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Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct

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This Article explores the unfortunately large number of instances in which appellate courts reverse convictions for serious prosecutorial misconduct but do not identify the names of the prosecutors who committed that misconduct. Because judges are reluctant to publicly shame prosecutors whose cases are reversed, this Article advocates that a neutral set of third parties undertake the responsibility of publicly identifying prosecutors who have committed serious misconduct. The naming of prosecutors will shame bad actors, provide a valuable pedagogical lesson for junior prosecutors, and signal to trial judges that certain prosecutors must be monitored more closely to avoid future misconduct.

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INTRODUCTION

Prosecutors are the most powerful actors in the American criminal justice system.[1] Unfortunately, in exercising that power, prosecutors occasionally[2] cross the line and commit misconduct.[3] This is not surprising. Much prosecutorial misconduct stems from the fact that law schools and district attorneys' offices often provide too little training demonstrating where to draw the line between aggressive prosecution and misconduct.[4] Taking a glass-half-full approach, we can take solace in the fact that much prosecutorial misconduct is

[1] *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 4 (2007) ("[P]rosecutors [hold] almost all of the cards."); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393 (1992) (explaining that "prosecutors wield vastly more power than ever before").

[2] Because most criminal cases are resolved by plea bargains and not subject to appeal, there is often little opportunity to discover prosecutorial misconduct. And in cases when defendants do go to trial, indigent defendants are sometimes represented by underpaid and overworked criminal defense lawyers who lack the time or the ability to recognize and preserve claims of prosecutorial misconduct. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851, 879, 890 n.140, 909, 915-16 (1995) (noting that "anectdotal evidence indicates that prosecutorial misconduct occurs at a rate higher than is indicated in reported cases" and that "it is probably fair to say that many instances of *Brady*-type misconduct are never discovered").

[3] *See generally* BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT (2007) (detailing types of errors and misconduct committed by prosecutors and other actors in criminal justice system); JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT (2003) (providing thorough assessment of various types of prosecutorial misconduct).

[4] *See* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 767-69 (1999) (discussing lack of ethics training provided by prosecutors' offices); *see also* Jamison v. Collins, 100 F. Supp. 2d 647, 673 (S.D. Ohio 2000) (granting writ of habeas corpus in capital case because prosecutors failed to turn over exculpatory evidence and noting that two lead prosecutors stated in their depositions that "they received no training from the Hamilton County Prosecutor's Office as to what constituted exculpatory evidence"); 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, 63 (2005) ("[A]ssistant prosecutors generally have less training and experience prosecuting criminal cases. Consequently, assistants are, for the most part, less familiar with state and federal constitutional strictures applicable to law enforcement, and more susceptible to inadvertent constitutional violations.").

inadvertent[5] and not prejudicial enough to necessitate reversing a defendant's conviction.[6]

What is surprising, and what certainly qualifies as a glass-half-empty perspective, is the tepid reaction from many judges when cases of serious misconduct come to light. Appellate courts only overturn defendants' convictions for prosecutorial misconduct when the prosecutors' misdeeds are very serious and result in clear prejudice to the defendant.[7] Yet when courts reverse these serious cases of misconduct, appellate courts often do not call out the offending prosecutors by name in judicial opinions.[8] Rather, many judges go to great lengths to redact the names of misbehaving prosecutors from trial transcripts quoted in judicial opinions.[9] And many prosecutors' offices do not sternly discipline prosecutors whose cases have been overturned because of misconduct.[10] In the absence of such public

[5] *See* Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 550 (1987) (arguing that primary causes of prosecutorial misconduct are endemic to system).

[6] For criticism of the incentive structure that the harmless error doctrine creates for prosecutors, see, for example, Gershman, *supra* note 1, at 424-32.

[7] *See infra* notes 28-31 and accompanying text.

[8] Scholars have noted in passing that appellate courts often fail to mention prosecutors by name when reversing convictions. *See, e.g.*, Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 830 (1999) ("Yet, when faced with prosecutorial misconduct, some judges shy away from 'naming names' and making it clear that a particular prosecutor has violated the norms of a government attorney."); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2126 (2000) ("[E]ven in the face of egregious behavior, orders announcing these reversals rarely single out anyone by name to bear the blame."); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 172-73 (2004) ("Indeed, few convictions are overturned by virtue of prosecutorial misconduct and, in the rare incidences of reversal, the appellate court opinions invariably neglect to identify the prosecutor by name."); Paul J. Speigelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 169-70 (1999) (finding that in survey of 45 federal cases reversed for improper arguments by prosecutors, only six decisions named prosecutor); *see also* United States v. Modica, 663 F.2d 1173, 1186 n.7 (2d Cir. 1981) ("We note that appellate courts have generally been reluctant to name the individual prosecutors whose comments have been found improper. Among the many reported decisions of this Court in the last decade, apparently only two identify the prosecutor."). To date, however, there has not been a systematic analysis of this phenomenon.

[9] *See infra* notes 50-59 and accompanying text.

[10] *See* Ryan Patrick Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479, 489 (2006) (explaining how Los Angeles County District Attorney's office resisted firing prosecutor responsible for multiple instances of misconduct, which culminated in rebuke by California Supreme Court); Barry

shaming for their misdeeds, there is little external pressure from the criminal justice system to prevent prosecutorial misconduct.[11] Put simply, other than their own personal moral code, there is little incentive for prosecutors to avoid misconduct.[12]

That prosecutors are not publicly called on the carpet for their misbehavior is troubling for three reasons. First, sweeping misconduct under the rug allows rogue prosecutors to keep their jobs. In future cases, they will be free to commit further misdeeds that may lead to the conviction of the innocent and the reversal of convictions of those who are guilty.[13] Second, because prosecutors are not named individually, criticism for their misconduct falls on the district attorney's office as a whole.[14] Rogue prosecutors thus sully the reputation of the entire office, leaving ethical prosecutors to labor under a cloud of misconduct. Third, the failure to publicly identify the bad apples denies junior prosecutors a valuable pedagogical lesson that would help them to avoid similar mistakes. At present, district attorney's offices hire many junior prosecutors straight out of law school where they learn a considerable amount of doctrinal law but very little about how to make ethical decisions in everyday situations. And once law students transition to serve as full-time prosecutors,

Tarlow, *RICO Report*, CHAMPION, Dec. 2001, at 56, 57-58 (discussing lack of punishment meted out by Justice Department's Office of Professional Responsibility).

[11] *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) ("[A]t present insufficient incentive exists for a prosecutor to refrain from *Brady*-type misconduct."); *see also* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 68 (2005) ("Even when the appellate court reverses a conviction on grounds of prosecutorial misconduct, the prosecutor who engaged in the misconduct generally escapes any repercussions."). Of course, there is significant internal pressure for prosecutors to behave ethically because most have a strong moral code and a desire not to commit misconduct.

[12] *See* Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1 (quoting Professor Bennett Gershman as saying, "There is no check on prosecutorial misconduct except for the prosecutor's own attitudes and beliefs and inner morality").

[13] *See* Adam Liptak, *Prosecutor Becomes Prosecuted*, N.Y. TIMES, June 24, 2007, at 4 (quoting University of Michigan Law School Professor Sam Gross as saying, "I don't know of a single case of discipline against a prosecutor who engaged in misconduct that produced [a] wrongful conviction and death sentence, and many of the cases involve serious misconduct").

[14] *See, e.g.*, Brian Rogers, *DA's Office Plugs Onward: Prosecutors Say the Fallout from Rosenthal's Misdeeds Stings*, HOUST. CHRON., Jan 22, 2008, at B1 (quoting senior prosecutor as saying: "You never know when you wake up and turn on the news what they're going to be saying about us, globally. We're all clumped together on being unethical and racist and liars" because of misdeeds of one prosecutor).

district attorneys' offices offer insufficient training to avoid the potential for misconduct that lurks around every corner.[15] For prosecutors pressed with busy trial schedules, the public identification of their colleagues' misconduct would have great pedagogical value.

In an ideal world, appellate judges or high-level supervisors in district attorneys' offices would publicly name prosecutors who commit misconduct. But, for the most part, that does not happen.[16] In the absence of key players stepping forward, the next best solution is for a third party to serve as an honest broker that could bring the names of offending prosecutors to light.

In recent years, many law schools have established "Innocence Projects" to work to free the wrongly convicted.[17] This model could be used to create a "Prosecutorial Misconduct Project" that tracks instances in which appellate courts reverse cases due to prosecutorial misconduct. The projects would focus on one or two core types of misconduct, such as failing to turn over favorable evidence to the defendant[18] or striking prospective jurors based on race,[19] both of which are common types of misconduct that violate longstanding United States Supreme Court precedent.[20] If an appellate court's decision did not name the offending prosecutor, project volunteers would then research and ascertain the prosecutor's identity. Thereafter, the Prosecutorial Misconduct Project would distribute a list to defense lawyers, prosecutors, judges, and bar disciplinary committees that describes the facts that led to the reversals and identifies the prosecutors who litigated the cases.[21]

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[15] *See, e.g.*, Dunahoe, *supra* note 4, at 63 (lamenting lack of training for assistant prosecutors).

[16] *See infra* Part II.

[17] *See generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003) (chronicling wrongful convictions of innocents).

[18] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring prosecutors to disclose favorable and material evidence to defendant).

[19] *See* Batson v. Kentucky, 476 U.S. 79, 93-94 (1986) (forbidding racial discrimination in jury selection and creating burden-shifting test to demonstrate inappropriate strikes).

[20] The Innocence Project, Understand the Causes: Forensic Science Misconduct, http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited Jan. 21, 2009) (listing suppression of exculpatory evidence as most common form of prosecutorial misconduct in DNA exonerations).

[21] If there were a concern about neutrality, the project could be expanded to identify the names of defense lawyers whom courts had found to have provided unconstitutionally deficient representation. Throughout this Article, I focus only on prosecutorial misconduct because courts do not appear to be reluctant to name

A law school's role in its Prosecutorial Misconduct Project would not be to make judgments about the conduct of particular prosecutors; appellate courts reversing the underlying conviction would have already made that determination. Instead, law schools would serve an information-forcing function, something that they are institutionally qualified to do.

By regularly publishing the names of prosecutors who commit misconduct, patterns would begin to emerge. The same prosecutors would likely show up repeatedly.[22] And with the lists in the hands of defense lawyers, local bar associations, and judges, it would be far more difficult for supervisors in district attorneys' offices to ignore the actions of offending prosecutors, thus raising a challenge to the culture of insulation that allows misconduct to go unpunished.[23]

Part I of this Article explores instances in which appellate courts reversed criminal convictions for serious prosecutorial misconduct but did not name the prosecutors who committed the misconduct. Part II then studies prosecutorial misconduct in capital cases and finds that judges are reluctant to identify misbehaving prosecutors by name, even when the defendant's life was on the line. In particular, Part II analyzes dozens of capital cases decided between 1997 and 2007 in which courts reversed convictions or death sentences for failure to turn over favorable evidence or for striking prospective jurors based on race. Part II finds that judicial opinions mention prosecutors by name in less than half of these capital cases. Part III then explores the reasons why judges and senior prosecutors are reluctant to publicly

defense lawyers who have provided ineffective assistance of counsel. *See, e.g.*, Gershman, *supra* note 1, at 445 ("This failure to discipline prosecutors contrasts sharply with the fairly common use of disciplinary sanctions against private attorneys in civil and criminal matters."); Mike McKee, *Do Judges Mask Misconduct? Prosecutors Are Often Unnamed When Opinions Blast Their Work*, RECORDER, Aug. 8, 2006, at 1 (explaining that appellate attorneys believe judges are reluctant to name misbehaving prosecutors but "courts don't hesitate in naming — and disgracing — defense lawyers"). Nevertheless, if the Prosecutorial Misconduct Project would be perceived as more neutral and therefore more effective, then it would be worthwhile to expand it to include defense lawyers.

[22] *See infra* notes 48-49, 243-46 and accompanying text (discussing Center for Public Integrity's database of thousands of cases of prosecutorial misconduct, including many repeat offenders).

[23] *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 506 (2004) (discussing pervasive problem of supervisors tolerating police misconduct and stating that "a law enforcement organization that tolerates repeated, notorious instances of the worst kinds of brutality — even by a minority of police officers — effectively signals to its employees that a certain level of violence is acceptable despite formal policies to the contrary").

shame or discipline prosecutors whose cases are reversed for misconduct. Part IV first presents the burgeoning "shaming" literature, which debates whether shaming punishments should have a place in the criminal justice system. It then briefly applies this literature to prosecutorial misconduct. Finally, Part V details how third parties — namely law school "Prosecutorial Misconduct Projects" — could provide a valuable service by publicly naming prosecutors who commit misconduct.

I. PROSECUTORIAL MISCONDUCT SEVERE ENOUGH TO REVERSE A CONVICTION BUT NOT TO NAME THE PROSECUTOR

There are numerous ways for courts to reverse criminal convictions for prosecutorial misconduct, such as failing to turn over exculpatory evidence,[24] selecting jurors based on unconstitutional criteria,[25] or knowingly using perjured testimony,[26] to name just a few.[27] Yet, the number of successful challenges to convictions begotten through misconduct remains rare. This is because prosecutorial misconduct claims are typically assessed under a harmless error standard.[28] Thus, even when defendants can point to a constitutional violation, they still must face the difficult task of pointing to identifiable prejudice they have suffered because of the violation.[29] Because courts are often reluctant to find errors to be harmful,[30] we can safely conclude that

[24] *See infra* notes 90-99 and accompanying text.

[25] *See infra* notes 120-28 and accompanying text.

[26] *See* Carissa Hessick, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 255, 256 (2002).

[27] For a list of additional misconduct, see Dunahoe, *supra* note 4, at 69-70.

[28] *See* Henning, *supra* note 8, at 721-22 ("[A] court need not precisely define prosecutorial misconduct because a finding of misconduct usually does not trigger relief unless the prosecutor's acts undermined the fairness of the proceeding or confidence in the jury's verdict.").

[29] *See* Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1103 (1994) ("[P]rosecutors are aware that as long as their ethical misconduct is not held to have substantially influenced the outcome of the trial, the prosecutor will not face dismissal or suppression.").

[30] Indeed, Professor Gershman argues that the harmless error doctrine has "unleash[ed] prosecutors from the restraining threat of appellate reversal" and that as a result, "many defendants have had their convictions affirmed despite clear prosecutorial overreaching." Gershman, *supra* note 1, at 427, 431; *see also* Hessick, *supra* note 26, at 263 ("A prosecutor with a strong case takes only a small risk in suborning perjury because under the harmless error rule, the court may decline to grant a new trial, in spite of perjured testimony[,] where evidence of a defendant's guilt is overwhelming.").

when a criminal conviction is reversed for prosecutorial misconduct there typically has been serious misconduct, not simply a "technicality."[31]

A. Omitting Names: From the Supreme Court on Down, Justices and Judges Do Not Name Prosecutors Who Have Committed Misconduct

If misconduct is important enough to reverse the conviction of a criminal defendant, then it would seem sensible that the public and particularly the legal community should know the name of the perpetrator of the misconduct. Yet, courts often go out of their way to avoid publicizing the names of prosecutors. The United States Court of Appeals for the Ninth Circuit's decision in *United States v. Kojayan*[32] is particularly instructive on this point.

In an opinion by prominent Judge Alex Kozinski, the court in *Kojayan* reversed a conviction for conspiracy to possess heroin after it came to light that the Assistant United States Attorney had lied in open court about the availability of a witness and the fact that the witness had a cooperation agreement.[33] In reversing the conviction, Judge Kozinski spoke in sweeping terms about how "lawyers representing the government in criminal cases serve truth and justice first."[34] The opinion has been cited nearly one thousand times[35] and is standard reading in some prosecutors' offices.[36]

More noteworthy than Judge Kozinski's prose, however, is the fact that he initially named the prosecutor forty-nine times in the slip opinion but subsequently deleted all references to the prosecutor's name from the final version of the opinion published in the Federal Reporter.[37] But Judge Kozinski did not act fast enough to permanently conceal the prosecutor's identity; the legal database LexisNexis® had already uploaded the original version of the opinion that included the

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[31] *See* William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 161 (2001) ("Intentional prosecutor and judge errors are more likely to be found harmful and lead the appellate court to reverse the defendant's conviction than are inadvertent errors.").

[32] 8 F.3d 1315 (9th Cir. 1993).

[33] *Id.* at 1318.

[34] *Id.* at 1323.

[35] An online search found 990 citing references (Westlaw Keycite, Feb. 16, 2009).

[36] *See* Mary Whisner, *When Judges Scold Lawyers*, 96 LAW LIBR. J. 557, 557 n.2 (2004) ("[T]he U.S. Attorney's office reportedly gives the [*Kojayan*] case to '[e]veryone who is trained there . . . because it really teaches a good lesson.'" (quoting Emily Bazelon, *The Big Kozinski*, LEGAL AFF., Jan.-Feb. 2004, at 23, 29)).

[37] *See* Henning, *supra* note 8, at 830.

prosecutor's name.[38] When told about the original version being available on LexisNexis®, Judge Kozinski responded with surprise and "wince[d]."[39]

Judge Kozinski is not alone in his desire to protect the identity of prosecutors who have committed severe misconduct.[40] Although the United States Supreme Court has specifically stated that one way to discipline misbehaving prosecutors is to "publically chastise[] the prosecutor by identifying him in [the court's opinion]," the Court has rarely followed its own advice.[41]

In the 2004 case of *Banks v. Dretke*, the Supreme Court reversed a death sentence because prosecutors had deliberately withheld the fact that one key witness was a paid police informant and failed to notify the trial court that multiple witnesses had testified untruthfully.[42] Among other criticism, the Supreme Court explained that "the State persisted in hiding [the key witness's] informant status and misleadingly represented that it had complied in full with its *Brady* [*v. Maryland*] disclosure obligations."[43]

Despite this egregious misconduct, the Court never identified the prosecutors involved. Instead, in the introduction and factual history section of its opinion, the Court referred forty-two times to "the State" and "the prosecutors."[44] In many of these instances and other references throughout the body of the opinion, it would have made more sense grammatically to use the prosecutors' actual names.[45]

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[38] *See* United States v. Kojayan, No. 91-50875, 1993 U.S. App. LEXIS 19873, at *7 (9th Cir. Aug. 4, 1993).

[39] Emily Bazelon, *The Big Kozinski*, LEGAL AFF., Jan.-Feb. 2004, at 23, 28.

[40] For more background on the efforts by the U.S. Attorney's Office to eliminate reference to the prosecutor's name, see Henry Weinstein, *U.S. Attorney Asks Court to Erase Criticism*, L.A. TIMES, Oct. 4, 1993, at B1. For another example of a court revising its opinion after its release to eliminate reference to the prosecutor, see *United States v. Horn*, 811 F. Supp. 739, 741 n.1 (D.N.H. 1992) ("The order has been revised to eliminate the name of the lead prosecutor."). And for an example of the Department of Justice unsuccessfully seeking to have a prosecutor's name removed from an opinion, see Fred Zacharias, *Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 764 n.150 (2001) (discussing United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993)).

[41] United States v. Hasting, 461 U.S. 499, 506 n.5 (1974) (noting usefulness of naming prosecutors but redacting name of prosecutor who had commented on defendant's failure to testify and upholding conviction on harmless error grounds).

[42] 540 U.S. 668, 675 (2004).

[43] *Id.* at 693.

[44] *See id.* at 674-89.

[45] For instance, it would have made much more sense to use the prosecutor's actual name in the following sentence from the Court's opinion: "If it was reasonable for Banks to rely on the prosecution's full disclosure representation, it was also

The Supreme Court's failure to name prosecutors is merely the tip of the iceberg. In 2003, the Center for Public Integrity released a study of more than 11,000 cases alleging prosecutorial misconduct in appellate opinions issued between 1970 and 2003.[46] In 2,012 of those decisions, courts found the prosecutor's misconduct sufficiently harmful to reverse the defendant's conviction or sentence.[47] Although the Center for Public Integrity did not compute the number of instances in which the prosecutor was identified by name, it did create an online database that listed all of the misconduct cases by state. Analyzing this database, I found that in the 2,012 cases reversed for prosecutorial misconduct, courts named the offending prosecutor in only 517 decisions.[48] That amounts to courts naming prosecutors in approximately twenty-five percent of cases.[49]

B. Redacting Names To Actively Shield the Identity of Misbehaving Prosecutors

Even more troubling than simply omitting the names of prosecutors who have committed misconduct are some judges' efforts to delete prosecutors' names from trial transcripts quoted in judicial opinions. For instance, in *United States v. Sterba*, a federal prosecutor made representations to the court during trial that later proved to be false.[50]

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appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Id.* at 694.

[46] *See* THE CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (2003), http://projects.publicintegrity.org/pm/default.aspx?sid=sidebarsa &aid =40 (last visited Feb. 9, 2009) [hereinafter CENTER FOR PUBLIC INTEGRITY].

[47] *Id.* The report also tracked many other instances in which courts found prosecutorial misconduct but upheld the convictions and sentences because the error was harmless. *See id.*

[48] Summary sheets tracking this information are on file with the author.

[49] The Center for Public Integrity data indicate wide variations in the naming practices by state. In Montana, Vermont, Alaska, and Hawaii, courts reversed a total of 54 cases for prosecutorial misconduct, but not a single court in any of those states identified the prosecutor by name. By contrast, Missouri courts reversed 77 cases for prosecutorial misconduct and identified the prosecutor by name in 50 of those instances; North Carolina courts found 14 cases that merited reversal and named the prosecutor in almost all of them. The Missouri and North Carolina approach is certainly the exception and not the rule, however. The overwhelming majority of states named only a fraction of prosecutors when reversing cases for misconduct. These figures were determined by compiling information from THE CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS, IN YOUR STATE, http://www.publicintegrity.org/pm/states.aspx (last visited Feb. 9, 2009).

[50] 22 F. Supp. 2d 1333, 1334-35 (M.D. Fla. 1998).

The trial judge granted a mistrial and issued a ten-page opinion quoting the prosecutors' false statements from the transcript.[51] Yet, rather than simply excerpt the transcript, the judge redacted the prosecutor's name and replaced it with the initials for Assistant United States Attorney ("AUSA") nearly forty times.[52]

Judge Kozinski took the very same approach in his *Kojayan* opinion castigating a federal prosecutor for deceiving the court about a key witness's cooperation agreement.[53] In the original opinion, Judge Kozinski quoted from the trial transcript to highlight an inappropriate objection made by the prosecutor — Jeffrey S. Sinek — that served only to interrupt the defense lawyer's summation.[54] In the final version of the opinion published in the Federal Reporter, Judge Kozinski replaced Sinek's name with "AUSA."[55] Even more remarkably, when Judge Kozinski quoted from the transcript of the Ninth Circuit oral argument, in which Sinek continued to represent the United States, Kozinkski redacted the oral argument transcript to replace two references to Sinek's name with AUSA.[56]

Even the Supreme Court of the United States has redacted prosecutors' names from trial transcripts while simultaneously criticizing their conduct. In a prominent case in which prosecutors were accused of using peremptory challenges to eliminate ten of eleven black prospective jurors based on race, the Court strongly suggested that prosecutors had violated the Equal Protection Clause of the Fourteenth Amendment.[57] Evidence showed that the prosecutors asked different voir dire questions depending on the race of the prospective jurors.[58] The Court appeared impressed by this evidence and quoted the transcript in its opinion. Yet instead of simply excerpting the full transcript, the Court eliminated the prosecutors' names and replaced them with "[Prosecutor]."[59]

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[51] *Id.*

[52] *Id.* at 1334-38.

[53] *See supra* note 33 and accompanying text.

[54] *See* United States v. Kojayan, No. 91-50875, 1993 U.S. App. LEXIS 19873, at *19 (9th Cir. Aug. 4, 1993).

[55] *See* United States v. Kojayan, 8 F.3d 1315 *passim* (9th Cir. 1993).

[56] *Compare id. passim* (prosecutor's name excluded), *with Kojayan*, 1993 U.S. App. LEXIS 19873, at *16 (prosecutor's name included).

[57] *See* Miller-El v. Cockrell, 537 U.S. 322, 323-25 (2003).

[58] *Id.* at 332-33.

[59] *Id.* at 333. In a subsequent review of the same conviction, the Court did cite the prosecutor's name. *See* Miller-El v. Dretke, 545 U.S. 231, 256 (2005).

C. Failure to Identify Repeat Offenders Because Each Judge Thinks This is the Prosecutor's First Offense

As Part II.C of this Article discusses, there are a variety of reasons why judges might decline to name misbehaving prosecutors. One primary reason may be a judge's belief that this is the prosecutor's first act of misconduct and that reversing the prosecutor's hard-won conviction is penalty enough to deter the prosecutor from committing misconduct in the future.[60] Put simply, the judge might be acting out of compassion because of a belief that the prosecutor was simply misguided in this particular case and does not deserve a public shaming that will harm her reputation.[61]

This act of compassion might be legitimate if the attorney is guilty of nothing more than an accidental first offense. But what if the prosecutor is a serial offender who has repeatedly escaped discipline for prior misconduct? What is to say courts have not already given the prosecutor two, three, or even more free passes?

The example of former federal prosecutor Karen Schmid Cox is illustrative.[62] In the late 1990s, Cox handled a case, *United States v. Sterba*,[63] where the defendant was charged with soliciting sex with a minor over the Internet. At Sterba's trial, Cox identified a key witness to the court, jury, and defense counsel as Gracie Geggs.[64] Yet this was not the witness's true name, which Cox knew was Adria Jackson.[65] Because of this deception, the defense was unable to discover the witness's criminal record or her past activities as an informant.[66] When this deception came to light toward the end of trial, the judge ordered a mistrial, took the highly unusual step of barring a second prosecution, and reported the misconduct to the state bar.[67] Although the federal judge described Cox's conduct as "patent[ly] disingenuous," he spared her any published shaming.[68] Moreover, in

[60] However, some scholars contend that reversing a conviction is no deterrent to the prosecutor whatsoever. *See* Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 976 (1984).

[61] For discussion on the importance of signaling in setting and determining lawyers' reputations, see Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 192-94 (2008).

[62] *See* Tarlow, *supra* note 10, at 58 (describing Cox's saga as "fiasco").

[63] 22 F. Supp. 2d 1333 (M.D. Fla. 1998).

[64] *Id.* at 1335.

[65] *Id.*

[66] *Id.* at 1339.

[67] *Id.* at 1343.

[68] *Id.* at 1338.

quoting from the official transcript, the judge redacted Cox's name and replaced it with "AUSA" at least three dozen times.[69]

Less than a year later, Cox's conduct was the subject of another prosecutorial misconduct decision.[70] In *Ruiz v. State*, the Florida Supreme Court found that Cox engaged in "egregious misconduct" by repeatedly making improper arguments such as suggesting that jurors were duty bound to sentence the defendant to death and implying that the defendant had to be guilty because innocent people are not put on trial.[71]

Although *Ruiz* was argued to the Florida Supreme Court well after the federal decision in *Sterba*, the *Ruiz* opinion makes no reference to Cox's past misconduct. We can infer that the Florida Supreme Court had no idea the district court had chastised her less than a year earlier for prosecutorial misconduct. Unlike the *Sterba* court, however, the Florida Supreme Court did not redact Cox's name from the trial transcript and it referred to her by name repeatedly throughout its opinion.[72]

A few years later, Cox was again publicly castigated by the Florida Supreme Court for prosecutorial misconduct.[73] Acting on a petition from the Bar, the Florida Supreme Court ordered that Cox be suspended for one year and that she demonstrate rehabilitation before being reinstated.[74] Shortly thereafter, Cox resigned from the United States Attorney's Office, approximately three years after the district

[69] *Id.* at 1334-38.

[70] Cox was a career prosecutor in the Hillsboro County State Attorney's Office before joining the United States Attorney's Office. Tarlow, *supra* note 10, at 58.

[71] 743 So. 2d 1, 4, 5, 7 (Fla. 1999).

[72] *See id.* at 5-10.

[73] In *Rogers v. State*, 783 So. 2d 980 (Fla. 2001), decided almost exactly two years after the *Ruiz* decision, the Florida Supreme Court again found that Cox had committed misconduct, this time by ordering the warrantless search of a defendant's jail cell in order to obtain evidence for an upcoming trial and by making the same type of improper closing argument that she gave in the *Ruiz* case. *See Rogers*, 783 So. 2d at 991-92, 1002 ("[T]he conduct of the prosecutors of the Hillsborough County State Attorney's Office who ordered investigators of that office to engage in a search of Rogers' cell and seize his personal papers was clearly improper."). Although the court ultimately found that these errors were not sufficiently prejudicial to warrant reversal of the defendant's conviction, the court did mention Cox by name twice and specifically stated that she had committed prosecutorial misconduct in the *Ruiz* case two years earlier. *Id.* at 991, 1002 n.6 ("Assistant State Attorney Karen Cox was the lead prosecutor in this case and the prosecutor who presented the improper 'Operation Desert Storm' closing argument in *Ruiz v. State*.").

[74] Florida Bar v. Cox, 794 So. 2d 1278, 1287 (Fla. 2001).

court issued its decision in *Sterba*.[75] One wonders whether her departure might have occurred faster had she initially been identified in the decision and had her name, rather than "AUSA," appeared unflatteringly in print dozens of times.

Prosecutor Cox's story is not an isolated incident. Consider also the saga of California prosecutor Rosalie Morton, who the California Supreme Court identified by name for prosecutorial misconduct in the death-penalty case of *People v. Hill*.[76] After a decade of appeals, the California Supreme Court reversed Hill's conviction partly[77] because Morton had mischaracterized evidence, referred to facts not in evidence, and misstated the law.[78]

The California Supreme Court repeatedly identified Morton by name[79] and criticized her misconduct.[80] More interestingly, the court noted that Morton's conduct had been criticized in at least three prior cases, though she was only named in one of the judicial decisions, and even that decision was unpublished:

> We take judicial notice of a 1987 unpublished opinion of the Court of Appeal . . . affirming a conviction of Roderick Congious, which not only cites Deputy District Attorney Rosalie Morton for prosecutorial misconduct, but identifies her as the offending prosecutor in two other[], published appellate decisions in which the Court of Appeal found prosecutorial misconduct without identifying the prosecutor.[81]

Although the appellate court issued its unpublished opinion citing Morton by name while pre-trial proceedings in *Hill* were ongoing, the

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[75] Tarlow, *supra* note 10, at 63.

[76] 952 P.2d 673, 679 (Cal. 1998). The Morton saga is discussed in Speigelman, *supra* note 8, at 121-28. Interestingly, although Professor Speigelman is very critical of "the prosecutor's practice of misconduct," he does not identify her by name in his law review article. *Id.* at 121.

[77] *Hill*, 952 P.2d at 698-99 ("Morton's misconduct, considered in the aggregate, may very well be sufficient of itself to require reversal of both the guilt and penalty judgments. We need not reach that question, however, for other errors, as previously discussed, occurred in this case.").

[78] *Id.* at 684-94.

[79] Speigelman, *supra* note 8, at 170 (noting that California Supreme Court named her more than 120 times).

[80] Unlike many other courts, the California Supreme Court is more prone to naming prosecutors who have committed misconduct. *See* McKee, *supra* note 21 ("Unlike the appellate courts, though, the California Supreme Court typically names prosecutors who've done wrong or been accused of it.").

[81] *Hill*, 952 P.2d at 699-700 (citations omitted).

trial judge in that case was likely unaware of it.[82] And the judge certainly could not have been aware of the two prior decisions criticizing Morton's conduct but not identifying her by name. Indeed, it appears that the California Supreme Court only became aware of Morton's prior misconduct because Hill's appellate lawyers dug up the information and asked the court to take judicial notice of it.[83]

One might wonder whether the trial judge or prosecutor's office might have barred Morton from Hill's trial in 1988 had the California Appellate Court published its opinion in 1987. And, in turn, one can wonder whether the misconduct that led to the 1987 opinion rebuking Morton might not have occurred if the earlier two appellate courts that criticized her conduct had identified her by name. Indeed, after the stinging rebuke of Morton by the California Supreme Court, she resigned her position as a prosecutor[84] and has not been noted for any further misconduct.[85]

The Cox and Morton incidents demonstrate how the same prosecutor can engage in flagrant and repeated misconduct. These tales also demonstrate how misbehaving prosecutors may relinquish their positions if courts sufficiently chastise them by name. Cox and Morton are not alone in receiving a free pass for the first instance of misconduct only to be named in a subsequent judicial opinion for misbehavior.[86] And they are certainly not the only prosecutors who have resigned their positions following a public shaming.[87]

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[82] *See* Speigelman, *supra* note 8, at 124.

[83] *See Hill*, 952 P.2d at 690 n.4 (noting "defendant's request for judicial notice").

[84] Mike Zapler, *State Bar Ignores Errant Lawyers: Prosecutors, Defense Rarely Disciplined*, SAN JOSE MERCURY NEWS, Feb. 12, 2006, at 1A.

[85] Although the California Supreme Court referred Morton to the State Bar for investigation, *Hill*, 952 P.2d. at 703 n.13, the Bar took no action against her. McKee, *supra* note 21.

[86] *See, e.g.*, United States v. Singleterry, 646 F.2d 1014, 1019-20 (5th Cir. Unit A June 1981) (naming AUSA Robert Berg for misconduct and indicating that he had not been named in recent prior instance of misconduct, *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979)).

[87] For instance, consider how two Department of Justice lawyers resigned after being named and sharply criticized by the United States Court of Appeals for the Sixth Circuit following their aggressive attempt to convict John Demjanjuk as the infamous Nazi concentration camp guard "Ivan the Terrible." *See* Demanjuk v. Petrovsky, 10 F.3d 338, 339-40 (6th Cir. 1993); Morton, *supra* note 29, at 1083. Indeed, the resignations are all the more noteworthy considering that the Justice Department disciplined neither lawyer. *See* Dan Christensen, *Was Counsel Guilty of Fraud?:* Demjanjuk *Case Now Haunts Former Prosecutor*, LEGAL TIMES, Jan. 24, 1994, at 2. The lead prosecutor maintains that "he has been 'unfairly harmed by the panel's opinion' and committed no fraud." *Id.*

II. FAILURE TO NAME THE PROSECUTOR IN CAPITAL REVERSALS

The cases discussed in Part I are troubling, particularly given that a number of them carried the ultimate sanction of death.[88] While judges might be reluctant to publicly tarnish a prosecutor's career over a case involving a relatively minor crime,[89] it is difficult to see why judges would have such reluctance in death-penalty cases. To investigate this, I surveyed successful claims involving two major types of prosecutorial misconduct — failure to turn over favorable evidence to defendants (so-called *Brady* violations) and the striking of prospective jurors based on race (so-called *Batson* violations) in death-penalty cases between 1997 and 2007. The results demonstrate that while courts seem more willing to name the perpetrators of misconduct in capital cases, more than 50% of courts were still unwilling to name misbehaving prosecutors.

A. Failure to Name Prosecutors When Finding Brady *Violations in Capital Cases*

Pursuant to the Supreme Court's decision in *Brady v. Maryland*, prosecutors are required to turn over evidence that is favorable — exculpatory or serves impeachment purposes — and that is material either to guilt or punishment, regardless of whether the prosecutor acts in good faith or bad faith in not turning over the evidence.[90] If the evidence is favorable to the defendant but not material — meaning that there is no reasonable probability that it would have changed the outcome — then a prosecutor's failure to disclose the evidence will not lead to reversal[91] of the conviction or sentence.[92]

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[88] The Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004), was a death-penalty case, as was the *Ruiz* case prosecuted by Karen Cox and the *Hill* case prosecuted by Rosalie Morton. *See supra* notes 42-45, 71-72, 76-83 and accompanying text.

[89] Of course, any incarceration would not seem minor to the defendant — the victim of prosecutorial misconduct.

[90] 373 U.S. 83, 87 (1963).

[91] United States v. Bagley, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

[92] My study is limited to actual *Brady* violations, as opposed to what some scholars have termed "*Brady*-type misconduct." Under the *Brady* doctrine, courts will not reverse a conviction unless the withheld evidence would have created a reasonable probability that the outcome would have been different. Codes of ethics go further, however, and can require a prosecutor to turn over evidence beyond what is covered by the *Brady* doctrine. Failure to comply with these ethics rules amounts to *Brady*-type misconduct. *See* Meares, *supra* note 2, at 909; Rosen, *supra* note 11, at 696.

Brady claims are one of the most common claims brought by prisoners,[93] including those on death row.[94] In fact, of the different types of prosecutorial misconduct, *Brady* claims are the most common violation found by courts.[95] Nevertheless, in the grand scheme of things, *Brady* claims are rarely granted.[96] A study of prosecutorial misconduct by the Chicago Tribune reviewed 11,000 homicide cases between 1963 and 1999 in which there were allegations that the prosecutor concealed exculpatory evidence or presented false information. It found that only 381 convictions were thrown out during that thirty-six-year period.[97] Of those, sixty-seven led to death sentences.[98] The authors of the study were convinced that the reversals accounted for "only a fraction of how often prosecutors commit such deception — which is by design hidden and can take extraordinary efforts to uncover."[99]

Undertaking a smaller project, I endeavored to find out what has happened when courts reversed capital convictions or death sentences for *Brady* violations. Between 1997 and 2007, federal and state courts reviewed more than 250 *Brady* claims in capital cases but found reversible error in only twenty-six cases.[100] Given such serious situations, one might expect judicial opinions to name the prosecutors

[93] *See* Sheri Lynn Johnson, *Wishing Petitioners to Death: Factual Misrepresentations in Capital Cases in the Fourth Circuit*, 91 CORNELL L. REV. 1105, 1132 (2006) ("Because it is unclear whether a free-standing claim of innocence is cognizable on habeas corpus, the most common vehicle for asserting an innocence claim in federal habeas corpus is a *Brady* claim."); *see also* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 54 (stating that *Brady* claims are most common fair trial claim brought in wrongful conviction cases).

[94] Johnson, *supra* note 93, at 1108 n.5 ("The three most common species of claims in capital cases are ineffective assistance of counsel claims, *Batson* claims, and *Brady* claims.").

[95] DAVIS, *supra* note 1, at 131 ("*Brady* violations are among the most common forms of prosecutorial misconduct.").

[96] *See* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1141 (2004) ("[W]hile claims of governmental failure to turn over *Brady* material are common, one study found only 270 federal and state court cases in the last forty years that had resulted in reversal of conviction or a new hearing due to withheld *Brady* material."); *see also* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 644 (2002) (arguing that *Brady* right is mirage and that ethical prosecutors can comply with doctrine without affording pretrial discovery).

[97] *See* Armstrong & Possley, *supra* note 12.

[98] *See id.*

[99] *Id.*

[100] *See infra* notes 101-02.

in all cases. Yet, courts named the prosecutors in only eleven cases.[101] In the other fifteen cases, the courts issued lengthy opinions, but nowhere mentioned the names of the prosecutors whose misconduct was responsible for the reversal of the most serious prosecutions in the American justice system.[102]

It is worth briefly highlighting some of the egregious misconduct in which courts spared prosecutors public shaming by hiding their names. In 2001, the Florida Supreme Court reversed a conviction and death sentence after it came to light that the prosecutors failed to turn over (1) a report indicating that hair found on the victim did not match the defendant and (2) evidence that another individual had confessed to the murder.[103] Although the court explained that the prosecutor's errors "severely compromised [the defendant's] right to a fair trial," it nonetheless never named the prosecutor in its opinion.[104]

A recent decision from Maryland's highest court reversed a death sentence because prosecutors failed to inform the defendant that the star trial witness had requested favorable treatment and refused to sign a written statement absent such treatment.[105] Thereafter, prosecutors allowed the witness to evasively testify that he had not asked particular officers for any promises or favors in exchange for the

[101] Appellate courts named the prosecutors in the following cases reversed for *Brady* violations: Nuckols v. Gibson, 233 F.3d 1261, 1262 (10th Cir. 2000); Avila v. Quaterman, 499 F. Supp. 2d 713, 742 (W.D. Tex. 2007); Tassin v. Cain, 482 F. Supp. 2d 764, 768 (E.D. La. 2007); Bell v. Haley, 437 F. Supp. 2d 1278, 1282 (M.D. Ala. 2005); United States v. Hammer, 404 F. Supp. 2d 676, 682 (M.D. Pa. 2005); Miller v. Johnson, H-99-0405, 2004 U.S. Dist. LEXIS 28941, at *28 n.7 (S.D. Tex. Jan. 30, 2004); Kelley v. Singletary, 222 F. Supp. 2d 1357, 1363 (S.D. Fla. 2002); Jamison v. Collins, 100 F. Supp. 2d 647, 666 (S.D. Ohio 2000); Ware v. State, 702 A.2d 699, 705 (Md. 1997); Riddle v. Ozmint, 631 S.E.2d 70, 73 (S.C. 2006); Tillman v. State, 128 P.3d 1123, 1135 n.11 (Utah 2005).

[102] Appellate courts reversed convictions or death sentences for *Brady* violations but failed to name the prosecutors in the following cases: Banks v. Dretke, 540 U.S. 668 (2004); Mitchell v. Gibson, 262 F.3d 1036 (10th Cir. 2001); East v. Johnson, 123 F.3d 235 (5th Cir. 1997); *In re* Brown, 952 P.2d 715 (Cal. 1998); *In re* Stacy, No. B143115, 2002 WL 1473126 (Cal. Ct. App. July 10, 2002); Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Young v. State, 739 So. 2d 553 (Fla. 1999); Schofield v. Palmer, 621 S.E.2d 726 (Ga. 2005); Head v. Stripling, 590 S.E.2d 122 (Ga. 2003); State v. Williams, 896 A.2d 973 (Md. 2006); Conyers v. State, 790 A.2d 15 (Md. 2002); State v. Bennett, 81 P.3d 1 (Nev. 2003); State v. Nelson, 715 A.2d 281 (N.J. 1998); McCarty v. State, 114 P.3d 1089 (Okla. Crim. App. 2005); *Ex parte* Richardson, 70 S.W.3d 865 (Tex. Crim. App. 2002).

[103] *See Hoffman*, 800 So. 2d at 179, 181.

[104] *Id.* at 182.

[105] *See Conyers*, 790 A.2d at 37.

information he provided.[106] The court castigated the prosecutors for this conduct, explaining that "the State was an active participant in the 'smoke and mirrors' effort to mislead the Petitioner and jury as to the full circumstances preceding and precipitating [the witness's] plea agreement."[107] Yet, the court still failed to name the prosecutor even once in its twenty-eight page opinion.

The Oklahoma Court of Criminal Appeals recently reversed a capital conviction and death sentence following allegations that a police chemist had altered lab tests and that prosecutors had failed to disclose impeachment evidence demonstrating that the chemist's work was not peer reviewed and that she had not completed her yearly proficiency tests.[108] The court identified the chemist by name more than fifty times, but it never named the prosecutors involved. Instead, the court referred to them dozens of times as the "State" or the "prosecutors," even where, as a linguistic matter, it would have made far more sense to identify them by name.[109] Ironically, the court contended that prosecutors and defense lawyers should have been "on notice" of the chemist's misconduct because prior court decisions had singled her out by name for inappropriate behavior.[110] It apparently did not occur to the court that future judges and defense attorneys would not receive similar notice regarding the identities of the prosecutors who allowed the chemist to continue her misconduct and who failed to turn over evidence required by the *Brady* doctrine.

Although the prosecutors' misconduct is clear cut in the abovementioned cases, skeptics might argue that judges failed to name prosecutors in other cases because it was unclear that they were at fault. Pursuant to the Supreme Court's decision in *Kyles v. Whitley*, the obligation to disclose favorable evidence extends beyond the prosecutor to "any favorable evidence known to the others acting on the government's behalf."[111] Thus, the *Brady* doctrine requires reversal even if fault lies with police officers or other key state

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[106] *See id.* at 41.

[107] *Id.*

[108] *See* McCarty v. State, 114 P.3d 1089, 1091 (Okla. Crim. App. 2005).

[109] *See, e.g.*, *id.* at 1093 ("We recognize the parties sharply disagree about the State's complicity in (or conscious disregard of) Ms. Gilchrist's actions. Petitioner's attorneys are adamant that the State should have known or were on notice regarding deficiencies in Ms. Gilchrist's opinions and scientific techniques."). Given that Ms. Gilchrist, a chemist, was part of "the State" for *Brady* purposes, however, it makes little sense to differentiate the prosecutors by referring to them as the State. *See* Kyles v. Whiley, 514 U.S. 419, 437 (1995).

[110] *Id.*

[111] 514 U.S. 419, 437 (1995).

employees, and even if the prosecutor was unaware that the exculpatory evidence existed.[112]

Therefore, we might infer that the reason courts do not name prosecutors in some opinions is that it was unclear whether they (as opposed to the police) were responsible for the *Brady* violations. And given that reversal was required regardless of the prosecutor's complicity, there was no reason for the court to wade into the factual question of which government employee was at fault.[113] Yet, a review of the twenty-six *Brady* reversals in capital cases indicates only one case in which the prosecutor was unaware of the favorable evidence.[114] In the remaining cases that fail to name the prosecutors, the clear implication of the court opinions is that the prosecutors were responsible for the misconduct.[115]

Taking the cases from the reverse angle, in the eleven cases where the courts did name the prosecutors, they typically did so in a sheepish way. In two of the cases, the courts only named the prosecutors by last name. And these prosecutors had common last names — Roberson and Martin.[116]

In most of the eight remaining cases, courts mentioned the prosecutors' names only in passing reference and not in the parts of the opinion that excoriate the prosecutors for misbehavior. Indeed, given that most *Brady* claims are brought as habeas corpus petitions, which produce lengthy opinions, even when the prosecutor is identified, the name is lost in the morass of the opinion. For instance,

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[112] *See id.*

[113] I am grateful to Professor Brandon Garrett for making this point to me.

[114] *See In re* Brown, 952 P.2d 715, 719-21 (Cal. 1998) (reversing conviction and death sentence because crime lab failed to disclose favorable lab tests).

[115] *See, e.g.*, Conyers v. State, 790 A.2d 15, 41 (Md. 2002) ("Finally, the State was an active participant in the 'smoke and mirrors' effort to mislead the Petitioner and jury as to the full circumstances preceding and precipitating Johnson's plea agreement. . . . In closing argument at trial, the prosecutor trumpeted Johnson's version of why he contacted police . . . .").

[116] Nuckols v. Gibson, 233 F.3d 1261, 1266 (10th Cir. 2000) (identifying "District Attorney Roberson"); United States v. Hammer, 404 F. Supp. 2d 676, 679-82 (M.D. Pa. 2005) (identifying prosecutor as "Mr. Martin"). By contrast, in one of these decisions the court went to the trouble of conspicuously and fully identifying the names of the defense attorneys in the very beginning of the opinion. *Hammer*, 404 F. Supp. 2d at 681 (stating in fourth paragraph of 126-page opinion that "Mr. Hammer was represented by David A. Ruhnke, Esquire, and Ronald C. Travis, Esquire, two highly experienced criminal defense attorneys"). The court also went to the trouble of specifically identifying the full names of the lawyers appointed for post-conviction proceedings. *Id.* at 687 ("By order of December 21, 2000, we appointed Monica Foster, Esquire, and Rhonda Long-Sharp, Esquire, to represent Mr. Hammer with respect to any post-conviction proceedings.").

in a Utah Supreme Court decision reversing a death sentence for failure to turn over transcripts from pre- and post-polygraph interviews of the key witness, the court issued a twenty-four-page decision that listed the prosecutor's name only once, buried in the middle of a footnote.[117] And even then the prosecutor was only named in a sentence discussing how the key witness had made a contradictory statement during an interview with the prosecutor.[118] Thus, it is unclear whether the prosecutor listed in the footnote is the one at fault for failing to turn over the transcripts.[119]

In sum, courts named the prosecutor in only thirty-five percent of the capital cases reversed for *Brady* violations from 1997 through 2007. Numerous courts failed to name prosecutors in egregious cases of misconduct, and when they did name offenders, they often did so only in passing rather than highlighting the offenders to shame them for their misconduct.

B. Failure to Name Prosecutors When Finding Batson *Violations in Capital Cases*

For decades, the Supreme Court has forbidden racial discrimination in selecting jurors, but it long embraced a test that made it nearly impossible for defendants to prove such discrimination.[120] Prosecutors could use their peremptory strikes to eliminate black prospective jurors and the defendant had no recourse unless he could show a pattern of such misconduct in other cases besides his own.[121]

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[117] Tillman v. State, 128 P.3d 1123, 1135 n.11 (Utah 2005); *see also* Tassin v. Cain, 482 F. Supp. 2d 764, 768 (E.D. La. 2007) (mentioning prosecutor's name only twice in 11-page opinion and doing so in way that made it unclear whether named prosecutor was one who handled case); Miller v. Johnson, No. H-99-0405, 2004 U.S. Dist. LEXIS 28941, at *28 n.7 (S.D. Tex. Jan. 30, 2004) (listing prosecutor's name only once and placing it in footnote in decision that was dozens of pages long).

[118] *See Tillman*, 128 P.3d at 1135 n.11 ("Specifically, in an interview with prosecutor Mike Christensen, [the key witness] expressly denied that [the defendant] had ever hit her or threatened her or her family with injury . . . .").

[119] By contrast, in only one of the 26 capital cases reversed for *Brady* misconduct did the court identify the prosecutors enough times to truly shame them. *See* Bell v. Haley, 437 F. Supp. 2d 1278, 1282 (M.D. Ala. 2005) (stating early in opinion that "[t]he prosecutors on the case were Janice Clardy and William R. Hill, Jr." and proceeding to name each of them dozens of times).

[120] *See* Pamela S. Karlan, Batson v. Kentucky*: The Constitutional Challenges of Peremptory Challenges*, *in* CRIMINAL PROCEDURE STORIES 382, 408 (Carol S. Steiker ed., 2006) (describing Supreme Court's jurisprudence as toothless).

[121] *See* Swain v. Alabama, 380 U.S. 202, 227 (1965) (forbidding racial discrimination in jury selection but seeming to require that defendants demonstrate repeated striking of black jurors in numerous cases besides defendants' individual cases).

In its 1986 decision in *Batson v. Kentucky*, the Court loosened the standard for demonstrating racial discrimination in the use of peremptory challenges by allowing defendants to focus exclusively on the voir dire in their own case.[122] The *Batson* decision created a burden-shifting standard in which the petitioner must demonstrate a prima facie case of discrimination, and the State must rebut that showing with race-neutral reasons for its peremptory strikes.[123]

While *Batson* may be an improvement on the Court's earlier jurisprudence, successfully demonstrating a *Batson* violation is no easy task.[124] Unlike almost all other areas of criminal procedure, *Batson* challenges involve an inquiry into the subjective state of mind of the prosecutor.[125] To a large extent, that subjective state of mind is unknowable and there is a great risk that prosecutors will shade their true reasons or, worse yet, lie outright to prevent the court from finding a *Batson* violation.[126] And well-meaning prosecutors may very well lie because they believe *Batson* violations amount to nothing more than a windfall for guilty defendants[127] or a strategic ploy by defense lawyers to keep a prodefense juror from being struck from the jury.[128] Put simply, when courts strike down death sentences for *Batson* violations, there has been a serious constitutional violation.

Between 1997 and 2007, courts reversed or strongly suggested that reversal was appropriate on remand in fifteen[129] death penalty cases

[122] 476 U.S. 79, 80 (1986).

[123] *See id.* at 96-98.

[124] *See, e.g.*, Joshua E. Swift, Note, Batson*'s Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 357-58 (1993) (studying 76 *Batson* challenges and finding that federal courts rejected prosecutors' race-neutral reasons in only three of them). Indeed, as Professor Karlan has explained, once a trial judge has rejected a *Batson* challenge, "defendants find it well-nigh impossible to overturn a trial court's finding that no *Batson* violation occurred." Karlan, *supra* note 120, at 408.

[125] *See* Hernandez v. New York, 500 U.S. 352, 378 (1991) (Stevens, J., dissenting) (arguing that requiring proof of subjective intent of prosecutor in *Batson* challenges imposes "added requirement" not normally required in other contexts).

[126] *See* Henning, *supra* note 8, at 792 ("Judicial inquiry into prosecutorial motives invites responses that may not always be candid, and indeed sometimes will be an outright lie.").

[127] *See id.* at 791.

[128] *See* Jean Montoya, *The Future of the Post-*Batson *Peremptory Challenge: Voir Dire by Questionnaire and the Blind Peremptory*, 29 U. MICH. J.L. REFORM 981, 1008 (1996) ("Some prosecutors also commented that defense counsel sometimes used the [*Batson*] motions strategically to embarrass the prosecutor or to prevent the loss of a juror biased in the defendant's favor.").

[129] This number is seemingly low. However, it is explainable by (1) the difficulty of proving a *Batson* violation, and (2) the fact that *Batson* violations can be

due to *Batson* violations.[130] Courts identified the prosecutors in less than half of those cases.[131] Moreover, as with *Brady* violations, some of the names were buried in long opinions and would only be noticed by someone looking carefully for them.

For example, in 2006 the Missouri Supreme Court reversed a capital conviction and death sentence because prosecutors had used peremptory challenges to strike five of the six black prospective jurors on the venire.[132] The court found that it was "obvious" that the prosecutor's race-neutral reasons "were merely a pretext for the State's exercise of its peremptory strikes for racially discriminatory reasons."[133] Yet the only reference to the prosecutor's name is in a quote from the voir dire transcript, and even then the court only used a surname and did so in a way in which it was not clear whether the individual was the prosecutor or defense lawyer.[134]

Similarly, an Alabama court reversed a death-penalty case because a prosecutor could not demonstrate race-neutral reasons for using twelve of his fifteen peremptory challenges to strike black prospective

procedurally defaulted if defense lawyers do not properly preserve the record. On the second point, see, for example, *Holloway v. Horn*, 355 F.3d 707, 713-18 (3d Cir. 2004) (finding *Batson* violation after rejecting vigorous argument by government that Holloway had procedurally defaulted claim).

[130] In 13 of the cases, appellate courts clearly reversed death-penalty cases for *Batson* violations. *See* Miller-El v. Dretke, 545 U.S. 231, 235 (2005); *Holloway*, 355 F.3d at 710-11; Bui v. Haley, 321 F.3d 1304, 1307 (11th Cir. 2003); Riley v. Taylor, 277 F.3d 261, 273 (3d Cir. 2001); Hardcastle v. Horn, 521 F. Supp. 2d 388, 423 (E.D. Pa. 2007); Lark v. Beard, 495 F. Supp. 2d 488, 503 (E.D. Pa. 2007); Yancey v. State, 813 So. 2d 1, 2 (Ala. Crim. App. 2001); People v. Silva, 21 P.3d 769, 798 (Cal. 2001); State v. Coleman, 970 So. 2d 511, 516-17 (La. 2007); State v. Harris, 820 So. 2d 471, 477 (La. 2002); Flowers v. State, 947 So. 2d 910, 939 (Miss. 2007); State v. McFadden, 216 S.W.3d 673, 674 (Mo. 2007); State v. McFadden, 191 S.W.3d 648, 650 (Mo. 2006). In the fourteenth case, the appellate court found a *Batson* violation but remanded the case rather than reversing the conviction because the record was incomplete. *See* Mahaffey v. Page, 162 F.3d 481, 486 (7th Cir. 1998) (finding *Batson* violation but explaining that "[b]ecause the [lower] court never required the State to [come forward with race-neutral explanations] . . . [w]e therefore REVERSE the judgment of the district court and order that the writ be granted unless, within 120 days, the state trial court holds a new hearing"). Finally, in the last case, the Supreme Court issued a certificate of appealability based on the *Batson* claim but remanded for further proceedings. *See* Miller-El v. Cockrell, 537 U.S. 322, 348 (2003).

[131] *Dretke*, 545 U.S. at 236; *Bui*, 321 F.3d at 1308; *Riley*, 277 F.3d at 271; *Hardcastle*, 521 F. Supp. 2d at 394; *Lark*, 495 F. Supp. 2d at 493; *Yancey*, 813 So. 2d at 3; *McFadden*, 191 S.W.3d at 658.

[132] *McFadden*, 191 S.W.3d at 657.

[133] *Id.*

[134] *Id.* (including questions to prospective juror from "Mr. Bishop"). It is not apparent, though one can assume, that Mr. Bishop was the prosecutor.

jurors.[135] The prosecutor tried to explain away one of the strikes by pointing to a black prospective juror's traffic tickets. The court was unconvinced by this explanation because the prosecutor failed to strike similar white prospective jurors, including one white juror who had twelve traffic offenses, two misdemeanors, and one felony charge.[136] To the court's credit, it did not redact the prosecutor's name when quoting from the voir dire transcript. Yet it only mentioned his name a handful of times and only listed him as Mr. Davis, rather than using his full name.[137]

Thus, while these two courts did technically identify the prosecutors by name, they did so only by leaving a handful of references to their last names in the quoted court transcripts. When these courts actually took pen to paper to use their own words to describe these prosecutors' actions, the courts used the words "prosecutor" or "State" over and over again, rather than identifying the prosecutors by name.[138]

Of course, even cursory and incomplete naming is preferable to no naming at all. As noted above, more than half of the courts finding *Batson* violations failed to name the offending prosecutor in the opinions.[139] And the failure to name was not for lack of opportunity.

For instance, the Third Circuit recently reversed a death sentence after the prosecutor used eleven of his twelve peremptory challenges to strike black prospective jurors from the venire.[140] The court spent one full page of its opinion quoting the stated reasons for the strikes and used the phrase "the prosecutor" thirteen times without ever identifying him by name.[141] The court saw no need to personally chastise the prosecutor even though it labeled his conduct as "evasive"[142] and said that there was "nothing . . . to indicate that he harbored anything but a

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[135] *Yancey*, 813 So. 2d at 2.

[136] *Id.* at 5.

[137] *Id.* at 3, 5, 6.

[138] *E.g.*, *id.* at 8 ("Here, *the prosecution* used its first four strikes to remove black prospective jurors . . . . *The State* used 12 of its 15 strikes to remove black veniremembers. . . . Thus, the voir dire provides no support for some of the reasons advanced by *the prosecution*. From the record it appears that *the prosecutor* engaged in disparate treatment when striking Yancey's jury.") (emphasis added).

[139] Miller-El v. Cockrell, 537 U.S. 322, 328 (2003); Holloway v. Horn, 355 F.3d 707, 712 (3d Cir. 2004); Mahaffey v. Page, 162 F.3d 481, 486 (7th Cir. 1998); People v. Silva, 21 P.3d 769, 790-96 (Cal. 2001); State v. Coleman, 970 So. 2d 511, 513 (La. 2007); State v. Harris, 820 So. 2d 471, 474-77 (La. 2002); Flowers v. State, 947 So. 2d 910, 916 (Miss. 2007); State v. McFadden, 216 S.W.3d 673, 674-75 (Mo. 2007).

[140] *Holloway*, 355 F.3d at 712, 730.

[141] *Id.* at 721.

[142] *Id.* at 729.

discriminatory intent to remove [a particular] juror because of his race."[143] Moreover, on the very next page, the court had no reluctance in stating the full name of the defendant's lawyer.[144]

Finally, nowhere is the failure to name prosecutors more apparent than in the Supreme Court's[145] much discussed decision in *Miller-El v. Cockrell*.[146] In a decision credited with reinvigorating the *Batson* doctrine,[147] the Court addressed a death-penalty case in which prosecutors had used their peremptory challenges to strike ten of eleven eligible black jurors.[148] The Court explained that prosecutors asked jurors about their views of the death penalty and varied the questions based on race in an apparent effort to exclude black jurors.[149] To illustrate this, the Court quoted from the record but redacted the district attorney's name from the transcript, replacing it with "[Prosecutor]."[150]

In sum, a number of courts have reversed capital cases because prosecutors engaged in racial discrimination in jury selection. Yet, consistently, these courts do not name the individual prosecutors. And when courts have identified prosecutors' names, they often only do so by including a handful of references from voir dire transcripts.

C. Reasons Judges Are Reluctant to Name Prosecutors

There are a variety of reasons why judges rarely identify prosecutors by name when reversing their cases for misconduct. As discussed below, some of the reasons demonstrate why trial judges fail to name

[143] *Id.* at 724-25.

[144] *Id.* at 722 n.10. Moreover, the Court did not hesitate to add (albeit interesting) details that the lawyer subsequently entered the federal witness protection program following convictions for bribery. *See id.*

[145] Although outside the time period of my study, the Supreme Court also failed to name the prosecutor in its 2008 decision reversing a capital case because of the prosecutor's "implausibl[e]" race-neutral reasons for striking black prospective jurors. *See* Snyder v. Louisana, 128 S. Ct. 1203, 1211 (2008).

[146] 537 U.S. 322 (2003).

[147] *See* Mattie Johnstone & Joshua M. Zacharia, Note, *Peremptory Challenges and Racial Discrimination: The Effects of* Miller-El v. Cockrell, 17 GEO. J. LEGAL ETHICS 863, 865-66 (2004).

[148] *See Miller-El*, 537 U.S. at 331.

[149] *See id.*

[150] *Id.* at 333. As noted, the Court issued a certificate of appealability in Miller-El's case and remanded the case to the Fifth Circuit. *See id.* at 348. When the Fifth Circuit again refused to find a *Batson* violation, the Supreme Court again granted certiorari. This time, the Court reversed the conviction and named the prosecutors who had conducted the voir dire. Miller-El v. Dretke, 545 U.S. 231, 236, 266 (2005).

prosecutors while other reasons explain why appellate judges fail to name offenders. Unfortunately, none of these explanations provides satisfactory justification for sparing misbehaving prosecutors from public naming.

The first, and most obvious, reason courts may be reluctant to identify prosecutors by name is that prosecutors are repeat players in the criminal justice system. This justification applies much more strongly at the trial court level than at the appellate level. At the trial level, prosecutors are often assigned to a particular judge's courtroom for an extended period of time.[151] This repeated contact may lead to a close relationship and bond between the judge and the prosecutor.[152] It therefore makes sense that the trial judges they appear in front of day after day would be reluctant to take prosecutors to task publicly. However, this logic does not apply as easily to appellate court decisions. Appellate judges typically do not have relationships with individual prosecutors. Indeed, many, though certainly not all, district attorneys' offices have appellate divisions that exclusively handle appeals. Thus, to the extent appellate judges have any repeat interaction with prosecutors' offices, it is often not with the individual who committed the misconduct that is the subject of the appeal.

A second, and more compelling, reason why appellate judges may decline to name prosecutors is a desire to protect their own. Many appellate judges were once prosecutors themselves.[153] Recalling how difficult the job was and with a fondness for their former position, appellate judges may be reluctant to stigmatize those with whom they can identify.

Moreover, there is a general instinct among lawyers to protect those in the profession. Disciplinary bodies are reluctant to impose stiff sanctions[154] and, perhaps more tellingly, many lawyers are reluctant to report the misconduct of their peers. Model Rule of Professional Conduct 8.3 requires any attorney to report another attorney's professional misconduct when that misconduct raises a "substantial

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[151] *See* Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 269 (2000) ("[P]rosecutors appear daily in front of the same judge."); Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 398 (2007) (explaining that prosecutors are "the ultimate repeat players[] since they litigate all criminal cases").

[152] *See* Flowers, *supra* note 151, at 269 (citing BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 12-13 (1996)).

[153] *See* Meares, *supra* note 2, at 912.

[154] *See* Henning, *supra* note 8, at 829 ("[T]he professional disciplinary system has proved inadequate in addressing prosecutorial misconduct."); Rosen, *supra* note 11, at 697.

question" as to that attorney's fitness to practice law.[155] Not surprisingly, compliance with Rule 8.3 is very low.[156] A study of 1,000 Boston attorneys found that only 6.3% of lawyers would report their colleagues to the bar were they aware of a flagrant violation of an ethical canon, which, if discovered, might result in criminal liability for their colleague.[157]

The reasons for the poor rate of reporting under Model Rule 8.3 and similar provisions include ignorance of the rules, fear of retaliation, fear of being labeled a snitch, and the lack of any real sanction for violating the rule.[158] Scholars have estimated that compliance with Model Rule 8.3 would greatly improve if sanctions were more than the trifle they currently are.[159] In that connection, it is noteworthy that judges face no sanction for failing to name prosecutors who have committed misconduct.

A third, and perhaps more obvious, explanation for courts' failure to name prosecutors is simple compassion. Judges might believe that the misconduct is an isolated episode. The thought process of judges might go like this:

> *Prosecutor X made a terrible error in failing to turn over exculpatory evidence or striking a series of prospective jurors based on their race. But I do not see any evidence that Prosecutor X is a consistently unethical person. This may have been an isolated*

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[155] MODEL RULES OF PROF'L CONDUCT R. 8.3 (2007).

[156] *See* Gerald E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 538 (noting "the disappointing experience of mandatory informing"); Cynthia L. Gendry, Comment, *Ethics — An Attorney's Duty to Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603, 606 (1994) ("Compliance with the requirement to report peer misconduct has been notoriously poor."); Ryan Williams, Comment, *Reputation and the Rules: An Argument for a Balancing Approach Under Rule 8.3 of the Model Rules of Professional Conduct*, 68 LA. L. REV. 931, 932 (2008) ("It will come as no surprise that lawyers prefer not to report the misconduct of their peers.").

[157] *See* Williams, *supra* note 156, at 945 (discussing David O. Burbank & Robert S. Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U. L. REV. 66, 99-100 (1974)).

[158] *See* Gendry, *supra* note 156, at 606-07. Indeed, in some communities, there is such hostility to reporting that a "stop snitching" movement has taken root and discouraged any type of cooperation with authorities, even to solve crimes. *See* Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1205 (2008).

[159] Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of* Himmel, 1988 U. ILL. L. REV. 977, 992 (noting that after Illinois Supreme Court suspended lawyer for one year for failing to report another attorney's misconduct that "preliminary empirical evidence already suggests that the number of cases in which lawyers report other lawyers has gone up").

> *mistake. After all, prosecutors have more cases than they can handle and it may simply have been an oversight or a momentary lapse of judgment. I just don't think it was a purposeful act of misconduct. If I call the prosecutor out by name it will harm her career, and I do not think that sanction is merited.*

Moreover, compassion for prosecutors (as opposed to the aggrieved criminal defendants who suffered the misconduct) might be more forthcoming because the prosecutors accused of the misconduct are sometimes present in front of the appellate judges to argue the issues on appeal.[160] It is much easier to speak ill of someone you have never met than someone who has appeared before you in court.[161]

Fourth, it is possible, though not particularly likely, that appellate judges fall victim to the same sort of "softening" that arguably happens to prosecutors over the years. Scholars have posited that as prosecutors see more and more violent cases they become jaded.[162] Simple theft does not look as bad when you have just prosecuted three violent robberies. We could posit the same phenomenon with respect to appellate judges. After seeing much inappropriate behavior by attorneys, it takes something truly outrageous to upset an appellate judge. This thesis is not compelling. Unlike prosecutors who deal with violent crimes day after day, judges see relatively few cases of egregious prosecutorial misconduct. It is therefore difficult to see how appellate judges would become jaded by prosecutors' misconduct.

Finally, there is the possibility that lower court judges disagree with the rules they are enforcing. For instance, some judges might disagree with the rule that prosecutors cannot comment on the defendant's failure to testify,[163] or they may see nothing wrong with striking black jurors based on race, so long as the State also strikes white jurors

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[160] *See, e.g.*, United States v. Kojayan, No. 91-50875, 1993 U.S. App. LEXIS 19873, at *16 (9th Cir. Aug. 4, 1993) (indicating that prosecutor accused of misconduct, whose name court originally included in appellate opinion but later redacted, personally argued appeal).

[161] Indeed, in the Fourth Circuit, the judges have a practice of descending from the bench to shake the hands of the advocates following each argument. *See* Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAG., Mar. 9, 2003, at 640.

[162] *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 921 (2006).

[163] *See* Mitchell v. United States, 526 U.S. 314, 336 (1999) (Scalia, J., dissenting) (strenuously criticizing this rule more than three decades after Supreme Court adopted it and arguing that "it is implausible that the Americans of 1791, who were subject to adverse inferences for failing to give unsworn testimony, would have viewed an adverse inference for failing to give sworn testimony as a violation of the Fifth Amendment").

based on race as well.[164] Thus, while judges may feel bound to follow precedents they do not like, they would be reluctant to excoriate prosecutors by name for disobeying rules with which they disagree. This explanation may hold true for a handful of judges. But by and large, it is not convincing. Because the harmless error test gives appellate courts little room to reverse convictions, rarely does anything short of flagrant misconduct trigger a reversal.[165] Thus, for the core types of prosecutorial misconduct, such as withholding exculpatory evidence, judges who find enough prejudice to reverse a conviction are likely to be offended by the prosecutors' clear violation of the rules.

In sum, the more convincing explanation for appellate courts' failure to name prosecutors for their misconduct is a combination of compassion, self-identification based on prior work as a prosecutor, and the general cultural norm against snitching on colleagues. As explained below, however, while these reasons have explanatory power, they are not adequate reasons for declining to name prosecutors who have committed misconduct.

III. SHAMING AS AN ALTERNATIVE SANCTION AGAINST PROSECUTORS

As discussed in Part II, prosecutors are rarely named for their misconduct. Prosecutors therefore escape public shaming for their misdeeds. By contrast, there has been a rise[166] in the use of shaming punishments against criminal defendants in recent years.[167] Such

[164] *See* Batson v. Kentucky, 476 U.S. 79, 137 (1986) (Rehnquist, J., dissenting) ("In my view, there is simply nothing 'unequal' about the State using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants . . . .").

[165] *See supra* notes 28-31 and accompanying text.

[166] Brian Netter, *Avoiding the Shameful Backlash: Social Repercussions for the Increased Use of Alternative Sanctions*, 96 J. CRIM. L. & CRIMINOLOGY 187, 189 (2005) ("[S]haming penalties [have been] increasing in recent years."); Ryan J. Huschka, Comment, *Sorry for the Jackass Sentence: A Critical Analysis of the Constitutionality of Contemporary Shaming Punishments*, 54 U. KAN. L. REV. 803, 804 (2006) (noting same trend).

[167] Prominent scholars are mixed on the value of shaming punishments. *Compare* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) (providing retributivist critique of shaming punishments), *and* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) (arguing that shaming punishments are not effective within context of American social and cultural norms), *with* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) [hereinafter, Kahan, *Alternative Sanctions*] (expressing view supporting shaming punishments). Professor Kahan has recently recanted his support for shaming as a viable substitute for incarceration. *See* Dan M. Kahan, *What's Really*

punishments are designed to publicize the defendant's illegal conduct, reinforce that such conduct is contrary to existing social norms, and to force the defendant to suffer for that misconduct.[168] While there has been much attention devoted to shaming criminal defendants, the same logic could also be applied to prosecutors who have flouted social norms and legal rules. And while there are certainly objections to shaming prosecutors, there is reason to believe such punishments can be effective.

A. Using Publicity to Shame Prosecutors

The leading scholar on shaming punishments, Professor Dan Kahan, has identified four categories of shaming: publicity, stigmatization, self-debasement, and contrition.[169] Examples abound for each type of shaming. Some jurisdictions have used the publicity approach by placing the names of men who solicit prostitutes in newspapers.[170] Judges have stigmatized offenders by forcing them to wear sign boards identifying their crimes.[171] Other judges have forced offenders to suffer the same type of suffering they inflicted, such as sentencing slum lords to house arrest in their own buildings.[172] Still other courts require offenders to display contrition by publicly apologizing to their victims.[173]

For present purposes, the publicity approach to shaming is worth further discussion. Some courts have taken what might be called a bludgeon approach to publicity shaming by shaming the offender in the eyes of society at large. A number of courts have ordered offenders to stand in busy areas wearing signs that announce their crimes.[174] Other offenders have been forced to advertise their misconduct in newspapers or on television.[175]

Wrong with Shaming Sanctions, 84 TEX. L. REV. 2075, 2075 (2006).

[168] *See* Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2187 (2003).

[169] Kahan, *Alternative Sanctions*, *supra* note 167, at 631. Professor Stephen Garvey has added another category for punishments that educate. Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 794 (1998).

[170] Kahan, *Alternative Sanctions*, *supra* note 167, at 632.

[171] United States v. Gementera, 379 F.3d 596, 598 (9th Cir. 2004).

[172] Don Terry, *Landlord in His Own Jail, Tenants Debate His Fate*, N.Y. TIMES, Feb. 18, 1988, at B1. This idea was later featured in a film starring Joe Pesci. THE SUPER (Twentieth Century Fox 1991).

[173] Garvey, *supra* note 169, at 791-94.

[174] *Id.* at 734 & n.9, 735 (recounting numerous sign punishments).

[175] Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of*

While many courts have used the bludgeon approach, some judges have recognized that the most powerful audience is not the general community but rather the offender's professional community. For instance, consider how one judge punished a lobbyist convicted of illegal campaign contributions by requiring him to compose a narrative about his crime and distribute it at his own expense to 2,000 Washington lobbyists and political action committees.[176] The underlying logic is that a lobbyist or corporate executive might not care what an auto mechanic from across town thinks of him, but he does care what his colleagues, customers, and peers think.[177]

The same approach could be applied to prosecutors. Prosecutors might not be concerned that the general public approves or disapproves of their tactics, but they are likely to care a great deal what their peers — judges, (some) defense lawyers, and other prosecutors — think about them. The obvious approach to shaming misbehaving prosecutors among their peer group is not to use newspapers that reach a general audience but, instead, judicial opinions that would be read by judges and other lawyers. Yet, as we have seen, even when judges name prosecutors in judicial decisions, the names are often lost in lengthy opinions.[178] And if lawyers are unlikely to see the names in judicial opinions because they are buried in footnotes or otherwise not prominently featured, the shaming will not be effective. We want the name to stand out, like a sandwich board walking down the street that says, "I stole mail."[179] As such, just as in the lobbyist case discussed above, a more effective approach would be to make a list of prosecutors' names and their misconduct and to then mail the list to the prosecutors' peer groups.

Shaming, even if it is only a list of prosecutors' names and a description of their actions, could be very effective.[180] In a profession

Prostitutes' Patrons, 49 VAND. L. REV. 1525, 1526-27 (1996).

[176] Dan M. Kahan, *Shaming White Collar Offenders*, 12 FED. SENT'G. REP. 51, 53 (1999).

[177] *See id.* Professors Kahan and Eric Posner have proposed institutionalizing publicity shaming in the Federal Sentencing Guidelines to deal with white collar offenders. *See* Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 385-86 (1999) (proposing "shaming component [that] . . . would consist of stigmatizing publicity in the form of a media announcement, paid for by the defendant, detailing in a straightforward fashion 'the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses'").

[178] *See supra* notes 117-19 and accompanying text.

[179] *See* United States v. Gementera, 379 F.3d 596, 598, 601-02 (9th Cir. 2004).

[180] *See* James Q. Whitman, *What Is Wrong With Inflicting Shame Sanctions?*, 107

where reputation is the most valuable commodity, identifying perpetrators of prosecutorial misconduct will be embarrassing. Moreover, it will also carry residual punishment down the road by diminishing a lawyer's chance of later achieving a judgeship or other high status public service job.[181] Additionally, identifying prosecutorial misconduct will highlight cases that might not otherwise receive media attention. This, in turn, will make it more likely that bar disciplinary committees will open an inquiry into the incidents and possibly discipline the offending lawyers in an official fashion.[182]

Finally, shaming prosecutors will signal to other actors in the criminal justice system that they should be cautious in dealing with these prosecutors. This has less to do with deterring or even punishing misbehaving prosecutors and more to do with protecting others around them. By way of analogy, some judges have ordered the use of special license plates for DWI offenders in order to signal to other drivers to keep a safe distance.[183]

The idea of signaling the need to be wary of certain prosecutors actually inverts a common objection to shaming punishments. Critics of shaming argue that such punishments are dehumanizing.[184] Rather

YALE L.J. 1055, 1058-59 (1998) (contending that although shame sanctions can work, they amount to dangerous interaction between Government and crowds).

[181] *See* Williams v. State, 734 P.2d 700, 704 n.6 (Nev. 1987) ("In the past, we have been reticent to identify the perpetrators of misconduct by name, primarily out of reluctance to do counsel serious lasting professional injury, *e.g.*, by diminishing their prospects when they may later be considered for judgeships or other public offices. In the future, however, attorneys who cannot conform to the proper norms of professional behavior, whether inside or outside the courtroom, should recognize they are assuming the risk of formal, public censure in our opinions."). *But see* Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at N1 (describing how three prosecutors who had been castigated by courts for misconduct were promoted in their own office and subsequently elected judges).

[182] *See* Dunahoe, *supra* note 4, at 73. However, as many scholars have observed, disciplinary boards are often paper tigers that rarely discipline prosecutors for misconduct. *See* Rosen, *supra* note 11, at 697 ("[D]isciplinary charges have been brought infrequently and meaningful sanctions rarely applied."); *see also* Gershman, *supra* note 1, at 445 (similar); Zacharias, *supra* note 40 (similar).

[183] Goldshmitt v. State, 490 So. 2d 123, 125-26 (Fla. Dist. Ct. App. 1986) (upholding such plates for rehabilitation and deterrence reasons rather than to protect public); People v. Letterlough, 655 N.E.2d 146, 149 (N.Y. 1995) (striking down use of DWI license plate that was ordered "to 'warn the public' of the threat presented by his presence behind the wheel"). Another example, though one that is not a fair comparison to conventional prosecutorial misconduct, is sex offender registries designed to alert neighborhood parents so as to protect their children. *See* Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 680 (2008).

[184] Massaro, *supra* note 167, at 1936-43; *see also* ANDREW VON HIRSCH, CENSURE AND SANCTIONS 82-83 (1993) ("A person can endure the deprivation of various goods and

than rehabilitate and reintegrate offenders, the punishments drive them to more reclusive behavior or, worse yet, into the arms of others who have been similarly shamed.[185] If this argument is correct, it is deeply troubling when applied to criminal defendants because the ostracized offender who has been driven to a sub-community of other criminals is far more likely to commit future crimes.[186]

However, the concern about breeding further misconduct should not concern us when we apply shaming to prosecutors. The ostracized prosecutor is likely to take one of two paths. On the one hand, the prosecutor may work hard to regain the trust of her tight-knit legal community. By actively working to repair her reputation, the prosecutor will not only be extra cautious to steer clear of misconduct, but she will probably make efforts to put her ethical behavior on display, thus providing a helpful lesson for junior prosecutors. On the other hand, and perhaps more likely, the shamed prosecutor may quit her job.[187] Just as the patron of a prostitute who has been plastered on television or in the newspaper may leave town to run from the embarrassment,[188] so too may a shamed prosecutor leave the district attorney's office. The difference, however, is that the john who has left town can patronize another prostitute (or descend into more deviant behavior) wherever he relocates, whereas the shamed prosecutor will have a tough time surviving the vetting process to be hired in another county prosecutor's office.[189]

liberties with dignity, but it is hard to be dignified while having to carry out abasing rituals, whether the lockstep, the stocks, or newer rituals.").

[185] Persons, *supra* note 175, at 1546 ("The primary effect of shame punishments may be not to decrease overall demand but to push prostitution either further underground or to other communities outside the purview of the shamers."); *see* Note, *supra* note 168, at 2198.

[186] *See* Massaro, *supra* note 167, at 1919 ("The stigmatized offender thus may 'drift' toward subcultures that are more accepting of her particular norm violations. Association with the subculture in turn may facilitate future crime, especially for crimes that require multiple actors or hard-to-obtain materials, tools, or connections.").

[187] Shaming a misbehaving prosecutor into quitting is akin to incapacitating a criminal to prevent further crimes. Persons, *supra* note 175, at 1541 ("[S]haming may, under some circumstances, incapacitate the offender from committing certain types of crimes.").

[188] *Id.* at 1547.

[189] Professor Massaro has recognized that offenders can easily move to another state to restart their lives following shaming. *See* Massaro, *supra* note 167, at 1935 (discussing *State v. Rosenberger*, 504 A.2d 160 (N.J. 1985), in which judge rejected shaming punishment for grand theft because offender moved across country, making it "probable that his new neighbors are totally unaware of his criminal conduct"). By contrast, lawyers cannot start over so easily in a new state. They must sit for the bar

And although there may be a handful of upstanding prosecutors who leave the office prematurely due to excessive fallout from the shaming, this risk is likely outweighed by the pedagogical lesson[190] to junior and senior prosecutors who will see that there are severe repercussions for misconduct.[191] Put simply, the concern about reintegration[192] following shaming is not as significant for prosecutors as it is for ordinary criminal defendants.

B. Problems with a Prosecutorial Shaming Approach

The idea of naming individual prosecutors to shame them is not without criticism. First, scholars have recognized that attempts to shame sometimes backfire. Some police officers, for instance, take pride in being seen as aggressive.[193] Gang members often consider imprisonment and other punishments to be a badge of honor.[194]

It is unlikely that the badge of honor problem will occur with respect to prosecutors because unlike police officers who have a comparatively low turnover rate,[195] prosecutors typically have much shorter tenures.[196] Prosecutors often use their jobs to gain experience

exam or, at minimum, satisfy the character and fitness standards to waive into the bar.

[190] In this respect, the identification of prosecutors may be justifiable to some scholars on the grounds that it truly educates, rather than simply humiliates, offenders. *See* Garvey, *supra* note 169, at 784-94 (differentiating between educational punishments and creative punishments that merely shame).

[191] Of course, one could counter that seeing one's colleague go down in flames creates an incentive for misbehaving prosecutors to simply cover their tracks better, rather than cleaning up their behavior.

[192] On the contention that shaming is more successful when it is reintegrative rather than purely stigmatic, see JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 55 (1989) ("[F]or all types of crime, shaming runs the risk of counterproductivity when it shades into stigmatization. The crucial distinction is between shaming that is reintegrative and shaming that is disintegrative (stigmatization).").

[193] *See* Armacost, *supra* note 23, at 517 ("[T]here is a widespread view among law enforcement officers that citizens who behave rudely or aggressively, or who use insolent or foul language, need to be 'taught a lesson.'").

[194] FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 216 (1973) (discussing gangs and noting that "[b]eing punished may even become a status symbol"); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1817-18 (2001) (discussing how efforts to shame inner-city gangs are sometimes turned on their head and seen as badge of honor).

[195] *See* David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1235-36 (2006) ("[P]olice departments have low turnover. The annual quit rate is around 4%.").

[196] In New Orleans, Louisiana, for instance, prosecutors typically last no longer than two years. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 63 (2002).

to become (better paid) criminal defense attorneys or to achieve enough contacts and prestige to be elected to a judgeship or a political office.[197] In order to move into these new lines of work, prosecutors must be cautious about their reputations not just among their present colleagues but also among other private and public constituencies. Moreover, past evidence demonstrates prosecutors' distaste for being called on the carpet for misconduct. When judicial opinions have named federal prosecutors, the Department of Justice has even sought to have their names removed.[198] This hardly suggests that naming prosecutors is a badge of honor.

A second and more compelling objection to prosecutorial shaming stems from the lengthy time between the occurrence of misconduct and the judicial opinions castigating the misbehavior. Appellate decisions reversing convictions resulting, at least in part, from prosecutorial misconduct do not occur overnight. It often takes years for a conviction to be reversed. This is particularly true for *Brady* claims that are often heard on habeas corpus petitions years after the defendant has been convicted.[199] And given the short tenure of prosecutors, the offending actor will often have moved on by the time his or her name is identified.[200]

This problem is slightly minimized with respect to death-penalty cases and other serious matters, which tend to be tried by more experienced prosecutors who have made long-term commitments to a district attorney's office. Thus, except when these career prosecutors have been elected to judgeships[201] or retired from the practice of law, many of them will still be employed at the prosecutor's office when the shaming occurs.[202] Moreover, of those prosecutors who leave the

[197] *See* Dunahoe, *supra* note 4, at 59 ("The office of State Assistant District Attorney is frequently but one pit stop on the highway to private sector employment.").

[198] Consider the *Kojayan* case, *supra* notes 32-39 and accompanying text, in which the Ninth Circuit acceded the Government's request to eliminate reference to the prosecutor. Henry Weinstein, *Court Will Not Name Reprimanded Prosecutor; Justice: Appeals Judges Say Misstatements to Jury Tainted Drug Case. The Ruling Is Sharply Critical of the U.S. Attorney's Office, But It Will Not Single Out the Offender*, L.A. TIMES, Nov. 4, 1993, at 8.

[199] *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 111 n.205 (2008).

[200] *E.g.*, Liebman, *supra* note 8, at 2119-20 (explaining that when cases are reversed years after trial, "the individual responsible for the violation very often is long gone from the agency").

[201] Unfortunately, there are a number of instances in which prosecutors who have been reprimanded for misconduct have been elected or appointed to judgeships between the time of the misconduct and the time it was identified on appeal. *Id.* at 2120 n.220; Armstrong & Possley, *supra* note 181.

[202] A third objection is that as prosecutorial shaming becomes more prevalent, it

district attorney's office, most will go to private practice where their reputations among other lawyers and judges still remain crucial.

In sum, the badge of honor problem and the lengthy time gap should not stand in the way of naming prosecutors in order to shame their misconduct.

IV. USING PROSECUTORIAL MISCONDUCT PROJECTS TO PROMOTE SHAMING

If we accept prosecutorial shaming to be a positive idea for rooting out and deterring misconduct, the hard question then becomes how it can be implemented. This Part explores where prior reform proposals have failed and advocates a path that steers clear of those problems.

A. Prior Reform Proposals and Their Flaws

Many scholars and courts have recognized the problem of prosecutorial misconduct and the need to deter it. They have offered good proposals, such as creating prosecutor grievance councils that would investigate complaints against prosecutors,[203] requiring bar disciplinary committees to review judicial decisions and institute disciplinary proceedings in egregious cases,[204] providing greater funding for bar disciplinary committees so they can take more proactive steps,[205] encouraging judges to refer more cases to bar

will have a less powerful impact. *See* Netter, *supra* note 166, at 200 (explaining that shaming might be deterrent because of its "circus appeal" and that "over-expansion could be self-defeating"). This danger is very minimal with respect to prosecutors because of the relatively small number of cases in which prosecutors are found to have committed misconduct.

[203] *See* Steele, *supra* note 60, at 982-88; *see also* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463-64 (2001) (advocating prosecutorial review board to handle specific complaints and to conduct random reviews on routine cases).

[204] *See* Rosen, *supra* note 11, at 735-36; *see also* Kelly Gier, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191, 205 (2006).

[205] Erica M. Landsberg, Comment, *Policing Attorneys: Exclusion of Unethically Obtained Evidence*, 53 U. CHI. L. REV. 1399, 1403-04 (1986) (explaining that one way to more rigorously enforce rules of professional responsibility is to "provide more money for disciplinary agencies" but recognizing that it might be politically unpalatable).

disciplinary committees,[206] and encouraging judges to cite prosecutors by name much more often.[207]

To date, none of those proposals has been successfully implemented. The reason, most likely, is that each proposal requires large expenditures of additional money or a challenge to entrenched interests. Establishing a prosecutorial grievance counsel would require new legislation to create the body and appropriate funding. Prosecutors likely would lobby against it,[208] and fiscal conservatives would likely oppose additional funding. The same logic would likely apply to additional funding for bar disciplinary committees.[209] Legislators seeking re-election would prefer to spend money on measures that target criminals, rather than on policing the people who put criminals in prison.[210]

Likewise, we cannot expect judges to begin referring more cases to bar disciplinary committees or to castigate prosecutors by name in judicial opinions simply because legal scholars suggest that they do so. As discussed above in Part II.C, there are entrenched reasons why judges are reluctant to call prosecutors on the carpet. Many judges were former prosecutors, and there is a general instinct for people to protect their own. Indeed, even among judges who were not prosecutors, there is still a reluctance to chastise fellow lawyers. Asking judges to voluntarily change their behavior in the face of these realities is admirable, but not terribly realistic.

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[206] People v. Green, 274 N.W.2d 448, 455 (Mich. 1979) (Williams, J., concurring) ("I would affirm but order the Clerk to report this matter to bar grievance authorities for appropriate action.").

[207] Gier, *supra* note 204, at 205-06 ("A second proposal would be requiring the courts to always publish the names of prosecutors whose cases were reversed for misconduct."). Gier does not explain who could require courts to name prosecutors. Encouraging such naming would be a more viable proposal. *See* Medwed, *supra* note 8, at 175.

[208] Like other interest groups in the criminal justice system, prosecutors have an effective lobby. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535, 537-38 (2001).

[209] *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 105 (1991) (recognizing fiscal constraints that preclude bar disciplinary committees from actively policing generalized "do justice" provisions of ethics code).

[210] Indeed, as Professor Stuntz has observed, most lawmakers would prefer to avoid even spending money on law enforcement if other options, such as harsher punishments, can satisfy the public's appetite instead. Stuntz, *supra* note 208, at 525-26.

B. Designing Prosecutorial Misconduct Projects

As we have seen, there is potentially great value to having judges publicly name prosecutors when reversing cases for prosecutorial misconduct. Yet as we have also seen, many judges are reluctant to take prosecutors to task until they are sure they are dealing with a repeat offender. Accordingly, I propose an alternative approach in which law schools establish Prosecutorial Misconduct Projects that would review appellate decisions finding prosecutorial misconduct but failing to name the offending prosecutors.

First, consider the model the projects would be based upon: Innocence Projects. The original Innocence Project began at the Benjamin Cardozo School of Law in New York City over fifteen years ago as an effort to exonerate innocent prisoners using DNA technology.[211] Under the leadership of Barry Scheck and Peter Neufeld, the Innocence Project has grown into a 501(c)(3) nonprofit corporation[212] that has a staff of more than forty employees.[213] It has spread to include numerous related projects in forty-one other states, the District of Columbia, and four foreign countries.[214] To date the Innocence Project has been instrumental in freeing many of the more than 200 inmates (including sixteen sentenced to death) who have been exonerated in the United States in recent years.[215] The Innocence Project movement has even led some states to establish innocence commissions as quasi-administrative agencies to investigate claims of innocence as well as explore systemic flaws in the criminal justice process.[216] In light of courts' resistance to free-standing claims of actual innocence,[217] the Innocence Project and state-created innocence commissions have been an important addition to the legal landscape.

Prosecutorial Misconduct Projects would fill a similar gap by identifying misbehaving prosecutors that appellate judges are unwilling to name. Under the supervision of a faculty supervisor, law

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[211] The Innocence Project, About the Organization, http://www.innocenceproject.org/Content/9.php (last visited Jan. 13, 2009).

[212] *Id.*

[213] The Innocence Project, Innocence Project Staff, http://www.innocenceproject.org/about/Staff-Directory.php (last visited Jan. 13, 2009).

[214] The Innocence Project, Other Projects Around the World, http://www.innocenceproject.org/about/Other-Projects.php (last visited Jan. 13, 2009).

[215] The Innocence Project, *supra* note 211.

[216] *See* Garrett, *supra* note 151, at 435-37.

[217] *See id.* at 435-36; *see also* Herrera v. Collins, 506 U.S. 390, 400 (1993) (rejecting argument that free-standing claims of actual innocence should be cognizable on federal habeas corpus review).

students would review cases from their jurisdiction in which convictions were reversed for prosecutorial misconduct. These cases would be easily identified by programming legal databases like Westlaw® or LexisNexis® to print cases with key words such as "*Brady*," "*Batson*," or "prosecutorial misconduct." If the judicial decision identifies the prosecutor by name, project volunteers would simply have to write down the prosecutor's name and a summary of the facts. If the opinion describes prosecutorial misconduct as the reason for reversing a conviction but does not name the prosecutors who committed the misconduct, the project volunteers would then travel to the courthouse to retrieve the trial transcript and search out the prosecutors' names.[218] In the event that the transcript is not available at the courthouse, the project volunteers could file an open records request to determine the names of the prosecutors.[219]

Thereafter, the project volunteers would produce a memorandum a few times per year that lists the facts of each case and the prosecutors who committed misconduct. The memorandum would also state whether the offending prosecutors had been identified for misconduct in any cases in prior years. The completed memorandum could then be posted on the organization's website and sent by hard copy to defense lawyers, prosecutors, bar disciplinary committees and, most importantly, every criminal court judge in the jurisdiction.

In a way, the Prosecutorial Misconduct Projects would serve the same role as investigative journalism. Some of the most enlightening work on prosecutorial misconduct has been conducted by media outlets that have reviewed thousands of cases of alleged prosecutorial misconduct.[220] This journalism has served a valuable shaming

[218] Obviously, this task would be much more onerous in a geographically expansive state with only one law school, for instance, Montana or South Dakota, and far easier in a big city like New York or Chicago. Nevertheless, because courts reverse so few cases for misconduct each year, it is likely that project volunteers would not have to travel much.

[219] This approach was recently used successfully by *Texas Lawyer* magazine to gather the names of Dallas County prosecutors who handled cases resulting in wrongful imprisonment of those later determined to be innocent. *See* John Council, *Witnesses to the Prosecution: Current and Former ADAs Who Helped Convict Exonerated Men Reflect*, TEX. LAW., June 9, 2008, *available at* http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202421991854.

[220] *E.g.*, Armstrong & Possley, *supra* note 12 (reviewing thousands of homicide cases and finding 381 convictions that were reversed because prosecutors concealed evidence or presented evidence they knew to be false); Bill Moushey, *Out of Control: Legal Rules Have Changed, Allowing Federal Agents, Prosecutors to Bypass Basic Rights*, PITTSBURGH POST-GAZETTE, Nov. 22, 1998, at A1 (reviewing numerous cases); Mike Zapler, *State Bar Ignores Errant Lawyers*, SAN JOSE MERCURY NEWS, Feb. 12, 2006, at A1

function in and of itself. However, while it is wonderful to have the media do the shaming, only a handful of media outlets have the resources to conduct such projects, and those organizations can only afford the time and column space to do so very infrequently.[221] And even when media outlets do undertake investigative journalism the findings are sometimes dismissed as the product of an organization with an axe to grind.[222] Perhaps for this reason, media shaming, whether it be large-scale exposés or standard news stories focusing on high-profile cases,[223] has not been an effective tool to punish and deter prosecutorial misconduct.[224]

By contrast, Prosecutorial Misconduct Projects would face fewer obstacles. Because they would be based on reported decisions, the otherwise difficult step of identifying the relevant cases would simply involve programming Westlaw® or LexisNexis® to identify the key cases. Additionally, because law students would be guided by appellate judges' reversals of convictions (rather than personally

(reviewing nearly 1,500 state disciplinary actions and finding that just one involved prosecutorial misconduct); CENTER FOR PUBLIC INTEGRITY, *supra* note 46 (reviewing more than 11,000 cases of alleged misconduct).

[221] Moreover, taking out advertisements in the media may be prohibitively expensive. *See* Skeel, *supra* note 194, at 1849 (discussing $100,000 price tag for shareholder activists to take out very effective shaming advertisement against passive directors of Sears, Roebuck & Co.).

[222] *See, e.g.*, John C. Luttrell, Letter to the Editor, *Looking for Victims*, ST. PETERSBURG TIMES, Jan. 20, 2007, at 13A (arguing in letter to editor that newspaper exposé about overcrowding in county jail was "attempting to cram some ridiculous agenda down our throats"). For the original report, see Jacob H. Fries, *Burden on the Block: A Times Special Report*, ST. PETERSBURG TIMES, Jan. 14, 2007, at 1A (detailing awful conditions experienced by journalist who spent 48 hours in overcrowded Pinellas County jail, which was built for 2,400 occupants but housed 3,800 people).

[223] *See* Dunahoe, *supra* note 4, at 73 ("[M]edia attention will most likely focus on only the most egregious prosecutorial violations.").

[224] *See* DAVIS, *supra* note 1, at 171-72 (explaining that media coverage of prosecutorial misconduct has not led to significant public response, but recognizing that "[o]ne reason may be that there has not been sufficient reporting of prosecutorial misconduct in the news media"). Additionally, the media plays to a general audience and that may be the wrong target group. While outrage by the general public is a way to trigger major change, it is a very challenging route to travel, especially when the public already has positive preconceived impressions of prosecutors and negative feelings toward assisting criminal defendants any further. *See id.* at 174-76 (discussing over-reporting of crime and glorification of prosecutors on television shows such as *Law and Order*). A better approach may be to exclusively target the community more familiar with prosecutors and more able to exert formal and informal pressure over them: defense lawyers, other prosecutors, bar disciplinary committees, and, most importantly, judges.

deciding whether there had been misconduct), it would be far more difficult for critics to accuse them of having an axe to grind.[225]

Moreover, while the media focuses on disseminating information to the general public, the Prosecutorial Misconduct Projects would target a much narrower audience: the power brokers in the criminal justice system. As Professor Stephanos Bibas has explained, there is a dramatic gulf between the knowledge of key players in the criminal justice system and the general public.[226] The media often exacerbates this problem rather than narrowing the gap.[227] Thus, the prospect of challenging entrenched opinions through media coverage is far less desirable than attacking it by providing greater information to the power brokers within the system. And as I argue below, providing greater information to the key players can have considerable benefits.

C. Greater Information Flow Leads to Greater Supervision of Prosecutors Who Have Committed Prior Misconduct

The criminal justice system suffers from poor information flow.[228] Insiders and particularly outsiders operate with information deficits that limit their ability to make good decisions.[229] Prosecutorial Misconduct Projects would serve an information-forcing function that could ameliorate the problem.

As Professor Fred Zacharias has recently explained, in the criminal justice system most criminal defendants are not sophisticated consumers of information. Rather, they rely on word of mouth from limited sources to find a lawyer.[230] Thus, choosing a defense lawyer

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[225] However, merely identifying information publicly can have far-ranging and unanticipated private consequences if private actors get carried away with themselves. *See* Seth Kreimer, *Sunlight, Secrets, and Scarlett Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 36-61 (1991) (describing impact of government disclosures of sensitive information).

[226] *See* Bibas, *supra* note 162, at 916.

[227] *See id.* at 925-26 (explaining how crime dramas and news reports of high-profile crimes skew public perceptions on everything from sentencing to how muddy, aggravating, and mitigating facts of individual cases can be). As Professor Bibas explains, while "[t]he best way to counteract misleading information is with more and better information," the problem is that "spreading better information among the general public is not easy to do." *Id.* at 955-56.

[228] *See generally* Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47 (2008) (arguing that prosecutors are not cognizant of resources held by rest of criminal justice system, particularly number of prison beds, when making plea bargaining decisions).

[229] *See* Bibas, *supra* note 162, at 921-24.

[230] *See* Zacharias, *supra* note 61, at 174-75.

requires reliance on a lot of signaling, much of it based on the lawyer's reputation. And much of it is inaccurate.[231] Perhaps for that reason, scholars have applauded the recent rise of third-party entities that rate lawyers and thus provide greater information to the consumers who might hire them.[232]

At first blush, Professor Zacharias's observations may not seem relevant to prosecutors because their client — the State — hires them only once and typically only after an exhaustive and informed interview process. Yet we need to be concerned not just with the hiring committee, but also with the other prosecutors and the judges with whom the new hire will work.

Individual prosecutors rotate between different courts to give them exposure to different senior prosecutors and different judges (and, although this is not the reason for moving them, to different defense lawyers as well).[233] There is certainly some scuttlebutt in the courthouse about individual prosecutors, but many judges, senior prosecutors, and defense lawyers receive little or, worse yet, inaccurate information about prosecutors arriving in new courts. The lack of information phenomenon is amplified when state prosecutors transfer to the United States Attorney's Office or to a nearby county's office, as they often do.[234]

With a lack of objective or first-hand information, supervising prosecutors and judges will extend the long leash of plea bargaining power based on prosecutors' reputations.[235] Those reputations may well be accurate. However, it is also quite possible that judges and supervising prosecutors may be unaware of a subordinate's misconduct in other courtrooms. These judges and supervising prosecutors may have no idea that Prosecutor X, who is fairly new to

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[231] *See id.* at 176-83.

[232] *See, e.g.*, Colleen Petroni, Comment, *Third-Party Ratings as Modern Reputational Information: How Rules of Professional Conduct Could Better Serve Lower-Income Legal Consumers*, 156 U. PA. L. REV. 197, 223 (2007) ("[T]hird-party rating systems can provide important and useful reputational information to consumers.").

[233] Rotation is a recommended practice to avoid too much coziness between prosecutors and judges. Flowers, *supra* note 151, at 290 ("[P]rosecutors should be rotated from courtroom to courtroom to avoid developing an intimate relationship between the prosecutor and the court.").

[234] The United States Attorney's Office in Tampa evidently lacked much knowledge about Karen Cox, who quickly committed misconduct upon arriving in the office. *See supra* note 70 and accompanying text.

[235] *See* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1414 (2003) ("In most systems, the routine work of individual prosecutors receives little review, and thus line prosecutors exercise personal as well as institutional discretion.").

their courtroom, had one of his cases reversed on appeal last year for failure to turn over exculpatory evidence, particularly if Prosecutor X was not named in the judicial opinion.

Information forcing by a third-party entity such as a Prosecutorial Misconduct Project will help to take those judges and supervising prosecutors out of the dark. Once the key players see a prosecutor's name on a circulated list of prosecutors who have been reversed for misconduct,[236] they will be far more careful in extending the plea bargaining leash and trusting the prosecutors' representations at trial.[237] Defense lawyers will (hopefully)[238] check more carefully into the prosecutors' representations about the case.[239] For cases that go to trial, senior prosecutors, both out of a sense of justice and a desire to avoid reversal, will double-check to ensure that all favorable evidence has been turned over to the defense, rather than relying on representations by the new prosecutor. And judges will keep a more watchful eye for they too will be extremely concerned about not only justice being done but also a decision being reversed.[240]

At minimum, the benefits of Prosecutorial Misconduct Projects will be twofold: (1) identifying all, rather than a fraction of, the

[236] In a way, naming prosecutors is like the doctrine of chances that prosecutors sometimes use against defendants. That doctrine posits that "evidence of the repetition of similar unusual events over time demonstrate a decreasing probability that those unusual events occurred by chance." Martin v. State, 173 S.W.2d 463, 467 (Tex. Crim. App. 2005); *see also* Gier, *supra* note 204, at 206 (explaining how defense lawyers attempted to use doctrine of chances against Texas prosecutor who they accused of misconduct).

[237] *See* Massaro, *supra* note 167, at 1900 ("Publicizing the offender's identity may alert community members of her criminal past and cause them to isolate her socially or professionally. People might, for example, refuse a convicted embezzler a position that gives her access to funds.").

[238] Unfortunately, many appointed defense lawyers are paid at rates so low that they have a financial disincentive to do anything more than simply plea out the case. *See, e.g.*, Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 95-96 (2007).

[239] As Professors Wright and Miller explain, "with so little defense attorney time to spread among so many cases, it will be an exceptional case where the defense lawyer adds much to the prosecutor's view of the facts and the law, particularly when the prosecutor has actually spoken to witnesses and envisioned a possible trial." Wright & Miller, *supra* note 235, at 1414. Thus, as Professor Bibas explains, "The result of inadequate discovery is that the parties bargain blindfolded. They bargain in whatever shadow of trial they can discern, but they can easily go astray based on bluffing, puffery, fear, and doubt." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2495 (2004).

[240] *But see* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 14-15 (1993) (arguing that fear of reversal is overrated among most judges).

misbehaving prosecutors, and (2) clearly identifying repeat offenders by name, rather than relying on word of mouth and office gossip to keep the key players in the criminal justice system informed.

With respect to the first point, recall that data from a Center for Public Integrity report indicate that less than twenty-six percent of cases reversing convictions for prosecutorial misconduct named the prosecutor.[241] And as described above in Part II.A-B, even in death-penalty reversals courts name prosecutors in less than 50% of cases. Prosecutorial Misconduct Projects would raise this percentage to all or nearly all cases.

Second, and more important than simply naming names, the Prosecutorial Misconduct Project could put that information in the hands of judges and other actors who can use it. While judges around the country might be aware of a handful of prosecutors practicing in their courts who have a reputation for playing foul, it is highly unlikely that they are aware of all the repeat offenders, even the ones who have been called out by courts in judicial opinions. Most trial judges lack the time to read every appellate case issued in their jurisdiction, and virtually no judge has time to scour the opinion carefully enough to spot a prosecutor's name if it is mentioned only once or twice.[242] This is to say nothing of the lack of institutional knowledge of judges recently elected or appointed to the bench. By contrast, a Prosecutorial Misconduct report that keeps a running tally of each time a prosecutor was reversed for misconduct will very clearly signal to judges who the repeat offenders are. And there are a significant number of repeat offenders.

For example, during a seven-year period, Texas's highest criminal court reversed the convictions of five defendants (from five separate cases) based on improper prosecutorial argument by Dallas County Assistant District Attorney Robert Whaley.[243] Given that ADA Whaley

[241] *See supra* note 49 and accompanying text.

[242] By way of comparison, one observer has argued that conventional publicity shaming will fail because "even in close-knit communities, most people do not closely examine each page of the local newspaper for information about their neighbors' indiscretions." Note, *supra* note 168, at 2196.

[243] Robillard v. State, 641 S.W.2d 910, 911-12 (Tex. Crim. App. 1982) (reversing conviction because prosecutor improperly offered his own personal opinion about defendant's written statement); Campbell v. State, 610 S.W.2d 754, 756-57 (Tex. Crim. App. 1980) (reversing conviction because prosecutor's argument to jury included prejudicial statements not supported by evidence in case); Wright v. State, 609 S.W.2d 801, 802-06 (Tex. Crim. App. 1980) (reversing conviction because prosecutors brought impermissible and prejudicial matters before jury); Lewis v. State, 529 S.W.2d. 533, 534-35 (Tex. Crim. App. 1975) (reversing conviction because of

undoubtedly handled thousands of cases during this time period (and likely handled the vast majority without any allegations of prosecutorial misconduct), it is doubtful that all of the judges he practiced in front of would have been aware of his penchant for pushing the bounds of permissible argument.[244] Had those judges been provided with a list of prosecutors whose cases had been reversed, they likely would have kept him on a tighter leash in his statements and arguments to juries.

Or consider how a Kansas City prosecutor — James Humphrey — managed to be reversed twice (and to earn the attention of the Missouri Supreme Court on a third occasion) in the early 1980s for attempting to define reasonable doubt and shift the burden of proof to the defendant.[245] More than a decade later, after memories likely had faded or judges had retired, a Missouri Court of Appeals again reversed one of Humphrey's cases for improper jury argument.[246] Trial judges might have kept this prosecutor on a tighter leash if they had received a list indicating multiple prior reversals for improper argument.

To be sure, Prosecutorial Misconduct Projects will not deter all prosecutors from misbehaving in the future. Given that many prosecutors commit misconduct accidentally, a certain amount of misconduct, even repeat misconduct, is inevitable. But a Prosecutorial Misconduct Project can go a long way to deterring[247] individual prosecutors by shaming offenders, providing a valuable pedagogical lesson for junior attorneys, and at the same time signaling to judges

inflammatory prosecutorial argument suggesting that prosecutors and not defense lawyers are more truthful because prosecutors take solemn oath to God to seek justice); Davis v. State, 506 S.W.2d 909, 910-11 (Tex. Crim. App. 1974) (reversing conviction because prosecutor made legal statements to jury that were in contradiction to judge's charge to jury).

[244] During the time of ADA Whaley's serial misconduct, there were 17 district courts in Dallas County. TEXAS STATE DIRECTORY: THE COMPREHENSIVE GUIDE TO DECISION-MAKERS IN TEXAS GOVERNMENT 99-106 (1980). With elections and retirements, not to mention visiting judges, those 17 courts would have been staffed by dozens of different judges over a seven-year period.

[245] *See* State v. Shelby, 634 S.W.2d 481, 484 (Mo. 1982) (reversing conviction); State v. Jones, 615 S.W.2d 416, 420 (Mo. 1981) (same); State v. Burnfin, 606 S.W.2d 629, 631 (Mo. 1980) (finding prosecutor's argument erroneous but upholding conviction under plain error doctrine because defendant failed to object at trial).

[246] *See* State v. Gonzales, 899 S.W.2d 936, 938 (Mo. Ct. App. 1995).

[247] Despite the burgeoning shaming literature, there is no more than conjecture as to the deterrent effect of shaming. *See* Kahan, *Alternative Sanctions*, *supra* note 167, at 639-40. Nevertheless, anecdotal evidence, such as the decline of prostitution following the publication of those convicted of soliciting, seems to indicate a deterrent effect. *See id.*

that they are dealing with prosecutors who need to be monitored more carefully.

CONCLUSION

If prosecutorial misconduct is serious enough to overturn a criminal conviction, then trial judges, defense lawyers, and other prosecutors should know the identity of the offending prosecutor. Yet, appellate judges usually refrain from identifying prosecutors by name. The reasons for judges' reluctance to name likely have to do with their status as former prosecutors and a desire not to chastise fellow lawyers. These reasons have explanatory power but they are not adequate reasons to allow misconduct to be swept under the rug. Prosecutors who commit reversible misconduct should be named and publicly shamed for their misdeeds. It is unlikely that trial and appellate judges will voluntarily change their long-time practice of keeping prosecutors' names out of judicial opinions. To fill the vacuum, independent third parties, specifically, Prosecutorial Misconduct Projects, should identify unnamed prosecutors and provide a regularly updated list of offenders and their misconduct to the key players in the criminal justice system. Such Prosecutorial Misconduct Projects would shame bad actors, educate younger prosecutors, and enable judges to keep a closer watch on prior offenders so as to avoid misconduct in future cases.