County Attorney in Maricopa County, was disbarred because of his own extreme abuse of authority after resigning amidst the scandal).

²¹⁰ This regime thus assumes that the current District Attorney will seek re-election. If a particular DA does not intend to run for the same office again, the threat of electoral sanctions will do little or nothing to shape her behavior.

²¹¹ Cf. Dunahoe, *supra* note 169, at 66 (“removal of the supervisor(s), through the democratic process, cannot be expected to completely—or, perhaps, even partially—rectify the problem of street-level misconduct”).

rights.²¹² However, recent developments in some jurisdictions indicate that the tide may be turning, and prosecutorial wrongdoing could impact a District Attorney's electability.²¹³

The punishment's severity, when viewed as a single vote, is vanishingly small. But, amalgamated, these punishments could shift re-election prospects. An elected district attorney is unlikely to know about an individual voter's prospective voting plan. Those plans—and information about them—likely only come to exist in close proximity to the election. Public attention on misconduct around the time of an election could thus move a candidate to address the issue in the media, disseminate relevant information, propose policy changes, or otherwise change office practices to enhance the district attorney's image at a crucial point in time. But, absent prolonged public focus and open, ongoing communication about voters' concerns with prosecutorial misconduct, the issue is unlikely to deter the district attorney's office in a sustained manner.

Celerity is not a virtue of the electoral accountability regime. Jurisdictions with prosecutorial elections generally conduct them every four years.²¹⁴ In the time between elections, an office will handle thousands if not tens or hundreds of thousands of cases.²¹⁵ Because they are fixed, election cycles cannot respond nimbly to emergent issues or crises. Yet, unlike other regimes, including the legal ones (civil liability, criminal liability, and professional discipline), this mode of prosecutorial accountability clearly defines when a decision will be made. That certainty of a decision with a binary outcome—which is distinct from the certainty that punishment will apply—may be relatively advantageous because it permits those concerned with misconduct to organize and make timely advocacy efforts. The electoral accountability mode appears both unable to punish individual misconduct in a swift manner and the most capable of making a jurisdiction-wide statement about misconduct that could lead to more scrupulous conduct.

IV. CAN WE REPAIR THE CHIEF MODES OF PROSECUTORIAL

²¹² See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 58–59 (1998) (“Elected prosecutors typically run on very general ‘tough on crime’ themes . . .”); Roger A. Fairfax, Jr., *The “Smart on Crime” Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 912 (2012) (“elected prosecutors, like all elected officials, undoubtedly feel pressure—either from voters or special interest groups—to be seen as tough on crime”).

²¹³ See, e.g., Kim Bellware, *It’s Not Just Police Shooting Scandals: Why Prosecutors Across the Country Are Finally Losing Elections*, HUFFINGTON POST (Mar. 31, 2016), http://www.huffingtonpost.com/entry/prosecutors-losing-elections_us_56f03af3e4b084c67220ffa3 (noting that “voters are beginning to reject a decades-old approach to crime along with the incumbents themselves”); see generally Sklansky, *supra* note 92.

²¹⁴ Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009).

²¹⁵ See *Office Overview*, L.A. CTY. DIST. ATTORNEY’S OFFICE, <http://da.lacounty.gov/about/office-overview> (Los Angeles County deals with around 71,000 felony cases each year).

ACCOUNTABILITY USING DETERRENCE?

While deterrence theory helps explain in part deficiencies in the current system for promoting prosecutorial accountability, the next question is whether it can also provide solutions. To answer this question, this Part will first unpack some of the overarching insights that emerge from the overview of deterrence theory and the deterrence-based evaluation of each mode of accountability. Then, drawing on these insights, it will recommend some changes that could enhance the system's efficacy. Lastly, this Part will identify a few critiques of the project and preliminarily respond as a first step in what should be an extended dialogue.

A. Key Insights

The deterrence perspective surfaces key insights about why our system for promoting prosecutorial accountability fails. To be sure, scholars and commentators have identified several of the core problems with the current system.²¹⁶ With respect to the insights highlighted here, deterrence does not have an exclusive claim. It does, however, offer a distinctive lens with which one can view the issues and a helpful language to describe them.

1. There is a widespread lack of celerity

Aside from the internal discipline regime, no mode of prosecutorial accountability is built to respond to misconduct swiftly. Although it is unclear how much celerity matters in the criminal justice context, there are good reasons to believe it is critical in prosecutorial accountability terms. Prosecutors in many offices do not stay in their roles for long periods.²¹⁷ Delayed punishment may be no punishment at all, especially if the official sanctions (e.g., a short suspension from practice that is actually deferred) are inconsequential and professional extralegal sanctions (e.g., employers choosing to hire other candidates because of the negative record) have passed their expiration date. Prosecutors will be deterred by a mode that responds quickly to their misconduct.²¹⁸ While one can envision an internal regime being nimble enough to provide celerity, it seems

²¹⁶ The work of scholars like Rachel Barkow, Stephanos Bibas, Angela Davis, Ellen Yaroshefsky, Daniel Medwed, Bruce Green, Bennett Gershman, and Alafair Burke—much of it cited in this Article—has been crucial.

²¹⁷ See, e.g., Thomas J. Charron, *Law School Loans and Lawyers in Public Service*, 40 PROSECUTOR 6, 6 (2006) (“The majority of offices that responded to the survey were small ones, employing an average of 10 or fewer prosecutors with turnover rates of 50 percent or higher.”); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 63 (2002) (“The average tenure of an ADA in the N[ew] O[rleans] DA office is around two years.”).

²¹⁸ See Andrew Cohen, *Prosecutors Shouldn’t Be Hiding Evidence from Defendants*, ATLANTIC (May 13, 2013), <http://www.theatlantic.com/national/archive/2013/05/prosecutors-shouldnt-be-hiding-evidence-from-defendants/275754/> (calling for “swift and significant punishment for prosecutors who violate the [Brady] rule”).

clear that criminal case review, civil liability, criminal liability, professional discipline, and electoral accountability are too lethargic as currently constructed to deliver.

2. Transparency matters

Another key lesson is that a mode's level of transparency matters a great deal. This lesson is a predictable outgrowth of the fundamental deterrence principle that prospective offenders need to know what behavior is prohibited and they need to know how they will be punished if they violate the rule. Similarly, in the prosecutorial accountability context, prosecutors need to know not only what constitutes misconduct (something they are already professionally obligated to know), but also what will happen if they commit it. A few modes are arguably transparent, but in a way that affirmatively undercuts deterrent effects. The criminal case review, civil liability, and criminal liability regimes have telegraphed that they will not subject most misconduct to a searching review. They have achieved this through the promulgation of doctrines like harmless-error review and absolute immunity, as well as a very well-established practice of not filing criminal charges against misbehaving prosecutors.

It is unclear whether internal discipline regimes make themselves transparent to employees of the district attorney's office, but available evidence suggests that these regimes, where they actually exist, are *ad hoc* and more informal.²¹⁹ There may not only be a total lack of external transparency with the public, but also a similar lack of internal transparency within the office.²²⁰

External regimes also lack transparency in crucial ways. Many of the professional standards that apply to prosecutors are vague.²²¹ Additionally, no disciplinary body produces a punishment chart or sentencing guidelines to indicate what outcomes a prosecutor may face for violating any of the applicable standards.²²² Lastly, the process by which these bodies investigate complaints is often secret, as are their reasons for declining or choosing to pursue disciplinary action.²²³ With the general exception of cases that have gone through a final adjudication in court, the dispositions of most cases also remain hidden.²²⁴ If disciplinary bodies

²¹⁹ See Zacharias, *Professional Discipline*, *supra* note 81, at 763.

²²⁰ See *supra* notes 67–68.

²²¹ See, e.g., Zacharias, *Can Prosecutors Do Justice?*, *supra* note 81, at 46 (“[T]he codes . . . treat prosecutors as advocates, but also as ‘ministers’ having an ethical duty to ‘do justice.’ Although the special prosecutorial duty is worded so vaguely that it obviously requires further explanation, the codes provide remarkably little guidance on its meaning.”).

²²² See Andrew John Hosmanek, *Punishment in Practice* (Aug. 2015) (unpublished Ph.D dissertation, University of Iowa), <http://ir.uiowa.edu/etd/1853/>.

²²³ See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 17–21 (2007).

²²⁴ See *id.* at 20 (“All but a few jurisdictions impose private discipline, and in many jurisdictions, it is the type of discipline most often imposed.”).

expect prosecutors to look at the few published opinions in which other prosecutors received punishment to develop a sense of prospective sanctions, they expect too much.

The electoral accountability regime is likewise not particularly transparent, but polls taken during election years and media coverage can convey to office-seeking prosecutors whether misconduct concerns are bubbling in the populace.

3. Methods for detection and apprehension must be scrutinized

Deterrence research indicates that the process used to expose wrongdoing can contribute significantly to deterrent effects. For example, if potential offenders recognize that police patrols will target certain regions or certain crimes, they may be effectively deterred.²²⁵ The increased risk of detection deters more law-breaking. Similarly, if the process by which prosecutorial misconduct came to the attention of those charged with holding them accountable was more effective, the increased risk of detection would curb more misconduct.

Detection in the misconduct context is a slightly ambiguous term because there is the matter of uncovering the misconduct itself (e.g., discovering the exculpatory evidence the prosecutor withheld before trial), and there is the separate matter of bringing that misconduct to the relevant authority with a request that it be punished. In the law enforcement context, one can consider two scenarios that illustrate the difference. The first is the failure of police to actually determine that some criminal activity—say, possessing a controlled substance—took place. The second is the failure of police to arrest an individual whom they know broke the law in a jurisdiction that has decided not to enforce the relevant possession crime. For clarity's sake, the latter scenario is one in which wrongdoing was detected, but the offender was not apprehended.

Both the risk of detection and the risk of apprehension matter. The responsibility for increasing the risk of detection appears to fall primarily on the shoulders of defendants and their lawyers. While one can imagine supervising prosecutors inside District Attorneys' offices helping line prosecutors decide *ex ante* what to do in particular circumstances, misconduct after-the-fact is less likely to come to light from internal supervision (either because the supervisor failed to notice it contemporaneously or was complicit).²²⁶ Though some *Brady* violations come to light while defendants are represented, many linger into post-conviction, where many indigent defendants have no access to counsel who can meaningfully gather and review records to uncover misconduct.²²⁷ Short of a mas-

²²⁵ See, e.g., KENNEDY, *supra* note 115, at 126.

²²⁶ See *supra* notes 71–73 and accompanying text.

²²⁷ See Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 845 (2013) (“most defendants, and virtually all noncapital defendants, have no lawyer to file postconviction petitions in either state or federal court”); see also Kozinski, *supra* note 71, at xv.

sive change to the policies regarding access to counsel, it is unfair to place the burden of detection solely on defendants. Indeed, the *Brady* doctrine itself recognizes the inequity.²²⁸ This underscores a fundamental problem: the most viable misconduct detector works inside the very same office as the offending prosecutor.²²⁹ Detection difficulties plague prosecutorial accountability mechanisms—a problem discussed more in Part IV(C).

The risk of apprehension describes the risk that an identified instance of misconduct will be reported to an entity that has the power to punish. The current system channels most misconduct claims into a sequenced review. First, defense lawyers raise claims of prosecutorial misconduct in the criminal case review regime. If that fails, defendants may turn to another mode, like the professional disciplinary regime. If it succeeds, on the other hand, defendants may turn to civil court.²³⁰ The internal discipline and criminal liability regimes offer little to defendants themselves so they have less of an incentive to attempt to initiate those proceedings.²³¹ The process by which different modes of accountability come to consider a case of alleged misconduct may be salient because the system now depends almost entirely on the incentives provided by specific remedies (a new trial, a monetary judgment for damages) to ensure apprehension. Most modes offer little to and require little of any actor aside from defense lawyers and defendants.

4. What matters is what matters to prosecutors

Given that deterrence theorists have identified a need to learn more about how potential criminal offenders develop their subjective impressions of punishment in the criminal justice context, researchers should learn more about how prosecutors view potential punishments for misconduct.²³² Persuasive arguments have been made indicating that efforts to deter misconduct should focus on line-level prosecutors, and those individuals tend to prioritize career advancement on a short-term horizon.

²²⁸ See Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 143 (2012) (“The Court has never added a requirement that defense counsel exercise due diligence. The Court’s concern with the defendant’s due process rights to exculpatory evidence is precisely why the duty to disclose exculpatory evidence is absolute and does not depend on the request of a defendant.”).

²²⁹ See Kozinski, *supra* note 71, at xxii (noting that “[p]rosecutors and their investigators have unparalleled access to the evidence”).

²³⁰ See *supra* note 183 and accompanying text.

²³¹ And defense lawyers have incentives not to make such reports. See *supra* note 194 and associated text.

²³² See KENNEDY, *supra* note 115, at 182 (“[I]t is what matters to offenders—not what matters to those designing deterrence regimes, and not what those designers think matters to offenders—that matters in deterrence. This core fact is universally acknowledged in deterrence theory, and then almost always promptly forgotten in practice.”).

zon.²³³ It may also be the case that prosecutors in different types of offices (based on factors like geography, office culture and reputation, caseload, economic mobility inside and outside of the office) view prospective punishments differently. (One might expect, for example, an office with low turnover to worry less about sanctions that might influence a potential future employer's hiring decision.) Of course, just as each prospective criminal offender has his own radically subjective view of punishment, so does each prosecutor. Nonetheless, generalized patterns may exist that could better inform what strategies for accountability work best in different circumstances.

Professor Zacharias has claimed that the only relevant subjective impression for prosecutors is their belief about whether they will be punished at all. He contrasts this with the criminal justice system's deterrence theory, which assumes that the severity of the punishment has some effect on potential offenders' cost-benefit calculations. In effect, he states that any public punishment, whatever it is, could achieve significant deterrent effects:

[L]awyers may react to the potential for discipline differently than putative criminal defendants react to the potential for prosecution. Criminal law deterrence theory, in contrast to professional discipline deterrence theory, relies heavily on the prediction that putative criminals will adjust their behavior significantly according to the likelihood of penalties. Although lawyers may engage in some cost-benefit analysis in comparing the extent of probable punishment with the benefits of engaging in prohibited conduct, lawyers are most likely to behave a certain way according to whether they will be punished at all. For lawyers, the key is the damage to reputation and peer admiration that any discipline will produce. Thus, a lawyer's sense that particular conduct will not result in discipline may encourage him to violate the codes, but a lawyer who believes that disciplinary prosecution actually will result may not distinguish between prosecutions likely to produce heavy sanctions²³⁴ (such as disbarment) and prosecutions involving lesser penalties.

This is a plausible view, yet it is an empirical question that deserves further exploration.

Another key insight arises in a similar vein: extralegal sanctions may matter a great deal in the prosecutorial accountability context. A prosecutor may be more deterred by the prospect of an unflattering media report in the biggest local newspaper than a civil judgment or even a short-term suspension from practice. While some extralegal sanctions may be inextricably tied to legal sanctions, accountability authorities could do more to tailor or encourage other extralegal sanctions to enhance deter-

²³³ Dunahoe, *supra* note 169, at 64 ("effective attempts to deter prosecutorial misconduct must focus on influencing the individual cost-benefit calculus of the low-level, transitory prosecutor").

²³⁴ Zacharias, *supra* note 107, at 691.

rent effects.

5. The lack of certainty cripples the system

Clearly, the biggest shortcoming in the current system is the lack of certainty. This underscores the point Professor Zacharias made about how prosecutors likely view the punishment question in the binary. The question they ask may simply be “will I be punished for this misconduct?” instead of “what kind of punishment might I face for this misconduct?” Most prosecutors would rationally answer that question with a confident “no.” The lack of certainty (or, perhaps more accurately, the certainty that punishment will not occur) may arise at any of three critical junctures: detection, apprehension, and imposition. Detection is the biggest hurdle, but even in those cases where detection occurs, apprehension (reporting) and imposition (the ordering of punishment) must follow. The current system of prosecutorial accountability does not optimally promote deterrence at each juncture.

While individual modes of accountability are ineffective on their own terms, the ways in which they interact compound shortcomings.²³⁵ At the least, the diffusion of responsibility encourages delay, further undermining celerity. More commonly, the diffusion produces inaction and finger-pointing, diminishing certainty. Although prosecutors regularly represent that any particular mode of accountability need not concern itself with vigorous enforcement of rules prohibiting prosecutorial misconduct, collectively the modes fail both to achieve general deterrence and to specifically deter rule-breakers. The experiential effect reflected in the criminal justice system almost certainly holds true in the prosecutorial accountability context. Indeed, available evidence indicates that many documented rule-breakers commit multiple violations.²³⁶ Once they realize they can break a rule or violate a constitutional provision without consequence, they are more likely to do it again.

With these key insights in mind, it makes sense to draw on deterrence theory to see what solutions may be available. Deterrence does not represent a panacea. But its principles do suggest productive steps we can take to refine and improve the modes of prosecutorial accountability.

²³⁵ See *supra* Part I(C).

²³⁶ See Levin, *supra* note 223, at 3 (“Although there has been very little study of recidivism, the limited data suggest that the rate of recidivism among lawyers who receive public sanctions is fairly high.”); FAIR PUNISHMENT PROJECT, AMERICA’S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY (June 2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf (finding that prosecutors responsible for the most death sentences around the country had been found responsible for misconduct on multiple occasions).

B. Some Initial Solutions

1. Consolidating the locus of responsibility

At a big-picture level, providing clarity about which modes should serve particular purposes would help address the diffusion of responsibility. As a first step, this Article proposes focusing reform efforts on two modes: criminal case review and professional discipline. The other modes, though they perhaps should continue to play specific, narrow roles in promoting prosecutorial accountability at an individual level, should primarily serve other functions.²³⁷

Civil liability deserves continued attention and reform, but deterrence is unlikely to play a major role in its operation. The regime should focus on compensating individuals who have been harmed by State misconduct, through either litigation or a designated statute.²³⁸ Moreover, given immunity and indemnification, this regime should focus on holding entire offices accountable rather than deterring particular individual wrongdoers.²³⁹

Criminal liability should also be separated from the mainstream scheme for holding prosecutors accountable for misconduct. It should remain available for particularly egregious acts or patterns of misconduct, but it clearly only has the capacity to work in extraordinary circumstances. The deep and inherent problems with enforcement in such a regime are difficult to overcome, and concerns about potential over-deterrence may be legitimate.

Internal discipline shows promise as a mode for promoting prosecutorial accountability. It can prioritize accountability above other goals. It can more easily detect misconduct than any other mode.²⁴⁰ It can also be the most nimble regime. These compelling advantages are offset, however, in large part by the drawbacks to self-regulation. While scholars have proposed excellent ideas for how prosecutors can curb misconduct through internal governance,²⁴¹ district attorney and U.S. attorney offices have a deep interest in protecting themselves from scrutiny.²⁴² To achieve

²³⁷ See *supra* note 104.

²³⁸ Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 74 (1999) (arguing that “a legislative remedy is the only reliable and fair response” for wrongful conviction).

²³⁹ Of course, if civil liability continues to be held out as a mode for prosecutorial accountability, major steps must be taken to make the regime more effective, including the elimination of absolute immunity for prosecutors and the reversal of *Connick v. Thompson*.

²⁴⁰ See *supra* note 229.

²⁴¹ See, e.g., Barkow, *supra* note 27, at 873 (considering “how federal prosecutors’ offices could be designed to curb abuses of power through separation-of-functions requirements and greater attention to supervision”); Bibas, *supra* note 27, at 964 (“The moral of the story is that institutionalized regulations are inherently blunt weapons, too crude and too sporadic to constrain prosecutors.”).

²⁴² Green, *supra* note 188, at 157 (likening prosecutorial self-regulation to “asking

that end, they have largely reinforced their black-box reputation. Without some baseline transparency requirement and external oversight, it may be unwise to leave accountability to the discretion of prosecutors.

The concern with self-governance is not unique to prosecutors' offices. Yet, the concerns may be more acute because so much is already asked of prosecutors.²⁴³ Putting a lead role in accountability on prosecutors may be asking them to do too much, especially given the challenging questions they must answer about how to allocate limited resources. With resource-allocation in mind, it may make more sense to place a significant amount of the responsibility to prevent misconduct on prosecutors' offices but impose the burden of enforcing accountability measures on an external body. Moreover, as a practical matter, the offices most likely to perform internal discipline well would also most likely make efforts to prevent misconduct on the frontend. Rather than complicate the calculus or divide resources between front-end prevention and back-end internal accountability, a clear division of responsibility may liberate offices to do one thing and do it well.

Electoral accountability, too, seems ill-suited to place individual prosecutorial accountability above other purposes. Although the public should be free to express concerns about prosecutorial misconduct and force prosecutors to address the issue in their campaigns, relying on democratic accountability to do the work needed to deter misconduct is unlikely to produce results. Voters have difficulty accessing information about prosecutors' offices in general, and have almost no ability to independently access information about misconduct.²⁴⁴ (Here, the media could play a crucial role, one worth exploring.) Even if voters were able to access information, it is not clear they would be positioned well to understand what that information means about the relative strengths or shortcomings of any given candidate.²⁴⁵ Electoral accountability may be vital to putting in office a leader who commits to changing internal culture and priorities, but it is not a workable tool for ground-level individual accountability.

Criminal case review, on the other hand, is a mode that may help deter prosecutorial misconduct in individual cases in a meaningful and ongoing way. It is typically the first mode invoked because of the incentives

the fox to guard the henhouse"); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 397 (2001) ("They are directly accountable only to other supervising prosecutors who typically share the same interests and goals.").

²⁴³ See Sklansky, *supra* note 6, at 476–77 (noting that "our expectations of prosecutors are so conflicting").

²⁴⁴ John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 177 (2015) ("almost no data is gathered on prosecutorial behavior").

²⁴⁵ See Sklansky, *supra* note 92.

it provides to defendants and defense lawyers²⁴⁶ and is thus both the most likely to detect misconduct and the most likely to provide a relatively swift response to a provable instance of prosecutorial misconduct. In addition to criminal case review, the professional disciplinary regime seems well-suited to be a primary mode for promoting prosecutorial accountability. “Indeed, the most frequently articulated goals of professional discipline systems coincide neatly with the goals of deterrence remedies for prosecutorial misconduct: the protection of the public, the protection of the administration of justice, and the preservation of confidence in the legal profession.”²⁴⁷ One can envision reforms large and small that could contribute to increasing the deterrent effect achieved by professional discipline.

2. *Improving Criminal Case Review*

Suggestions to improve the criminal case review’s deterrent capacity must acknowledge that the punishment available to courts conducting judicial review—reversal—is a powerful medicine that courts are reluctant to use. The suggestions made here draw on the insight that extralegal sanctions often work as well if not better than legal sanctions. And they recognize that while the diffusion of responsibility is a major problem, improved coordination between various modes of prosecutorial accountability could substantially improve their ability to deter misconduct.

In the *Brady* context, prosecutors who have hidden exculpatory evidence have avoided findings of misconduct because the Supreme Court’s test suggests that there is no constitutional “violation” unless the defendant prevails in proving that the suppressed evidence—had it been turned over—would have made a material difference at trial.²⁴⁸ This conflation of a violation with the question of whether a remedy is warranted has insulated prosecutors from accountability.²⁴⁹ Criminal case review could facilitate extralegal sanctions if the Supreme Court made clear that the suppression of exculpatory evidence represents a violation of a constitutional obligation, regardless of materiality.

Criminal case review could also facilitate extralegal sanctions or other modes of accountability if findings of misconduct were properly reported to the jurisdiction’s disciplinary body. Judges who determine that prosecutorial error or misconduct may warrant disciplinary action have

²⁴⁶ See *supra* Part I(B)(1).

²⁴⁷ Dunahoe, *supra* note 169, at 76.

²⁴⁸ See Bidish Sarma, *Do Supreme Court Justices Understand How Prosecutors Decide Whether to Disclose Exculpatory Evidence?*, ACSBLOG (Mar. 17, 2016), <https://www.acslaw.org/acsblog/do-supreme-court-justices-understand-how-prosecutors-decide-whether-to-disclose-exculpatory> (“unless a defendant proves prejudice, the Court does not label the State’s conduct a constitutional violation”).

²⁴⁹ This is true even in states in which the ethical rule for disclosure of exculpatory evidence is broader than the *Brady* rule and does not depend upon materiality to trigger a violation.

an ethical obligation to refer the prosecutor in question to the disciplinary board.²⁵⁰ Enforcing such a requirement would largely address the apprehension concern that looms over cases in which a judge finds a breach of the rules but determines the remedy she is empowered to provide is not warranted in the circumstances.²⁵¹ It would ensure that the disciplinary body apprehends the offender, lifting from it the burden of proactively identifying criminal cases in which misconduct occurred.²⁵²

A related suggestion also capitalizes on the deterrence value of extra-legal sanctions. Courts conducting judicial review of criminal cases should identify misbehaving prosecutors by name in written opinions.²⁵³ Not only does this trigger potential reputational consequences (by providing a signal to potential future employers, for example), but it also enables a number of ancillary efforts to promote accountability.²⁵⁴ Like a judicial referral requirement, it reduces the apprehension costs incurred by a disciplinary body actively seeking prosecutors who have violated the rules. It also creates a record upon which future decision-makers can rely to determine if a particular prosecutor has a record of misconduct.²⁵⁵ Moreover, to the extent that being named is a punishment itself, the permanence of a published judicial opinion may be seen as more severe because of its lasting effect.²⁵⁶

It is worth exploring other judicial remedies for prosecutorial misconduct that may achieve something closer to optimal deterrence. Professor Starr has proposed the idea of sentence reductions as an alternative sanction for prosecutorial misconduct that does not implicate the same concerns that the reversal of a conviction does.²⁵⁷ Courts have also recently begun to take seriously the possibility that misconduct may disqualify certain prosecutors or certain offices from pursuing particular

²⁵⁰ See generally Leslie W. Abramson, *The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751 (1997).

²⁵¹ Although judges are evidently reluctant to refer misconduct, see *supra* note 195, they are better positioned than defense lawyers and other actors in the system. See Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 551 (2009) (“Judges, in contrast to lawyers and their clients, are especially well-situated to undertake that task.”).

²⁵² See *id.* at 564 (“judges need to be made aware that their increased reporting of lawyer misconduct would be welcomed by disciplinary authorities”).

²⁵³ Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1090 (2009) (“Shaming, even if it is only a list of prosecutors’ names and a description of their actions, could be very effective.”); see also Kozinski, *supra* note 71, at xxxvi (“Naming names and taking prosecutors to task for misbehavior can have magical qualities in assuring compliance with constitutional rights.”).

²⁵⁴ See Gershowitz, *supra* note 253, at 1065.

²⁵⁵ See *id.*

²⁵⁶ Cf. KENNEDY, *supra* note 115, at 37 (describing how many criminal offenders prefer shorter periods of imprisonment to longer periods of probation).

²⁵⁷ See *supra* note 167.

cases.²⁵⁸ This remedy is a powerful tool for delivering a swift response to misconduct. Continued exploration and experimentation with alternative remedies may prove fruitful.

One reason courts conducting criminal case review may be reluctant to provide the remedy of a reversal is that they do not want to punish too severely unintentional misconduct. But how should courts respond when the misconduct was intentional? In some jurisdictions, state law requires courts to grant a new trial when they find that a prosecutor deliberately violated the rules.²⁵⁹ These doctrines, which are more protective than the federal constitutional baseline, represent state-level determinations about the appropriate application of the available punishment. While some states may decide that such doctrines over-deter or lead to windfalls for defendants, others may find that the balance should be struck on the side of discouraging misconduct more forcefully.

In one particular misconduct-related context, the question of a specific prosecutor's credibility is directly relevant. Under *Batson*, courts consider "all relevant circumstances" when deciding the equal protection question,²⁶⁰ including whether the prosecutor or her office has a history of discriminating on the basis of race or gender in jury selection.²⁶¹ Equal protection case law requires intentional discrimination to trigger a remedy, and courts have found credibility relevant to the specific question of intent.²⁶² At present, similar credibility considerations do not explicitly

²⁵⁸ Christopher Goffard, *Orange County D.A. Is Removed from Scott Dekraai Murder Trial*, L.A. TIMES (Mar. 12, 2015), <http://www.latimes.com/local/orangecounty/lame-jailhouse-snitch-20150313-story.html> (exploring how "a criminal court judge removed the Orange County District Attorney's office from one of its highest-profile murder cases"); Alec, *MO: St. Louis County DA's Office Removed from Murder Trial for Misconduct*, THE OPEN FILE: PROSECUTORIAL MISCONDUCT AND ACCOUNTABILITY (Apr. 7, 2016), <http://www.prosecutorialaccountability.com/2016/04/07/mo-st-louis-county-das-office-removed-from-murder-trial-for-misconduct/> (exploring how "an appeals court . . . removed St. Louis County District Attorney Robert McCulloch's office from prosecuting a murder case after a judge found prosecutors had violated the defendant's attorney-client privilege").

²⁵⁹ See, e.g., *State v. Wyche*, 518 A.2d 907, 910 (R.I. 1986) ("When the failure to disclose is deliberate, this court will not concern itself with the degree of harm caused to the defendant by the prosecution's misconduct; we shall simply grant the defendant a new trial."); *People v. Vilardi*, 555 N.E.2d 915, 920 (N.Y. 1990) (holding that "[w]here the defense itself has provided specific notice of its interest in particular material, heightened rather than lessened prosecutorial care is appropriate").

²⁶⁰ *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

²⁶¹ See *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (drawing upon "historical evidence of racial discrimination by the District Attorney's Office"); *id.* at 347 (explaining that "[t]his evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case"); *Currie v. McDowell*, 825 F.3d 603, 611 (9th Cir. 2016) ("it is not only the same office, but the same prosecutor, who brings a history of *Batson* violations with him").

²⁶² See, e.g., *Batson*, 476 U.S. at 98 n.21 (1986) ("In a recent Title VII sex discrimination case, we stated that 'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. Since the trial judge's findings

factor into tests governing other prosecutorial misconduct claims. However, one can imagine a particular prosecutor or office's history of *Brady* violations making a difference to a court's analysis of whether evidence was actually suppressed, for example, or how to craft an appropriate remedy.²⁶³ In those states with special remedies for intentional misconduct, the intent question invites a credibility analysis that logically incorporates historical findings about prosecutorial practices.²⁶⁴ Courts can and should rely upon previous findings of misconduct to analyze current claims.²⁶⁵

3. Improving external/professional discipline

A significant reform in professional discipline that could achieve great deterrent effects would be the creation of something akin to criminal sentencing guidelines made applicable to violations of rules governing prosecutorial conduct. Right now, disciplinary bodies provide no clear indication about how they will punish instances of misconduct that come to their attention.²⁶⁶ If this mode were to take deterrence theory seriously, it would consider predetermining prospective punishments for particular violations and disseminating that information to practicing prosecutors.²⁶⁷ At the moment, prosecutors lack any notice about how they may be punished; as a result, they can argue that any punishment imposed is too harsh in light of the fact that they were never informed in advance. Punishment guidelines would also reduce the individualized

in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (internal citations omitted)).

²⁶³ Cf. *United States v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993) (taking into account "considerations beyond th[e] case" to ensure "that the circumstances that gave rise to the misconduct won't be repeated in other cases"); *Odom v. United States*, 930 A.2d 157, 158–59 (D.C. 2007) ("[A] trial court has discretion to fashion . . . appropriate remedial sanctions for the government's failure to make timely disclosure of . . . exculpatory evidence . . .").

²⁶⁴ Professor Andrew Crespo persuasively argues that courts are the institutions most equipped to uncover and maintain historical facts relevant to these types of analyses. See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2092 (2016) ("Criminal courts, however, need not rely on such second-best efforts to create *Brady* compliance registries within their jurisdictions, for the courts already know every case in which a *Brady* issue is raised and how that issue was resolved. The court, after all, is the institution that is adjudicating the claims."). The relevance of this observation may turn on the quality of the technology utilized in a particular court system. *See id.*

²⁶⁵ Cf. *Milke v. Ryan*, 711 F.3d 998, 1016 (9th Cir. 2013) (taking note of "the cavalier attitude of the Maricopa County Attorney's Office toward its constitutional duty to disclose impeachment evidence" when evaluating the credibility of a State witness whose misconduct was simultaneously unraveling another prosecution in the jurisdiction while the defendant awaited sentencing).

²⁶⁶ See, e.g., *Discipline*, OREGON STATE BAR, <https://www.osbar.org/discipline>.

²⁶⁷ "A sanction, or a risk of sanction, that is unknown cannot, by definition, deter." *KENNEDY, supra* note 115, at 24.

burden that accompanies the disciplinary body's sentencing function. To the extent that figuring out how to punish a particular prosecutor imposes costs and takes time and resources, guidelines can help quell those concerns.

While the basic proposal is easy to summarize, it would be very difficult to decide on the details and implement. In addition to the practical challenge of generating the change—which may best be tackled by a leading organization like the American Bar Association—there is the broader philosophical question of whether such guidelines would constitute a drastic departure from current theories of attorney regulation. Professor Zacharias wrote that:

The option of reconstructing professional regulation according to a criminal law model is plausible. One certainly could rewrite the professional codes to mirror criminal law on a smaller scale and enforce specialized (and presumably more specific) prohibitions for lawyers. One should not, however, underestimate the radical character of that approach. It is not consistent with the present goals of lawyer regulation.²⁶⁸

Just because the change would be radical, however, does not mean that it could not be justified.

The current system's profound failure to ensure prosecutorial accountability may warrant a fundamental reassessment of the professional regulation of prosecutors. The prospective challenge of drawing up sentencing guidelines appears enormous if one concludes that all attorneys—not just prosecutors—must be regulated in the same way. However, prosecutorial regulation poses unique problems to professional disciplinary bodies. These problems may represent the grounds upon which to base a separate accountability regime. An independent approach could take hold because prosecutors possess more power than other lawyers, do not have clients who lodge complaints like other lawyers, and benefit from separation-of-powers concerns.²⁶⁹ Indeed, this past year the New York state legislature considered a law that would have created an independent state commission on prosecutorial conduct.²⁷⁰ The legislature voted down the proposal, but its consideration signals an interest in the specialized approach.²⁷¹

Indeed, in recognizing the unique challenges that prosecutorial regulation has posed to disciplinary bodies, several scholars have called on those bodies to take a distinctive investigative approach in this context. Professor Rosen, for example, called on them to be more proactive and

²⁶⁸ Zacharias, *supra* note 107, at 725.

²⁶⁹ See, e.g., Rosen, *supra* note 85, at 733–34.

²⁷⁰ See Gershman, *supra* note 12.

²⁷¹ Joel Stashenko, *Measure Targeting Misconduct by DAs Fails for Third Time*, N.Y. L.J. (June 22, 2016), <http://www.newyorklawjournal.com/id=1202760601883/Measure-Targeting-Misconduct-by-DAs-Fails-for-Third-Time>.

to initiate their own investigations into prosecutorial misconduct rather than merely responding to complaints.²⁷² This proposal also addresses in part the apprehension problem that group norms of non-reporting create. Professor Zacharias also claimed that proactive discipline might be an appropriate approach for certain categories of attorney misconduct, particularly those categories in which discipline is likely to “enhance deterrence.”²⁷³ In conjunction with the judicial referral and naming-and-shaming reforms suggested in the criminal case review context, a proactive approach would ensure at the least that already-documented instances of misconduct (for example, in the criminal case regime) are dealt with by the professional discipline regime. Going one step further, if disciplinary bodies were empowered to audit district attorney offices, they could be significantly more effective.²⁷⁴ Proactive discipline and better reporting suggest to potential offenders a higher degree of certainty of apprehension and a probability of a swifter response.

Professional disciplinary bodies have other options to deter prosecutorial misconduct beyond implementing sentencing guidelines and conducting proactive investigations. Communication is key to effective deterrence, and disciplinary boards could pursue targeted campaigns to influence prosecutorial behavior.²⁷⁵ For example, they could send to prosecutors copies of dispositions relevant to the discipline of prosecutorial misconduct. Rather than relying on a generic email newsletter or the mere publication of a disciplinary disposition in the traditional reporter, a targeted communication strategy could have an immediate effect and boost marginal deterrence. These bodies could go further than publicizing actual disciplinary outcomes—they could announce disciplinary priorities to let prosecutors know what forms of prosecutorial misconduct will be subjected to additional scrutiny. Of course, they would need to follow through on these commitments if they wish to maintain credibility. Otherwise, the experiential effect may kick in, and eventually even prosecutors who had not committed misconduct may come to learn that the disciplinary body’s purported enforcement priorities were not real.²⁷⁶

²⁷² See Rosen, *supra* note 88, at 735–36.

²⁷³ See Zacharias, *supra* note 107, at 740 (“Hence, a portion of every disciplinary agency’s resources should be devoted to proactive discipline. In other words, each agency should go beyond simply responding to client complaints. It should make an express determination of the types of prosecutions that would enhance deterrence, should target misconduct fitting within those categories, and should actively research sources that allude to or reveal visible violations of the rules.”).

²⁷⁴ See Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2158–59 (2010) (describing Professor Angela Davis’s similar idea of “Prosecution Review Boards”).

²⁷⁵ KENNEDY, *supra* note 115, at 29 (“So, deliberate communication . . . can matter a great deal.”).

²⁷⁶ Paternoster, *supra* note 114, at 809 (“Prior perceptions of the risk of punishment are generally modified downward when people commit crimes and get away with it. . . . People also generally increase their perceptions of the risk of punishment

Given that repeat offenders represent—or at least appear to represent—a significant problem in the realm of prosecutorial misconduct, disciplinary bodies should prioritize apprehending and punishing those prosecutors who have violated the rules on multiple occasions. Few things damage the deterrent capacity of the professional discipline regime more than high-profile examples of misbehaving prosecutors averting consequences, while simultaneously winning convictions and gaining fame rather than notoriety.

Publicity may do more than help communicate to prospective offenders; it may also be a potent extralegal sanction that prosecutors view as severe. If disciplinary bodies mail opinions that will inform friends, colleagues, and prospective employers about the outcome of a disciplinary proceeding, prosecutors may very well hesitate to perform acts that would jeopardize their standing in the profession.²⁷⁷ If disciplinary bodies become serious about publicity, they could begin to work with media outlets to draw even more public attention to the problem of prosecutorial misconduct. The media in recent years has demonstrated a sustained interest—nationally and locally—in stories about State misconduct.²⁷⁸ Disciplinary bodies can tap into these powerful extralegal sanctions to drive home their point.²⁷⁹

A disciplinary focus on more serious instances of misconduct also makes sense from a deterrence perspective.²⁸⁰ Misconduct's severity can be difficult to gauge, but it turns on factors like the form of misconduct, the substance, intent, and consequence. A prosecutor's decision to suppress exculpatory evidence pointing to innocence in a capital murder trial, for example, is more severe than an isolated comment made in passing that arguably disparages the defense attorney's credibility in an attempted assault prosecution. A disciplinary focus on *Brady* violations can deter other instances of serious misconduct, whereas a focus on minor ethical breaches may not entail a spillover deterrent effect.²⁸¹

when they do get caught.”).

²⁷⁷ Disciplinary boards could also maintain a list of prosecutors whom they have disciplined and make it available to courts, defense lawyers, and district attorney offices. Cf. Gershowitz, *supra* note 253, at 1064 (calling on a “third party to serve as an honest broker that could bring the names of offending prosecutors to light”).

²⁷⁸ See, e.g., Lorenzo Johnson, *A Few Bad Apples, or Fruits of a Poisonous Tree?*, HUFFINGTON POST (Feb. 6, 2017), http://www.huffingtonpost.com/lorenzo-johnson/a-few-bad-apples-or-the-fruits_b_14597290.html.

²⁷⁹ See Paternoster, *supra* note 114, at 821 (“For deterrence to work well, the would-be offender, tempted by the immediate gains of committing the crime, must be able to quickly conjure up in her mind the anticipated pain of punishment.”).

²⁸⁰ “Special attention to particular offenses is of course routine in traditional enforcement and deterrence regimes.” KENNEDY, *supra* note 115, at 110.

²⁸¹ Cf. Paternoster, *supra* note 114, at 809 (“What was interesting, however, is that while there was a significant relationship between arrests for a serious crime and perceived certainty, it was insignificant when arrest for any offense was used. This implies that attempts by authorities to crack down on minor crimes in ‘zero tolerance’ cam-

C. *Critiques of Using Deterrence to Promote Prosecutorial Accountability (and Some Responses)*

1. *Detection problems impede deterrence*

Perhaps the most powerful critique of deterrence theory's applicability to prosecutorial accountability is that the inability to detect most misconduct saps the system of its efficacy. Scholars agree that most *Brady* violations, for example, are never identified.²⁸² If that is true, then what hope does deterrence theory really offer?

A similar question arises in the criminal justice context. Criminologists point out that most criminal offenses are not reported to law enforcement.²⁸³ Indeed, “[e]ven trained professionals required by law to report offenses do not do so reliably . . .”²⁸⁴ This is a serious conundrum because “[c]rime not reported cannot be met with formal sanctions; to the extent that informal sanctions need to be activated by a formal criminal justice response, they also cannot be activated.”²⁸⁵ Although a significant amount of crime is never reported, nobody persuasively argues that the criminal justice system plays no deterrent role. Indeed, even with serious gaps in crime reporting and crime-solving, people by and large expect to be punished for criminal activity.²⁸⁶ The criminal justice system undoubtedly produces some amount of deterrence, even if that amount is debatable.

However, in the prosecutorial accountability context, one may plausibly claim that the system produces almost no marginal deterrence. The difference is that the current system manages to punish close to none of the prosecutors responsible for the suppression of exculpatory evidence. Even with the detection problems inherent in the prosecutorial accountability project, consistent punishment of rule-breakers whom are identified would make the system look a bit more like today's criminal justice system. Detection problems persist in the criminal justice system, but deterrence is an observable quality within it.

The invisibility of most misconduct creates major concerns on the certainty front—that, there is no doubt. Efforts to shore up the consistency of the criminal case review and professional discipline regimes can foster not only instrumental compliance, but also improve detection

paigns are not likely to spill over to affect beliefs about the probability of arrest for more serious crimes.”).

²⁸² Barkow, *supra* note 38, at 2094 (“Because the likelihood that a disclosure violation will be detected is so low, prosecutors are less likely to be deterred from engaging in intentional misconduct or from taking steps to ensure that they do not make unintentional mistakes.”).

²⁸³ BUREAU OF JUSTICE STATISTICS, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006–2010 (2012), <https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf>.

²⁸⁴ KENNEDY, *supra* note 115, at 45.

²⁸⁵ *Id.*

²⁸⁶ See *id.* at 9.

and apprehension because the system will be seen as more legitimate than before.²⁸⁷ When instances of misconduct are actually uncovered, the system should address them and should do so transparently. While determining viable means of detecting misconduct and apprehending wrongdoers will inevitably remain a significant concern, it may be that the causal arrow runs both directions. Lack of detection certainly hurts the legitimacy of current modes of accountability, but bolstering those modes' legitimacy may improve detection. In these ways, effective methodological reforms may help address enforcement concerns.

2. Deterrence will drive misconduct further underground

Some may argue that a deterrence-led approach to prosecutorial accountability may lead prosecutors to cover up their misconduct.²⁸⁸ While it is true that the prospect of real punishment may prompt some prosecutors to exert more energy in hiding evidence of misconduct, this critique assumes that misconduct is intentional and knowing. However, a significant amount of misconduct is unintentional, entailing mistakes in judgment and misinterpretations of obligations.²⁸⁹

Even considering instances of intentional misconduct, the worry that these acts will be further suppressed overstates the status quo capacity for detection. As explored above, see *supra* Part IV(C)(1), detection is already a sizable challenge. Prosecutors have thus far avoided detection in many cases, and in those cases in which they did not, they largely avoided apprehension and imposition. A robust regime of professional discipline and deterrent criminal case review could certainly change the stakes and calculations, increasing the risk that a prosecutor would, for example, take extreme measures to hide exculpatory evidence. However, it would also hopefully change expectations and norms within the prosecution function in a way that made such efforts costly, difficult, and less likely to succeed.

3. Reproducing the very problems evident in the criminal justice system

Individuals who believe that deterrence has not served the criminal justice system well may argue that deterrence theory would reproduce problems in the prosecutorial accountability system. While a shift in context will not cure entirely deterrence's shortcomings, many deterrence concepts appear more suitable in the professional regulation and accountability context. Prosecutorial regulation is a far less disparate and

²⁸⁷ See *id.* at 60 ("Research has found that people obey the law not just because they are afraid of being punished or because they believe the law is morally right, but also because they believe the law and its enforcement is impartial and being fairly administered." (internal citation omitted)).

²⁸⁸ See Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2182 (2010).

²⁸⁹ See Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 FORDHAM L. REV. 715, 730 (2011).

far-reaching endeavor than punishing criminal behavior. Gathering information about the field, communicating effectively, and developing widely-applicable strategies should be substantially easier. Moreover, prosecutors operate in a professional capacity, and are thus much more likely to behave like the rational actors that deterrence theory posits will respond to prospective costs and benefits. While lawyers, too, suffer from cognitive and mental health issues that may interfere with rational decision-making,²⁹⁰ the population of lawyers as a whole would likely be more responsive to deterrent measures.

4. Why deterrence theory?

An initial question some may ask is “why choose deterrence theory?” This question seems especially relevant given the prominence that legitimacy theory has achieved in the context of understanding the rift between disaffected communities and law enforcement. “Legitimacy is a feeling of obligation to obey the law and to defer to the decisions made by legal authorities. Legitimacy, therefore, reflects an important social value, distinct from self-interest, to which social authorities can appeal to gain public deference and cooperation.”²⁹¹ Generally, legitimacy refers to public compliance with laws governing society, but the concept also applies to compliance with rules within an organization.²⁹² Legitimacy theorists criticize deterrence approaches in part because “they define people’s relationship to law and legal authorities as one of risk and punishment. This lessens people’s focus upon other aspects of their connection to society, such as shared values and concerns, and encourages people to act in ways that are linked to personal gains and losses.”²⁹³

Unlike a deterrence approach, a legitimacy approach would promote self-regulation over external forms of accountability.²⁹⁴ Legitimacy thus calls upon leaders in District Attorney offices to inculcate prosecutors in values that respect defendants’ rights and affirm constitutional principles like due process. Legitimacy researchers continue to amass evidence supporting their views on how to improve public compliance with State authority,²⁹⁵ potentially problematizing the choice of deterrence theory in the prosecutorial accountability context.

This Article does not challenge the idea that legitimacy, too, may provide valuable insights into prosecutorial accountability. While re-

²⁹⁰ Cf. *Atkins v. Virginia*, 536 U.S. 304, 305 (2002) (discussing how some cognitive and behavioral impairments can undercut a punishment’s deterrent potential).

²⁹¹ Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 235 (2008).

²⁹² See, e.g., Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267 (2014).

²⁹³ Tyler, *supra* note 161, at 310.

²⁹⁴ See, e.g., *id.* at 311–12.

²⁹⁵ See Meares et al., *supra* note 140, at 1195–96 (citing studies that indicate “that legitimacy has a profound impact on behavior”).

searchers have evaluated legitimacy's applicability within corporations and police forces, it seems they have not yet worked with District Attorney offices.²⁹⁶ Without questioning the need for this research, this Article proposes that deterrence theory may provide a more plausible comprehensive approach than legitimacy for a few reasons.

First, a fundamental challenge for prioritizing legitimacy is that the profession entails such significant power and discretion that it may be difficult to encourage its members to comply with a higher but more abstract "authority."²⁹⁷ Prosecutors serve not only as law enforcers, but also, to a large extent, as deciders of what the laws are and what they mean in any given case.²⁹⁸ Combining this vast authority with a duty to serve as an advocate creates perhaps insurmountable challenges to realizing the sometimes-contrary values loosely embodied in the ill-defined prosecutorial duty to seek justice.²⁹⁹

Second, the current evidence indicating that prosecutorial misconduct is fairly prevalent may reflect that shared values—prized in the legitimacy framework³⁰⁰—do not produce a sufficient counterweight to the various pressures (public, cognitive, workload, etc.) inherent in the job. Prosecutors are members of the bar, and in joining the bar they have made a commitment to obey a jurisdiction's rules of professional conduct. In this way, they have already done more to buy in to the system than members of the public do with respect to criminal laws for example. Nevertheless, compliance remains elusive. The explicit, written rules of conduct articulate values that should bolster legitimacy, but apparently do not—or do not enough.

Third, prosecutors by and large endorse if not effectuate deterrence principles in their daily jobs. Building a system of compliance on legitimacy rather than external accountability may be less effective with a population that already subscribes to the cost-benefit mindset upon which deterrence relies.

Importantly, the question of whether deterrence theory and legiti-

²⁹⁶ See, e.g., Tyler, *supra* note 161.

²⁹⁷ A sense of duty to an abstract higher authority does not seem to deter misconduct currently. As noted in Part I(B)(4), the lack of an organized structure for accountability within each prosecutors' office makes enforcement of misconduct nearly impossible. See *supra* notes 64–73 and accompanying text.

²⁹⁸ See, e.g., Luna & Wade, *supra* note 20.

²⁹⁹ See Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 Mo. L. Rev. 999, 1046 (2009) ("Relying on prosecutors to act as anything but advocates in those situations may simply be unrealistic."); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 329 ("even for the most ethical prosecutors, those most committed to the ideal of doing justice, the prosecutorial role inevitably fosters tunnel vision").

³⁰⁰ See Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78, 80 (2014).

macy are mutually exclusive in the prosecutorial accountability context is an open one. While some suggest that deterrence inherently clashes with legitimacy, there may be room for complementary approaches.³⁰¹ Internal self-regulatory efforts warrant encouragement. At the same time, external modes of accountability can play a role in deterring rule-breaking. The internal legitimacy approach largely focuses on top-down changes led by office leaders seeking to redefine an office's values and culture. The latter deterrence-based approach helps promote bottom-up changes by encouraging line-level prosecutors to ensure that their offices understand that they may personally suffer consequences if they violate constitutional or ethical rules. Perhaps legitimacy and deterrence could work together to produce greater rule compliance than either would in isolation.

CONCLUSION

The application of deterrence theory to prosecutorial accountability helps explain why the current system fails to curb prosecutorial misconduct. Building reforms around key deterrence concepts may chart a corrective course that takes the problem of prosecutorial misconduct seriously. To the extent discourse around prosecutorial accountability resists engaging with deterrence theory, proponents of reform should seek clear justifications for that resistance. Deterrence is far from a panacea, but it provides crucial insights that deserve continued attention in the prosecutorial accountability context.

³⁰¹ Cf. Mitchell N. Berman, *Two Kinds of Retributivism*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433 (R.A. Duff & Stuart Green eds., 2011) (arguing that retribution and consequentialist aims of the criminal justice system are not diametrically opposed and can work in harmony).