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CARDOZO LAW REVIEW
de•novo

THE NEW YORK PROSECUTORIAL CONDUCT
COMMISSION AND THE DAWN OF A NEW ERA OF
REFORM FOR PROSECUTORS

Clyde Rastetter[†]

“You have a D.A., he doesn’t talk about when they convict you or how they convict you, he’s talking about how he’s going to kill you. He don’t give a damn if you’re innocent. He don’t give a damn if you’re guilty. He’s talking about killing you. . . . [I]t’s like a bad dream. You want to wake up, but you can’t do it.”

—Exoneree Randall Dale Adams¹

[†] Associate Editor, *Cardozo Law Review*. J.D. Candidate, Benjamin N. Cardozo School of Law, June 2020; B.A., *summa cum laude*, Columbia University, 2015. First and foremost, I am grateful to the wonderful staff of the Innocence Project and my terrific colleagues from the clinic who all prompted me to focus on this subject—including my supervising attorney, the inimitable Seema Saifee. I also want to thank Barry Scheck for focusing my attention on New York’s reforms and for his inspiration and support, as well as for being the first to cite a work-in-progress version of this Note in his excellent preface to the latest edition of the Georgetown Annual Review of Criminal Procedure. I would also like to thank my Note Advisor, Professor Ekow Yankah, for his discerning feedback and patient encouragement, and all of the editors of Volumes 40 and 41 of the *Cardozo Law Review*, whose tireless efforts, including their careful consideration, expert edits, and generous guidance, made this piece possible. I must also extend infinite gratitude to my family—my parents, Bill and Cary, and my brother and sister-in-law, Andy and Alexandra—for their kindness, patience, love, and support. Any mistakes and mischaracterizations are mine and mine alone.

¹ THE THIN BLUE LINE (American Playhouse 1988).

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INTRODUCTION

For many years, a large segment of the *Law and Order*–watching American public has assumed that the criminal justice system plays out in practice the same way it does on TV—fair, honest, and impartial prosecutors pursuing justice and endeavoring to put the correct wrongdoers behind bars.² At the same time, a growing group of academics and practitioners have pushed back against this prevailing narrative, pointing to worrying deviations.³ Yet, these critiques have

² See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 53–54 (2016); CTR. FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 2 (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf> [<https://perma.cc/Y3W9-NCLW>].

³ See Green & Yaroshefsky, *supra* note 2, at 56–57; see also Barry Scheck, *The Integrity of Our Convictions: Holding Stakeholders Accountable in an Era of Criminal Justice Reform*, 48 GEO. L.J. ANN. REV. CRIM. PROC. iii, v–vii (2019) (discussing prosecutor Ken Anderson, who purposefully excised exculpatory information from police reports provided to the trial judge for in camera review in the case of Michael Morton, causing Morton to be wrongfully convicted of his wife’s murder and imprisoned for twenty-five years before Anderson’s wrongdoing was uncovered); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 885–

struggled to gain traction in the face of prosecutorial responses that any such deviations are merely “episodic,” and the lack of systematic data collection that would lend definitive support to either side.⁴ However, the advent of DNA analysis in the late 1980s—which for the first time provided a scientifically proven way of determining someone’s involvement in a crime⁵—ushered in an era of dramatically increasing numbers of wrongful convictions being uncovered, along with new data about the factors that cause them.⁶ While estimates about the true extent of wrongful convictions vary, recent analyses have approximated that two to fifteen percent of people convicted of certain crimes are not the true perpetrators of those crimes.⁷ Whatever the actual percentage, there is no longer any doubt that thousands, if not tens of thousands, of innocent Americans have been wrongfully branded as criminals and convicted of crimes they did not commit.⁸

As the pace of exonerations in the DNA era has steadily increased,⁹ so too has the data accumulated about the role of prosecutorial misconduct in contributing to these wrongful convictions.¹⁰ According to

88, 885 n.8 (2015) (discussing Carmen Marino, an Ohio prosecutor who attributed his success in obtaining convictions to jurors, whom he bragged were distrustful of defendants that did not testify in their trials and were therefore “predisposed to find defendants guilty because they trust police and prosecutors”; so many of Marino’s convictions were later found to have been irrevocably tainted by his egregious misconduct that a judge who recently ordered a new trial in a case he prosecuted described Marino as being “infamous in Cuyahoga County for his vindictive, unprofessional and outrageous misconduct in criminal cases”).

⁴ See Green & Yaroshefsky, *supra* note 2, at 56–58; Scheck, *supra* note 3, at xxv.

⁵ See BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT xviii–xxiii (2001).

⁶ See, e.g., *id.* at xviii–xxiii, 222–34, 296, 318, 361 (finding prosecutorial misconduct, including the suppression of favorable evidence, knowing use of false testimony, and coerced witnesses, to have been a contributing factor in approximately thirty-three of seventy-four of the DNA exonerations that had occurred thus far).

⁷ See CTR. FOR PROSECUTOR INTEGRITY, *supra* note 2, at 2.

⁸ See Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xiii–xvi (2015); CTR. FOR PROSECUTOR INTEGRITY, ROADMAP FOR PROSECUTOR REFORM 1, 1 (2014), <http://www.prosecutorintegrity.org/wp-content/uploads/WhitePaper-RoadmapProsecutorReform.pdf> [<https://perma.cc/S3FD-3CZU>].

⁹ See *Exonerations by Year: DNA and Non-DNA*, NAT’L REGISTRY OF EXONERATIONS (Oct. 9, 2019), <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> [<https://perma.cc/3YKB-SEM4>].

¹⁰ See *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) (“There is an epidemic of *Brady* violations abroad in the land.”); Green & Yaroshefsky, *supra* note 2; Daniel S. Medwed, *Brady’s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1539–40 (2010); Jodi Nafzger, *Leveling Felony Charges at Prosecutors for Withholding Evidence*, 66 DRAKE L. REV. 307, 329–32 (2018); Sullivan & Possley, *supra* note 3, at 883–90; CTR. FOR PROSECUTOR INTEGRITY, *supra* note 2; Opinion, *Prosecutors Need a Watchdog*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/opinion/new-york-prosecutors-cuomo-district-attorneys-watchdog.html> [<https://perma.cc/2DSV-4LXV>].

the National Registry of Exonerations, official misconduct has been a contributing factor in fifty-four percent of all DNA and non-DNA exonerations to date.¹¹ Despite this, prosecutors are rarely, if ever, disciplined when their misconduct is uncovered.¹² As a result of the

Prosecutorial misconduct can take many different forms, but it is generally defined by courts as “any conduct by a prosecutor that violates a defendant’s rights, regardless of whether that conduct was known or should have been known to be improper by the prosecutor, or whether the prosecutor intended to violate legal requirements.” INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF CONNICK V. THOMPSON 9 (2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf [<https://perma.cc/MC9L-NJHK>]; see also Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 402–03 (2006). This Note focuses primarily on prosecutorial misconduct related to the Supreme Court’s holdings in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny—such as the suppression or destruction of evidence favorable to an accused—because studies have identified *Brady*-related prosecutorial misconduct as a leading cause of wrongful convictions and a contributing factor in more than one-third of all identified cases of official misconduct. See Medwed, *supra*, at 1537–40; Sullivan & Possley, *supra* note 3, at 920 (citing Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 482–83, 509–10 (2009)); *% of Exonerations by Contributing Factor*, NAT’L REGISTRY OF EXONERATIONS (Dec. 23, 2019), <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> [<https://perma.cc/T9KR-2WUJ>]; see also *Official Misconduct*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Official-Misconduct.aspx> [<https://perma.cc/V9ZB-9YKV>]. The Supreme Court held in *Brady* that the suppression of potentially exculpatory evidence by prosecutors “violates [an accused’s] due process [rights] where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution*.” *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (emphasis added) (quoting *Brady*, 373 U.S. at 87). Evidence is “material” for the purposes of *Brady* “when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Smith v. Cain*, 565 U.S. 73, 75 (2012) (quoting *Cone v. Bell*, 556 U.S. 449, 469–70 (2009)); see also *Kyles*, 514 U.S. at 434 (“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985))). As a result of the *Brady* line of decisions, prosecutors have an affirmative, constitutionally mandated duty to, among other obligations, both learn of any evidence favorable to an accused that is known to those acting on the government’s behalf, such as the police, and to disclose any favorable evidence to an accused. See, e.g., *Kyles*, 514 U.S. at 432–40. Given the “unparalleled access to the evidence in criminal cases” enjoyed by police and—by extension—prosecutors, as compared to defense lawyers and investigators, the *Brady* rule has been described as the “ultimate guarantor of fairness in our criminal justice system.” Kozinski, *supra* note 8, at xxxiii.

¹¹ See *% of Exonerations by Contributing Factor*, *supra* note 10; see also *Official Misconduct*, *supra* note 10.

¹² See, e.g., BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT Preface (2d ed. 1999), Westlaw (database updated Oct. 2019) (“A prosecutor’s violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies.”); Sullivan & Possley, *supra* note 3, at 890–95 (“The lack of discipline imposed on prosecutors who violate the code of professional ethics has been widely observed in legal literature. But despite this well-known

growing recognition of prosecutorial misconduct's contribution to wrongful convictions, and the apparent failure of existing disciplinary systems to curb this misconduct, a number of states have recently adopted significant reforms aimed at deterring and preventing prosecutorial wrongdoing.¹³ Two states in particular have led the way with trailblazing reforms: North Carolina, which adopted open-file discovery in 2004 and established an Innocence Inquiry Commission in 2006;¹⁴ and New York, which in 2017 adopted a rule requiring standing *Brady* orders to be issued at the outset of all criminal proceedings and in 2018 established the country's first commission on prosecutorial conduct.¹⁵ Although each of the reforms adopted by North Carolina and New York are crucial steps toward preventing wrongful convictions, New York's reforms went one step further and implemented specific mechanisms to ameliorate the conditions that allowed prosecutorial misconduct to occur in the first place.¹⁶ For instance, New York's *Brady* order serves an important educational function for all stakeholders involved in a criminal proceeding by listing each category of *Brady* information required to be disclosed under the relevant case law, thereby helping to ensure that even prosecutors at offices lacking robust training procedures will, by force of habit, be educated on exactly what their legal duties are.¹⁷ Similarly, New York's establishment of a commission on prosecutorial conduct sends the message loud and clear: should prosecutors deliberately disregard the legal and ethical duties that *Brady* orders make them aware of, they can and will be investigated and potentially removed from office.¹⁸ As a result, New York's reforms appear poised to provide the kind of accountability and deterrence necessary to alter the status quo and ensure

problem, the landscape has not shifted. Courts and ethics bodies rarely sanction prosecutors, and the rare disciplinary measures tend to be mere slaps on the wrist. This trend of inaction is consistent even in arguably the most egregious cases of prosecutorial misconduct: the suppression of exculpatory evidence.”).

¹³ See, e.g., Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008); Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, or Not*, 48 TEX. TECH. L. REV. 893 (2016); Scheck, *supra* note 3, at viii–xii, xxv–xxvii; Emmet G. Sullivan, Opinion, *How New York Courts Are Keeping Prosecutors in Line*, WALL ST. J. (Nov. 17, 2017, 6:09 PM), <https://www.wsj.com/articles/how-new-york-courts-are-keeping-prosecutors-in-line-1510953911> [https://perma.cc/YNN4-SPWK]; *Governor Cuomo Signs Legislation to Establish Nation's First Commission on Prosecutorial Conduct*, GOVERNOR ANDREW M. CUOMO (Aug. 20, 2018), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-establish-nations-first-commission-prosecutorial-conduct> [https://perma.cc/L8U9-Z839].

¹⁴ See discussion *infra* Section II.A.

¹⁵ See discussion *infra* Section II.B.

¹⁶ See discussion *infra* Section II.B.

¹⁷ See discussion *infra* Section II.B.1.

¹⁸ See discussion *infra* Section II.B.2.

that prosecutors abide by their legal and ethical duties in every case they prosecute.¹⁹

Part I of this Note will provide a brief overview of the history of the national dialogue regarding prosecutorial misconduct in this country and a summary of the clamor for greater accountability that has emerged in the last two decades. It will also look at some of the factors that led to the current state of affairs. Part II will analyze the reforms adopted by North Carolina and New York by examining the comparative benefits and drawbacks of each, focusing on which measures appear most promising in light of their prospective impact and efficacy thus far. Finally, Part III will propose that the two reforms recently adopted by New York—the implementation of standing *Brady* orders at the outset of all criminal proceedings and the establishment of a prosecutorial conduct commission—provide the blueprint for ushering in a new era of accountability, as each of New York’s reforms creates specific mechanisms to check prosecutorial overreach. In this way, New York’s reforms offer a framework for other states to follow in order to bring transparency and accountability to an area where they have historically been sorely lacking.

I. BACKGROUND

In an oft-cited speech given to a gathered conference of United States Attorneys in 1940, then–United States Attorney General and future Supreme Court Justice Robert H. Jackson declared that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”²⁰ Indeed, as Jackson pointed out, the discretionary powers possessed by prosecutors—such as deciding who to investigate, what charges to bring, or what pleas to offer—are incredibly broad and their exercise of these powers can have enormous and far-reaching impacts.²¹

¹⁹ See *infra* Part III.

²⁰ Robert H. Jackson, U.S. Attorney Gen., The Federal Prosecutor, Address Before the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940–1941).

²¹ See *id.*; see also Brandon K. Crase, *When Doing Justice Isn’t Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 477 (2007) (“The Supreme Court has made it abundantly clear that the discretion entrusted to prosecutors is enormously broad. The discretion afforded to prosecutors extends from the finest detail of the case to the questions of whether to investigate, grant immunity, or even whether to bring the charges at all. Today’s prosecutors are constrained only by imprecise ethical guidelines and judicial review for flagrant violations of their duties.” (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996))); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1524–25 (1981) (“The core of prosecutors’ power is charging, plea bargaining, and, when it is under the prosecutor’s control, initiating investigations. Decisions whether and what to charge, and whether and on what terms to bargain, have been left in prosecutors’ hands with very few limitations.”).

Far more so than any decisions made by judges, prosecutors' discretionary decisions shape our criminal justice system and impact the lives of those who come into contact with it on a daily basis.²² For the most part, prosecutors make these decisions behind closed doors and are accountable only to other prosecutors, rather than to the people directly affected by their choices.²³

The recognition of the immense power prosecutors possess and the special role they serve in our justice system is encapsulated by the admonishment in our ethics rules that prosecutors must serve as “minister[s] of justice” rather than as “advocate[s],” a role that carries with it “specific obligations to see that the defendant is accorded procedural justice.”²⁴ These rules reflect the understanding that prosecutors must take great care in exercising their power so as to ensure

²² See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007) (“Prosecutors are the most powerful officials in the criminal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have a greater impact and more serious consequences than those of any other criminal justice official.”); see also, e.g., GERSHMAN, *supra* note 12, at Preface (2d ed.) (“The prosecutor’s dominance in American criminal law, well established when this book was first published in 1985, has become even more entrenched. The last fifteen years are most notable for a vast accretion of power by prosecutors, increased deference by courts to prosecutorial prerogatives, and a general failure of courts and disciplinary bodies to impose meaningful sanctions on prosecutors for misconduct.”); Vorenberg, *supra* note 21, at 1522 (“[A]s the powers of other criminal justice officials have contracted, those of prosecutors have expanded. . . . There is a broad and rather casual acceptance of the fact that prosecutors often exercise greater control over the administration of criminal justice than do other officials.”).

²³ See Vorenberg, *supra* note 21, at 1522; see also DAVIS, *supra* note 22, at 5, 15 (“[T]hese important, sometimes life-and-death decisions . . . are totally discretionary and virtually unreviewable. Prosecutors make the most important of these discretionary decisions behind closed doors and answer only to other prosecutors. Even elected prosecutors, who presumably answer to the electorate, escape accountability, in part because their most important responsibilities—particularly the charging and plea bargaining decisions—are shielded from public view. . . . [U]nlike judges, parole boards, and even other entities within the executive branch such as police, presidents, and governors, [prosecutors] have escaped the kind of scrutiny and accountability that we demand of public officials in a democratic society.”).

²⁴ MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2018); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); Jackson, *supra* note 20, at 6 (“A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of [prosecutorial] power, and the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”); *Stay Tuned with Preet: Winning in the Age of Trump & Twitter (with David Frum)*, at 1:15:12–33, WNYC RADIO (Jan. 31, 2019), <https://bit.ly/2HOxS26> [<https://perma.cc/DRL8-G5KS>] (“Justice is not about putting people in prison. Justice is about doing the right thing, and sometimes that means getting people out of prison; just like it sometimes means not prosecuting people; just like it sometimes means giving people a second chance. All those things, depending on the circumstances, are important, vital, and central, to not only doing justice, but having people have faith that justice is being done.”).

that they are advancing the public good in all respects rather than their or anyone else's personal agenda, a sentiment that Jackson himself expressed in his speech.²⁵

A. *The DNA Era and a Shifting Status Quo*

In the leadup to the DNA era, it was generally assumed that misconduct committed by prosecutors—whether intentional or unintentional—was largely aberrational.²⁶ Judges defaulted to giving prosecutors the benefit of the doubt and operated under the presumption that prosecutors' offices could generally be trusted.²⁷ Academics and practitioners pushed back against this assumption, suggesting that prosecutorial misconduct was more widespread and systemic than anomalous.²⁸ Yet, these critiques mostly fell on deaf ears, and little, if any, attention was paid to them by mainstream governmental or media institutions.²⁹ Moreover, prosecutors countered these critiques by relying on the long-prevailing view that reports of misconduct were being blown out of proportion, and that any misconduct was due to “a few bad apples” or “a handful of rogue prosecutors.”³⁰

The status quo began to shift in the late 1990s when the *Chicago Tribune* and *Pittsburgh Post-Gazette* ran separate exposés detailing findings of widespread impropriety on the part of prosecutors across the country, including instances in which some prosecutors had gone as far

²⁵ See Jackson, *supra* note 20, at 3–4 (“While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. . . . Your positions [as United States Attorneys] are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.”).

²⁶ See Green & Yaroshefsky, *supra* note 2, at 52–53.

²⁷ See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“[I]n the absence of clear evidence to the contrary, courts presume that they [prosecutors] have properly discharged their official duties.” (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926))); see also Green & Yaroshefsky, *supra* note 2, at 54–56.

²⁸ See Green & Yaroshefsky, *supra* note 2, at 56–58.

²⁹ See *id.*

³⁰ Bennett L. Gershman, *New Commission to Regulate Prosecutorial Misconduct*, HUFFINGTON POST (May 20, 2014), https://www.huffingtonpost.com/bennett-l-gershman/new-commission-to-prosecutorial-misconduct_b_5353570.html [https://perma.cc/MX7Q-ZLHA]. Prosecutors also argued that prosecutorial misconduct should be narrowly defined as only intentional wrongdoing, rather than also encompassing negligently or inadvertently caused wrongdoing, despite the fact that courts do not distinguish between intentional and inadvertent misconduct when analyzing the misconduct's legal impact on the integrity of a conviction. See Green & Yaroshefsky, *supra* note 2, at 58–60; see also *supra* note 10.

as intentionally hiding exculpatory evidence in very serious cases.³¹ Even more troubling was the *Chicago Tribune*'s conclusion that prosecutors who engaged in serious misconduct expected to go unpunished.³² Although the public concern aroused by these reports did not last long,³³ the Duke Lacrosse Scandal less than a decade later thrust the issue back into the national spotlight in a frenzied manner.³⁴ In that case, which was highly publicized from start to finish, North Carolina prosecutor Michael Nifong charged three members of the Duke University lacrosse team with sexual assault and then made a flurry of ethically dubious media statements in which he opined in no uncertain terms on the defendants' guilt.³⁵ Not long after, it was revealed during a hearing on a motion to compel discovery that Nifong had deliberately instructed a lab director to omit exculpatory DNA test results from reports provided to the defense—a bombshell revelation that eventually led to the indictment being dropped.³⁶ Disciplinary charges were subsequently brought against Nifong for violating ethical, statutory, and constitutional requirements for

³¹ See Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win, Part 1: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), <https://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html> [https://perma.cc/GW3D-EN3U] (“With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases. They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs. They do it to win. . . . In the first study of its kind, a Chicago Tribune analysis of thousands of court records, appellate rulings and lawyer disciplinary records from across the United States has found . . . [that] at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false.”); Bill Moushey, *Hiding the Facts Readout; Discovery Violations Have Made Evidence-Gathering a Shell Game*, PITT. POST-GAZETTE (Nov. 24, 1998), <https://bit.ly/2S7ie2s> (“In its review of 1,500 allegations of prosecutorial misconduct over the past 10 years, the Post-Gazette found hundreds of examples of discovery violations in which prosecutors intentionally concealed evidence that might have helped prove a defendant innocent or a witness against him suspect. But [in] most cases reviewed by the Post-Gazette . . . [p]rosecutors who violated discovery rules were seldom punished. Many violated discovery rules over and over again.”); see also Green & Yaroshefsky, *supra* note 2, at 60–61; Joy, *supra* note 10, at 399–400; CTR. FOR PROSECUTOR INTEGRITY, *supra* note 2, at 2.

³² See Armstrong & Possley, *supra* note 31; see also Sullivan & Possley, *supra* note 3, at 884–90 (surveying just a few of the plethora of examples of prosecutors engaging in serious misconduct and escaping any discipline).

³³ An informal poll conducted by the *Chicago Tribune* after its exposé ran suggested that the lack of sustained public outrage over prosecutorial misconduct “may be a result of lack of information about what prosecutors do and how they behave.” Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 465 (2001).

³⁴ See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice”*, 76 FORDHAM L. REV. 1337 (2007).

³⁵ See Green & Yaroshefsky, *supra* note 2, at 76; Mosteller, *supra* note 34, at 1348–52.

³⁶ See Mosteller, *supra* note 34, at 1363; Aaron Beard, *Judge Sends Duke Prosecutor to Jail*, OKLAHOMAN (Sept. 1, 2007, 2:16 AM), <https://oklahoman.com/article/3115792/judge-sends-duke-prosecutor-to-jail> [https://perma.cc/W44K-V5AC]

the disclosure of exculpatory evidence.³⁷ The media frenzy continued throughout Nifong's disciplinary hearing, which resulted in Nifong being found guilty of ethical violations and disbarred.³⁸

The intense media scrutiny accompanying the Duke Lacrosse case and several other high-profile cases following close on its heels thrust a discussion of prosecutorial misconduct to the forefront of the national dialogue.³⁹ In addition, the number of DNA exonerations occurring every year had reached a steady pace by this point,⁴⁰ with each exoneration shedding an increasingly bright light on the various factors that lead to wrongful convictions, including many instances of prosecutorial misconduct.⁴¹ Increasing numbers of commentators published articles examining these newly uncovered instances of prosecutorial misconduct and highlighting the lack of accountability they revealed.⁴² Moreover,

³⁷ See Mosteller, *supra* note 13, at 292.

³⁸ See Duff Wilson, *Prosecutor in Duke Case Is Disbarred for Ethics Breaches*, N.Y. TIMES (June 16, 2007), <https://www.nytimes.com/2007/06/16/us/16cnd-nifong.html> [<https://perma.cc/59BS-C4HW>].

³⁹ See, e.g., Gershman, *supra* note 30. Perhaps the most notable of these subsequent cases was the prosecution and October 2008 conviction of former long-time U.S. Senator Ted Stevens for lying on Senate disclosure forms, costing him re-election and shifting the balance of power in the Senate. See Kozinski, *supra* note 8, at xxiii–xxiv; Sullivan, *supra* note 13. Shortly after Stevens's conviction, a whistleblower FBI agent revealed that government lawyers had knowingly concealed numerous pieces of evidence that likely could have resulted in Stevens's acquittal had they not been withheld. See Kozinski, *supra* note 8, at xxiii. Incensed by the government's insistence that the concealed evidence was not material to the verdict or relevant to the defense, District Judge Emmet Sullivan appointed a special prosecutor to investigate the matter. The special prosecutor determined that Justice Department lawyers had "committed deliberate and 'systematic' ethical violations by withholding critical evidence pointing to Stevens's innocence." Sullivan, *supra* note 13; see also Kozinski, *supra* note 8, at xxiv. However, the special prosecutor also found that Judge Sullivan was powerless to censure the wrongdoers because he had not issued a direct, written order requiring the prosecution to abide by their constitutional obligation to disclose exculpatory evidence. See Sullivan, *supra* note 13. Judge Sullivan was so affected by the entire episode that he has become a vocal proponent of the need for greater prosecutorial accountability. See Sullivan, *supra* note 13; Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138.

⁴⁰ From 2000 to 2019, the average number of new DNA exonerations each year has held steady at just above twenty exonerations per year. See *Exonerations by Year: DNA and Non-DNA*, *supra* note 9.

⁴¹ See *% of Exonerations by Contributing Factor*, *supra* note 10; *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states> [<https://perma.cc/HS99-HT5Z>]; *Exonerations by Year: DNA and Non-DNA*, *supra* note 9; see also *Official Misconduct*, *supra* note 10.

⁴² See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Joy, *supra* note 10, at 399–400, 403; Mosteller, *supra* note 34, at 1348–52; Sullivan & Possley, *supra* note 3; KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 (2010), <https://digitalcommons.law.scu.edu/ncippubs/2> [<https://perma.cc/A7BN-4MKH>]; Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*,

journalists were shocked to discover that what had happened to Michael Nifong was the exception, rather than the rule, and that even when prosecutors committed misconduct sufficiently egregious to overturn a conviction, those prosecutors were almost never punished.⁴³ Even commentators at staunchly conservative publications expressed outrage at the unchecked behavior of prosecutors and urged for national attention to be focused on the issue.⁴⁴ Everyone was asking themselves the same question: why do prosecutors who break the law not get punished?⁴⁵

B. *Connick v. Thompson and the Myth of the Self-Policing Prosecutor*

The answer to this question is aptly illustrated by the facts of *Connick v. Thompson*, decided by the U.S. Supreme Court in 2011.⁴⁶ In one of two underlying criminal cases, John Thompson was prosecuted by the Orleans Parish District Attorney's Office (OPDA) for an armed robbery during which the assailant cut themselves and bled on one of the

PROPUBICA (Apr. 3, 2013, 5:30 AM), <https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody> [<https://perma.cc/4Q88-4AW8>]; Editorial, *Rampant Prosecutorial Misconduct*, N.Y. TIMES (Jan. 4, 2014), <https://www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html> [<https://perma.cc/6D2X-XERE>].

⁴³ See Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA TODAY (Sept. 23, 2010, 1:31 PM), http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm [<https://perma.cc/27KQ-9QLC>] (review of federal prosecutions initiated between 1997–2010, finding 201 instances of misconduct by federal prosecutors, forty-seven of which led to exonerations, but finding that only one offending prosecutor faced any type of serious sanction); Sapien & Hernandez, *supra* note 42 (discussing review of a decade's worth of rulings by state and federal courts in New York City where more than two dozen instances of prosecutorial misconduct sufficiently egregious to lead to overturned convictions had occurred and finding that only one prosecutor faced any disciplinary action); Fredric N. Tulsy, *Review of more than 700 appeals finds problems throughout the justice system*, MERCURY NEWS (Jan. 31, 2007, 7:48 AM), <https://www.mercurynews.com/2007/01/31/part-one-review-of-more-than-700-appeals-finds-problems-throughout-the-justice-system> [<https://perma.cc/XJ3W-2NPD>] (review of five years of records from a single California district uncovered how “[i]n nearly 100 cases, the prosecution engaged in questionable conduct that bolstered its effort to win convictions Some Santa Clara prosecutors withheld evidence that could have helped defendants, some defied judge’s orders and some mislead juries during closing arguments”).

⁴⁴ See Kevin D. Williamson, *When District Attorneys Attack*, NAT’L REV. (May 31, 2015, 8:00 AM), <https://www.nationalreview.com/2015/05/criminal-justice-mess-orange-county-kevin-d-williamson> [<https://perma.cc/2GVN-9A3W>] (discussing the unprecedented decision by a California judge to disqualify an entire district attorney’s office from a high-profile capital murder case after revelations that the office had “colluded with the Orange County sheriff’s department to systematically suppress potentially exculpatory evidence in at least three dozen cases”).

⁴⁵ See, e.g., Nina Morrison, Opinion, *What Happens When Prosecutors Break the Law?*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html> [<https://perma.cc/DBP6-X8K5>]; see also *supra* notes 31–32, 42–44 and accompanying text.

⁴⁶ 563 U.S. 51 (2011).

victim's pant legs.⁴⁷ A swatch of the victim's pant leg was removed, and a test conducted before trial conclusively established that the assailant's blood type was B.⁴⁸ Thompson's blood type was O.⁴⁹ However, prosecutors failed to disclose the existence of the blood swatch or the blood type test results prior to trial.⁵⁰ Even worse, Gerry Deegan, the OPDA prosecutor handling the case, checked the blood swatch out of the property room on the morning of the first day of trial and the swatch was never again located.⁵¹ As a result, Thompson was convicted of armed robbery, which was then used to separately convict Thompson of an unrelated murder.⁵² Although the murder occurred prior to the armed robbery, prosecutors deliberately reversed the order of the trials so they could use the robbery conviction to prevent Thompson from testifying in his own defense at the murder trial, as well as to increase the likelihood that he would be sentenced to death.⁵³ While the jury deliberated in the armed robbery trial, one of the prosecutors even told Thompson in no uncertain terms what his plan was: "I'm going to fry you. You will die in the electric chair."⁵⁴ The gambit worked, and following the murder trial in which OPDA prosecutors continued to disregard *Brady's* requirements,⁵⁵ Thompson was found guilty of first-degree murder and sentenced to death.⁵⁶

Fourteen years later, after Thompson had exhausted all of his appeals, the State of Louisiana scheduled his execution.⁵⁷ In a last-ditch effort to save his life, Thompson's attorneys hired a private investigator, who miraculously discovered a copy of the exculpatory report on the results of the blood-typing test conducted prior to Thompson's robbery trial.⁵⁸ The prosecutor, Deegan, had since passed away, but before his death—and after learning that he was terminally ill—Deegan confessed to a friend and fellow prosecutor that he had intentionally suppressed the

⁴⁷ *Id.* at 81 (Ginsburg, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 85.

⁵² *Id.* at 83–87.

⁵³ *Id.* at 82–83, 85–87.

⁵⁴ *Id.* at 85 n.7 (citation omitted).

⁵⁵ During that trial, prosecutors failed to disclose several key pieces of exculpatory evidence to the defense, including eyewitness statements suggesting the real murderer was Kevin Freeman, Thompson's co-defendant and the State's star witness against him. *Id.* at 85–87. Given Thompson's prior robbery conviction, he was powerless to rebut Freeman's testimony and point to Freeman as the real killer without facing blistering impeachment on cross-examination. *Id.*

⁵⁶ *Id.* at 87.

⁵⁷ *See id.*

⁵⁸ *Id.* at 87–88.

exculpatory blood swatch evidence in Thompson's robbery case.⁵⁹ That friend kept Deegan's confession to himself for five years until he learned that the defense had located a copy of the report, at which time he finally acknowledged Deegan's admission.⁶⁰ After this information was presented to the trial court, it insisted on a full evidentiary hearing—despite the fact that OPDA had already moved to dismiss the robbery case—as the court found it could no longer accept the office's representations at face value.⁶¹ Before formally dismissing the charges, the trial court admonished the various OPDA assistant district attorneys sitting in the courtroom: "I hope . . . [you] take to heart the message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work."⁶²

In spite of the court's reprimand, the job of punishing the errant prosecutors fell to the very same district attorney's office to which they belonged.⁶³ Grand jury proceedings were initiated against the responsible prosecutors, but they were quickly terminated after a single day, as long-time District Attorney Harry Connick maintained that the lab report was not *Brady* material and told the investigating prosecutor that the grand jury would make his job more difficult.⁶⁴ The investigating prosecutor resigned in protest, and no further disciplinary action was taken.⁶⁵

Thompson subsequently filed a civil action against Connick and OPDA under 42 U.S.C. § 1983, alleging they had violated his constitutional rights by withholding the blood swatch *Brady* evidence.⁶⁶ In their depositions and at trial, Connick and his former top lieutenants repeatedly misstated *Brady*'s requirements, demonstrating that—as pointed out by Thompson's expert witness—they had no understanding of their obligations under *Brady* whatsoever.⁶⁷ Indeed, Connick admitted he had stopped paying attention to developments in the law after he was first elected in 1974.⁶⁸ OPDA's culture of flagrant disregard toward defendants' constitutional rights under *Brady* and its progeny has proven to be so deeply ingrained and pervasive that publicly available

⁵⁹ *Id.* at 87.

⁶⁰ *Id.* at 87–88.

⁶¹ *Id.* at 88.

⁶² *Id.* (citation omitted).

⁶³ *Id.* at 88–89.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 90–91.

⁶⁷ *Id.* at 93–97. Thompson's expert characterized Connick's supervision regarding *Brady* as "the blind leading the blind." *Id.* at 97.

⁶⁸ *Id.* at 97. Justice Ginsburg highlighted how problematic this was, given that "[d]uring the relevant time period, there were many significant developments in this Court's *Brady* jurisprudence . . . [and] the Louisiana Supreme Court issued dozens of opinions discussing *Brady*." *Id.* at 99 n.16 (citations omitted).

information reveals OPDA failed to comply with *Brady* in no less than forty-five different cases—at least fourteen of which have resulted in reversals of convictions by the U.S. Supreme Court, the U.S. Court of Appeals for the Fifth Circuit, and the Louisiana Supreme Court.⁶⁹ Six of these reversals occurred *prior* to Thompson’s two trials in 1985.⁷⁰ In fact, OPDA has become so infamous for its track record of violating defendants’ *Brady* rights that the Louisiana State Court of Appeal, Fourth Circuit, wrote in a recent decision that it was “not unmindful of the storied, shameful history of the local prosecuting authorities’ noncompliance with *Brady*.”⁷¹ Despite this, only a single Louisiana prosecutor—a former OPDA prosecutor—has ever been formally sanctioned by Louisiana State disciplinary authorities for failing to comply with *Brady*.⁷²

1. Ineffective Existing Systems of Oversight

The facts of *Connick* illustrate several leading reasons identified by recent literature that explain why prosecutors who commit misconduct tend to evade punishment entirely, or, at most, receive sanctions amounting to a proverbial slap on the wrist.⁷³ First and foremost among these is the long-standing and recently reaffirmed assumption by courts that existing oversight systems within the legal profession and district attorneys’ offices sufficiently ensure that prosecutors act lawfully.⁷⁴ Indeed, this erroneous assumption was the precise reason why the

⁶⁹ See Complaint at ¶¶ 119–50, *Jones v. Cannizzaro*, No. 18-cv-00503 (E.D. La. Jan. 16, 2018), ECF No. 1, 2018 WL 418159. The following are all cases in which OPDA *Brady* violations resulted in reversed convictions: *Smith v. Cain*, 565 U.S. 73 (2012); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Floyd v. Vannoy*, 894 F.3d 143 (5th Cir. 2018); *Truvia v. Connick*, 577 Fed. Appx. 317, 320 (5th Cir. 2014); *Mahler v. Kaylo*, 537 F.3d 494 (5th Cir. 2008); *Monroe v. Blackburn*, 607 F.2d 148 (5th Cir. 1979); *Davis v. Heyd*, 479 F.2d 446 (5th Cir. 1973); *State v. Bright*, 875 So. 2d 37 (La. 2004); *State v. Knapper*, 579 So. 2d 956 (La. 1991); *State v. Rosiere*, 488 So. 2d 965 (La. 1986); *State v. Perkins*, 423 So. 2d 1103 (La. 1982); *State v. Curtis*, 384 So. 2d 396 (La. 1980); *State v. Falkins*, 356 So. 2d 415 (La. 1978); and *State v. Carney*, 334 So. 2d 415 (La. 1976). The forty-five publicly available cases in which OPDA failed to comply with *Brady* are likely just the tip of the iceberg. See Complaint, *supra*, at ¶¶ 124–28.

⁷⁰ See *Monroe*, 607 F.2d 148; *Davis*, 479 F.2d 446; *Perkins*, 423 So. 2d 1103; *Curtis*, 384 So. 2d 396; *Falkins*, 356 So. 2d 415; *Carney*, 334 So. 2d 415.

⁷¹ *State v. Wells*, 191 So. 3d 1127, 1139 (La. Ct. App. 2016).

⁷² See *In re Jordan*, 913 So. 2d 775, 784 (La. 2005) (suspending Roger Jordan from the practice of law for three months but deferring the suspension in its entirety so long as Jordan committed no further misconduct during the subsequent one-year period); John Simerman, *Prosecutor Spared Discipline in Key Louisiana Supreme Court Decision over Withheld Evidence*, *ADVOCATE* (Oct. 19, 2017, 5:20 PM), https://www.theadvocate.com/new_orleans/news/courts/article_371e4f7c-b509-11e7-bde9-bb1d88d2a37f.html [<https://perma.cc/TEJ9-TVXS>].

⁷³ See INNOCENCE PROJECT, *supra* note 10, at 11–13; see also *supra* note 12.

⁷⁴ See *Connick v. Thompson*, 563 U.S. 51, 64–68 (2011).

Connick Court reversed Thompson's jury verdict and held that a district attorney's office could *not* be held constitutionally liable for a single act of misconduct by an employee, no matter how egregious the misconduct in question.⁷⁵

Yet, studies conducted in the years since *Connick* was decided have demonstrated that this reasoning is fundamentally flawed.⁷⁶ For instance, an investigation into the professional conduct rules and attorney disciplinary procedures of all fifty states in the wake of *Connick* found that state bar authorities rarely subject prosecutors to disciplinary action.⁷⁷ The investigation concluded that the states' procedures, as currently constituted, did a "poor job of policing prosecutors."⁷⁸ A review of public attorney disciplinary records in California from 1997 to 2009 reached the same conclusion.⁷⁹ Although there had been at least 707 findings of prosecutorial misconduct during this period,⁸⁰ including sixty-seven instances of the same prosecutors committing misconduct more than once,⁸¹ the review discovered that only ten of the 4741 disciplinary actions reported in the *California State Bar Journal* from 1997 to 2009 involved prosecutors, and only six of those were related to their conduct in the handling of a criminal case.⁸² Additionally, several members of the Innocence Network formed a prosecutorial oversight commission after *Connick* to investigate the Supreme Court's conclusion that existing oversight systems were sufficient to respond to and prevent prosecutorial misconduct.⁸³ The commission reviewed the existing literature and research on prosecutorial misconduct, quantified the prevalence of misconduct through independent research, and held forums with

⁷⁵ See *id.* at 64–68, 71–72.

⁷⁶ See David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011), http://www.yalelawjournal.org/pdf/1018_hpkwev93.pdf [<https://perma.cc/9Z37-7XAV>]; Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537 (2011); INNOCENCE PROJECT, *supra* note 10.

⁷⁷ See Keenan et al., *supra* note 76.

⁷⁸ *Id.* at 205. In fact, state bar authorities may sometimes actively hinder investigations into prosecutorial misconduct. Such was the case with Leslie P. Smith, a Virginia lawyer who reluctantly kept secret "brazen [prosecutorial] misconduct" in the form of "coaching a witness and hiding it from the defense" for ten years, because he was informed by the Virginia State Bar that he had no choice, even though the information could—and eventually did—save the life of a man on death row. Adam Liptak, *Lawyer Reveals Secret, Toppling Death Sentence*, N.Y. TIMES (Jan. 19, 2008), <https://www.nytimes.com/2008/01/19/us/19death.html> [<https://perma.cc/MWY3-9BTN>].

⁷⁹ See RIDOLFI & POSSLEY, *supra* note 42, at 2–4.

⁸⁰ See *id.* at 16.

⁸¹ See *id.*

⁸² See *id.* at 54.

⁸³ See INNOCENCE PROJECT, *supra* note 10, at 7.

stakeholders in six states.⁸⁴ After summarizing the results of its findings, the commission concluded that our current systems of prosecutorial oversight are either “failing or nonexistent.”⁸⁵

Given the failure of professional conduct rules and attorney disciplinary procedures to provide a check against prosecutorial misconduct, the responsibility for punishing a law-breaking prosecutor often falls solely to the very same district attorney’s office in which the misconduct occurred, as in *Connick*.⁸⁶ Yet, this means that the investigation and potential indictment of an errant prosecutor must be carried out by her current or former coworkers and possible friends, thus creating an inherent conflict of interest.⁸⁷ Furthermore, the negative publicity and scrutiny that such an investigation generates for a district attorney’s office means that any employees tasked with carrying it out are instinctively disincentivized from fully investigating and punishing those involved, no matter how noble their motives.⁸⁸ As a result, it is likely that many district attorneys conclude, as *Connick* did, that thoroughly investigating allegations of prosecutorial misconduct will make their jobs too difficult to be worth the hassle.⁸⁹

2. Culture of Underreporting

Another reason why prosecutors tend to evade punishment for their misconduct is the culture of underreporting that is pervasive throughout the nation’s criminal justice system, despite most jurisdictions’ ethical requirements that instances of attorney misconduct must be reported.⁹⁰ Indeed, this problem is reflected in the *Connick* trial court’s willingness to leave any decisions about disciplinary action to the district attorney’s office rather than to also report the misconduct to the state disciplinary authorities that regulate attorney conduct.⁹¹ The primary reason for this culture of underreporting offered by panelists at forums hosted by the Innocence Network’s prosecutorial oversight commission was fear of hurting relationships with individuals the panelists worked with on a daily basis.⁹² In particular, defense attorneys reported being strongly

⁸⁴ *See id.*

⁸⁵ *Id.* at 20.

⁸⁶ *See id.* at 17.

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See Connick v. Thompson*, 563 U.S. 51, 88–89 (2011) (Ginsburg, J., dissenting).

⁹⁰ *See Keenan et al.*, *supra* note 76, at 221, 244; INNOCENCE PROJECT, *supra* note 10, at 14; RIDOLFI & POSSLEY, *supra* note 42, at 48–51.

⁹¹ *See Connick*, 563 U.S. at 88–89.

⁹² *See INNOCENCE PROJECT*, *supra* note 10, at 14.

disincentivized to report any prosecutorial misconduct for fear of alienating the same people who exercised unfettered discretion over the outcomes of their clients' cases.⁹³ Indeed, defense attorneys find themselves in a precarious ethical dilemma where reporting misconduct has the potential to adversely affect every future client they have, but not reporting it may negatively impact their current client's case. Faced with these two distressing outcomes, defense attorneys understandably choose not to report, in hopes of minimizing the overall harm to all of their clients.⁹⁴ Yet, defense attorneys are not alone, as the disincentive to report misconduct appears to be so strong that even judges in jurisdictions with statutorily required reporting requirements by and large continue to fail to do so.⁹⁵

3. Fundamental Flaw in the *Brady* Rule

The final reason illustrated by *Connick* about why law-breaking prosecutors are rarely punished springs from an innate fault of the Supreme Court's holding in *Brady v. Maryland*.⁹⁶ Namely, the *Brady* rule makes prosecutors the sole arbiters of what evidence is favorable to an accused, which in turn creates a fundamental conflict of interest for prosecutors, no matter how benevolent and well-intentioned they might be.⁹⁷ Although the Court routinely reminds district attorneys that "the prudent prosecutor will resolve doubtful questions in favor of disclosure,"⁹⁸ even the most righteous prosecutors will at some point find they must choose between their dual, competing roles as advocates and

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.*; see also Keenan et al., *supra* note 76, at 221.

⁹⁶ See Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 HOFSTRA L. REV. 87, 87–89, 92–109 (2017); Medwed, *supra* note 10, at 1539–44; Sullivan & Possley, *supra* note 3, at 914–20.

⁹⁷ See Sullivan & Possley, *supra* note 3, at 915 n.132 ("In the opinion of one of the authors, based upon his personal experience as both a former U.S. Attorney and as a defense attorney, it is obvious that even the most honorable prosecutors have a built-in conflict of interest in deciding what to produce to the defense before trial. This opinion is supported by the myriad cases of undisclosed exculpatory evidence in the Registry of Exonerations."); see also Jones, *supra* note 96, at 104–06; KATHLEEN M. RIDOLFI ET AL., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES 22 (2014), <http://digitalcommons.law.scu.edu/facpubs/885> [https://perma.cc/HZ2P-XY8M].

⁹⁸ *United States v. Agurs*, 427 U.S. 97, 108 (1976); see also, e.g., *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.").

ministers of justice.⁹⁹ Will they, for instance, see that justice is done and disclose the favorable evidence that might allow a confessed and DNA-linked rapist to walk free, or will they suppress the evidence to ensure that the rapist is convicted and that they win their case?¹⁰⁰ It is an impossible decision for anyone to make and is one that has far too many important ramifications to be left in the hands of just one of the stakeholders in our adversarial criminal justice system.¹⁰¹

Moreover, prosecutors have nothing to lose and everything to gain by doing precisely the opposite of what the Supreme Court instructs and erring in favor of suppression rather than disclosure.¹⁰² This is partly because it is simply “not in their hearts to look for ways to help the other side,”¹⁰³ but it is also because a prosecutor’s decision to withhold evidence normally means that the evidence will forever be hidden from defense lawyers and the courts.¹⁰⁴ Indeed, prosecutors are under no obligation to provide a privilege log to the defense or to inform them about what evidence they have withheld, nor must they consult with the court about what they should or should not produce.¹⁰⁵ This, combined with the dearth of repercussions even when misconduct is found to have occurred, means the *Brady* rule as currently formulated seems to actually create “perverse incentives” for prosecutors to engage in, rather than refrain from, committing misconduct.¹⁰⁶

⁹⁹ See Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 727–28 (1999) (“The prosecutor labors under the pull of two divergent forces created by the ethical precepts. One of these forces requires an attorney to advocate passionately the government’s position, while the other pushes the prosecutor to seek a result that may not be exactly what the client and the attorney desire: a conclusion short of a criminal conviction. Therefore, at the core of a prosecutor’s function lies a potentially irreconcilable conflict between doing justice—which the ethical codes do not define—and the prosecutor’s role as the government’s primary advocate in the criminal justice system.”); see also RIDOLFI ET AL., *supra* note 97, at 22; Jones, *supra* note 96, at 104–06; Sullivan & Possley, *supra* note 3, at 915 n.132.

¹⁰⁰ See, e.g., Jones, *supra* note 96, at 104 (“Although prosecutors believe they have a responsibility to be ‘just’ and ‘fair,’ they also maintain an equally strong belief that the defendant is guilty and deserves to be convicted and punished. Prosecutors . . . fear that compliance with *Brady* will result in unjust acquittals. . . . [And] that ‘dishonest’ defense attorneys will use the favorable information to ‘create’ a baseless defense, distort the ‘real’ facts of the case, or otherwise gain an unfair advantage in the litigation.”).

¹⁰¹ See RIDOLFI ET AL., *supra* note 97, at 22; Henning, *supra* note 99, at 727–28; Jones, *supra* note 96, at 104–06; Sullivan & Possley, *supra* note 3, at 915 n.132.

¹⁰² See RIDOLFI ET AL., *supra* note 97, at 22; Jones, *supra* note 96, at 104–06; Sullivan & Possley, *supra* note 3, at 915 n.132.

¹⁰³ Kozinski, *supra* note 8, at xxvii.

¹⁰⁴ See Medwed, *supra* note 10, at 1541–42; Sullivan & Possley, *supra* note 3, at 916.

¹⁰⁵ See Sullivan & Possley, *supra* note 3, at 916.

¹⁰⁶ Joy, *supra* note 10, at 400. Professor Joy further points out that “psychological literature demonstrates that when one is not held accountable for decisions several biases come into play that negatively affect the quality of those decisions. Thus, the overall lack of accountability is a

The problematic nature of this current state of affairs is fittingly encapsulated in the views expressed by former Orleans Parish District Attorney Harry Connick when questioned about his office's history of *Brady* violations during the trial in John Thompson's civil suit.¹⁰⁷ For instance, Connick was asked about the Supreme Court decision *Kyles v. Whitley*, in which the Court reversed another capital murder conviction and death sentence obtained by his office due to its suppression of exculpatory *Brady* evidence.¹⁰⁸ In so doing, the Court roundly rejected OPDA's proposals to loosen the *Brady* rule to give prosecutors "a certain amount of leeway in making a judgment call" about the disclosure of any given piece of evidence,¹⁰⁹ as well as to not hold prosecutors accountable for favorable evidence withheld from them by the police.¹¹⁰ As for *Kyles*'s trial, the Court concluded that "'fairness' cannot be stretched to the point of calling this a fair trial."¹¹¹ In spite of the Court's emphatic rejection in *Kyles* of OPDA's proposed changes to the *Brady* rule,¹¹² and the office's long and continuing track record of *Brady* violations and related reversed convictions,¹¹³ Connick nonetheless told Thompson's civil jury that he was satisfied with his office's practices in the wake of *Kyles*, and that the decision had not occasioned any need to change his office's practices.¹¹⁴ Indeed, Connick admitted that he had never once

condition contributing to prosecutorial misconduct." *Id.* at 427 (citing Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999)); *see also* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 294 (2004) ("[There is a] human tendency to push margins when there are no sufficiently demanding external controls While most prosecutors are honorable, there are individual prosecutors who will take advantage of any system. The current system offers more incentive and opportunity for the errant prosecutor.").

¹⁰⁷ *See supra* notes 67–68 and accompanying text.

¹⁰⁸ 514 U.S. 419 (1995); *see Connick v. Thompson*, 563 U.S. 51, 100 (2011) (Ginsburg, J., dissenting).

¹⁰⁹ *Kyles*, 514 U.S. at 438–39 ("Unless . . . the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.").

¹¹⁰ *Id.* at 438 ("[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.").

¹¹¹ *Id.* at 454. The Court continued: "[C]onfidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid." *Id.*

¹¹² *See supra* notes 109–110 and accompanying text.

¹¹³ *See* Michael Wines, *Prosecutors Had the Wrong Man. They Prosecuted Him Anyway.*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/us/prosecutors-new-orleans-evidence.html>. [<https://perma.cc/NKQ7-9YYW>]; *supra* notes 67–71 and accompanying text.

¹¹⁴ *See Connick v. Thompson*, 563 U.S. 51, 100 (2011) (Ginsburg, J., dissenting).

fired or even so much as disciplined a single prosecutor for violating *Brady*,¹¹⁵ in spite of their long and “storied” track record of doing so.¹¹⁶ Given Connick’s answer to this question about *Kyles*, one can only imagine that he would have provided the same response if asked about changing his office’s practices in the wake of any of the other numerous decisions in which prosecutors from his office were found to have violated defendants’ *Brady* rights.¹¹⁷ Such casual indifference to the Supreme Court’s constitutional strictures—as also reflected in Connick’s resistance to holding accountable the prosecutors responsible for Thompson’s conviction because doing so would make his job more difficult¹¹⁸—can be explained only by the fact that Connick faced no consequences for not abiding by the Court’s directives.¹¹⁹

Connick is hardly an aberration in this regard. For example, one article written in the wake of the Court’s decision in *Connick* used evidence gleaned from civil rights lawsuits to examine the disciplinary practices of three “progressive” New York City district attorney’s offices—in the Bronx, Queens, and Brooklyn—each of which had a history of violating defendants’ *Brady* rights and convictions subsequently being overturned.¹²⁰ Discovery exchanged in the civil cases and depositions taken of prosecutors from these offices revealed, however, that the overturned convictions had provided no impetus for the offices to change their practices.¹²¹ Rather, each office continued to lack any codes of conduct or formal disciplinary rules to deter prosecutors from violating *Brady* and other related due process rules that help guarantee defendants their constitutional right to a fair trial.¹²² Moreover, the three district attorney’s offices were unable to offer any evidence that they had a practice of imposing sanctions or other negative consequences on prosecutors who violated *Brady*.¹²³ This perhaps helps explain why there continue to be findings that prosecutors from these offices have committed misconduct.¹²⁴ The article thus concluded by urging the Supreme Court to abandon its “false assumption” that prosecutors are

¹¹⁵ See *id.*

¹¹⁶ See *supra* notes 67–71 and accompanying text.

¹¹⁷ See *supra* notes 69–71 and accompanying text.

¹¹⁸ See *Connick*, 563 U.S. at 100 (Ginsburg, J., dissenting) (alteration in original).

¹¹⁹ See *supra* text accompanying notes 12, 106.

¹²⁰ See Rudin, *supra* note 76, at 544–72.

¹²¹ See *id.* at 548–55, 563–67.

¹²² See *id.* at 544, 572.

¹²³ See *id.* at 540, 553, 557–58, 566–67.

¹²⁴ See Sapien & Hernandez, *supra* note 42; Denis Slattery, *Bronx Prosecutor Bashed and Barred from Courtroom for Misconduct*, N.Y. DAILY NEWS (Apr. 6, 2014, 2:01 AM), <http://www.nydailynews.com/new-york/bronx/bronx-prosecutor-barred-courtroom-article-1.1746238> [<https://perma.cc/3RC8-EV4R>].

actually disciplined by, or have reason to fear being disciplined by, their offices or state disciplinary authorities.¹²⁵

The takeaway from the current landscape surrounding the *Brady* rule is therefore inescapable—if defendants’ constitutional rights are to be vindicated in this country, something more is needed.¹²⁶ As long as sole discretion and oversight over the exercise of *Brady* obligations remains with prosecutors, *Brady* violations will continue unchecked.¹²⁷ As observed by Thomas Sullivan, the former U.S. Attorney for the Northern District of Illinois, the proof is in the pudding: “the myriad cases of undisclosed exculpatory evidence in the Registry of Exonerations” are a clear demonstration that the system is not working.¹²⁸

II. ANALYSIS: STATE-LEVEL REFORMS

Although there is greater awareness than ever before about the role of prosecutorial misconduct in causing wrongful convictions, the literature examining the issue in the years since *Connick* makes clear that existing mechanisms meant to police prosecutors have largely been toothless and ineffective.¹²⁹ As a result, several states have adopted reforms that take dramatic steps toward introducing greater accountability into this area.¹³⁰ Two states in particular have led the way with trailblazing reforms: North Carolina, which adopted open-file discovery in 2004¹³¹ and established an Innocence Inquiry Commission

¹²⁵ Rudin, *supra* note 76, at 572.

¹²⁶ See Kozinski, *supra* note 8, at xxvi (“While most prosecutors are fair and honest, a legal environment that tolerates sharp prosecutorial practices gives important and undeserved career advantages to prosecutors who are willing to step over the line, tempting others to do the same. Having strict rules that prosecutors must follow will thus not merely avoid the risk of letting a guilty man free to commit other crimes while an innocent one languishes his life away, it will also preserve the integrity of the prosecutorial process by shielding principled prosecutors from unfair competition from their less principled colleagues.”); see also *supra* notes 96–97, 99–125 and accompanying text.

¹²⁷ See *supra* notes 96–125 and accompanying text; see also DAVIS, *supra* note 22, at 15 (“Prosecutors have been left to regulate themselves, and . . . such self-regulation has been either nonexistent or woefully inadequate.”); Kozinski, *supra* note 8, at viii (“[W]e have what I have described elsewhere as an ‘epidemic of *Brady* violations abroad in the land’ . . .”).

¹²⁸ Sullivan & Possley, *supra* note 3, at 915 n.132.

¹²⁹ See *supra* Part I.

¹³⁰ See, e.g., Mosteller, *supra* note 13; Reamey, *supra* note 13; Scheck, *supra* note 3; Governor Cuomo Signs Legislation to Establish Nation’s First Commission on Prosecutorial Conduct, *supra* note 13; Sullivan, *supra* note 13.

¹³¹ See *Open and Shut: North Carolina Strengthens Its Open Discovery Law*, EVIDENCEPROF BLOG (June 3, 2011), <https://lawprofessors.typepad.com/evidenceprof/2011/06/back-in-2004-north-carolina-governor-mike-easley-signed-a-bill-into-law-that-required-prosecutors-to-share-their-files.html> [https://perma.cc/YDF2-PAZ8]. Although several other states have since followed

in 2006;¹³² and New York, which in 2017 adopted a rule requiring standing *Brady* orders to be issued at the outset of all criminal proceedings¹³³ and in 2018 established the country's first commission on prosecutorial conduct.¹³⁴ This Section will begin with a brief discussion of each of these reforms before analyzing which reforms seem to have the greatest potential for ushering in a new era of accountability and reform for prosecutors.

A. North Carolina

1. Open-File Discovery

Two years prior to the Duke Lacrosse Scandal and Michael Nifong's disbarment, North Carolina passed a trailblazing open-file discovery law that requires district attorneys to open their files to defense attorneys who request access before trial and fully disclose things like police investigator notes, witness statements, scientific test results, and lists of probable trial witnesses.¹³⁵ Open-file discovery laws like this have grown increasingly popular as of late, and they generally require complete disclosure of prosecution files to the defense, without regard to the materiality of the documents.¹³⁶ In 2011, North Carolina updated its law to impose new obligations on investigative agencies to promptly provide material to prosecutors even before they are explicitly requested to do

North Carolina's lead, *see, e.g.*, Reamey, *supra* note 13, North Carolina's early adoption of open-file discovery allows for a more in-depth look at the effect it has had, and how the reform has played out in practice.

¹³² See Mary K. Tate, *Commissioning Innocence and Restoring Confidence: The North Carolina Innocence Inquiry Commission and the Missing Deliberative Citizen*, 64 ME. L. REV. 531, 534 (2012).

¹³³ See Scheck, *supra* note 3, at viii; Sullivan, *supra* note 13.

¹³⁴ See *Governor Cuomo Signs Legislation to Establish Nation's First Commission on Prosecutorial Conduct*, *supra* note 13.

¹³⁵ See *Open and Shut: North Carolina Strengthens Its Open Discovery Law*, *supra* note 131. North Carolina's adoption of the law was spurred by the scandal that erupted over the 1998 conviction of Alan Gell for capital murder when it was later revealed that prosecutors had withheld several key pieces of exculpatory evidence in the case. See Mosteller, *supra* note 13, at 264–76. Gell was exonerated and freed from death row after his retrial in 2004, at which time the influential North Carolina State Senator Tony Rand gave local prosecutors and defense attorneys an ultimatum: “[w]ork out an open file discovery bill or the legislature would pass one on its own.” *Id.* at 272.

¹³⁶ See Nafzger, *supra* note 10, at 349; *see also* Reamey, *supra* note 13; Ashley Southall & Jan Ransom, *Once as Pro-Prosecution as Any Red State, New York Makes a Big Shift on Trials*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/nyregion/prosecutors-evidence-turned-over.html> [https://perma.cc/Y4J9-H78L].

so.¹³⁷ The amendment also expanded the types of materials these agencies must provide to help ensure that prosecutors are promptly provided with all relevant information, which they can then pass on to the defense.¹³⁸

The efficacy of North Carolina's open-file discovery law is appositely illustrated by the Duke Lacrosse Scandal itself. Commentators have pointed out that the scandal played a crucial role in revealing Nifong's misconduct and bringing about his disbarment.¹³⁹ Indeed, the Disciplinary Hearing Committee that presided over Nifong's disbarment proceedings primarily rested its decision upon his failure to comply with various obligations imposed by the law.¹⁴⁰ The most important aspect of the law—and part of why it played such an outsized role in the case—is that instead of giving prosecutors sole discretion to assess what evidence is exculpatory and therefore necessary to turn over to the defense, it creates a baseline of standard disclosure requiring *all* material to be shared so that the parties can determine as much for themselves.¹⁴¹ The significance of this cannot be overstated. For instance, prosecutors—not used to thinking like defense attorneys—may innocently judge something to not be exculpatory and necessary to disclose, whereas a veteran

¹³⁷ See N.C. GEN. STAT. ANN. § 15A-903(c) (West 2018); *Open and Shut: North Carolina Strengthens Its Open Discovery Law*, *supra* note 131. These new obligations were aimed at incentivizing police and law enforcement to search for and produce all relevant and available evidence, or risk being charged with a felony if they fail to do so. See *Open and Shut: North Carolina Strengthens Its Open Discovery Law*, *supra* note 131.

¹³⁸ See N.C. GEN. STAT. ANN. § 15A-903(a) (West 2018); *Open and Shut: North Carolina Strengthens Its Open Discovery Law*, *supra* note 131.

¹³⁹ See Kozinski, *supra* note 8, at xxvii (“[T]hree years after its passage, the law forced disclosure of evidence that eventually exonerated three Duke lacrosse players who were falsely accused of rape—and led to the defeat, disbarment and criminal contempt conviction of Durham District Attorney Mike Nifong.”); Mosteller, *supra* note 13, at 259–60, 262 (discussing the outsized role of North Carolina's open-file discovery law in the events of Duke Lacrosse case and arguing that “broad . . . disclosure requirement[s] in criminal cases . . . help[] prevent failures of ethical standards from ever occurring because little opportunity is allowed for misjudging what is potentially exculpatory evidence”).

¹⁴⁰ See Mosteller, *supra* note 13, at 292–93 (discussing how the open-file discovery law did “the lion's share of the work” in the “process that led to the ultimate disclosure of the exculpatory information and the imposition of serious professional disciplinary sanctions against Nifong”).

¹⁴¹ See Sullivan & Possley, *supra* note 3, at 921–22 (“The benefit of open file discovery is that it removes the determination of disclosure from the prosecutor after he evaluates each piece of evidence or information and tests it against local discovery rules as well as *Brady* and its progeny. The process gives substantial measure of assurance to the trial judge and defense lawyer that there has been a good faith effort to provide the defense with the government's complete file.”); see also Mosteller, *supra* note 13, at 292–93 (pointing out how the open-file discovery law's “routine application produced the basis for further [discovery] requests, and its standard requirement of full disclosure established an expectation of compliance that the trial judge [in the Duke Lacrosse case] treated as routine”).

defense attorney might conclude precisely the opposite.¹⁴² Moreover, open-file discovery theoretically helps to spare prosecutors from situations in which implicit bias might affect their evaluation of potential *Brady* evidence, and to temper “the tension between the prosecutor’s dual role of zealous advocate and minister of justice,” which “peaks in the context of *Brady* decisions.”¹⁴³ As such, by removing from prosecutors sole discretion over determining whether a piece of evidence is favorable and therefore necessary to disclose,¹⁴⁴ open-file discovery laws like North Carolina’s help to assuage some of *Brady*’s flaws that have become apparent in the years since it was decided¹⁴⁵ and to remove the possibility that prosecutors ever have the chance to commit *Brady* violations.¹⁴⁶

2. The Innocence Inquiry Commission

In the wake of several other high-profile wrongful convictions, and as the Duke Lacrosse Scandal was still unfolding, North Carolina became the first state in the country to pass legislation creating a so-called Innocence Inquiry Commission, which is empowered with the legal authority to investigate claims of innocence and refer cases to a panel of judges able to grant immediate freedom.¹⁴⁷ North Carolina’s Commission is headed by an Executive Director tasked with implementing the Commission’s “extraordinary procedure to investigate and determine credible claims of factual innocence,” and is composed of eight voting members—representative of each of the stakeholders in the criminal justice system—who are responsible for deciding which of the commission’s cases to refer for judicial review by a three-judge panel.¹⁴⁸ A petitioner claiming innocence is entitled to appointed counsel throughout the inquiry into their case, and the Commission is vested with subpoena and other broad powers which it may utilize in conducting its

¹⁴² See Mosteller, *supra* note 13, at 310 (“The beauty of full open-file discovery is obvious as a remedy for the difficulty of subjective choice in a competitive adversarial environment. It does not require a prosecutor to make difficult discretionary decisions . . . [d]isclosing all evidence . . . means that most *Brady* evidence will be disclosed as part of the routine.”).

¹⁴³ Medwed, *supra* note 10, at 1542. For instance, “[h]aving already concluded that the defendant is likely guilty, a prosecutor might discount the subsequent discovery of exculpatory information so as to shirk the uncomfortable psychic reality that he may have charged an innocent person with a crime.” *Id.* at 1543; see also RIDOLFI ET AL., *supra* note 97, at 22.

¹⁴⁴ See *supra* note 141.

¹⁴⁵ See discussion *supra* Section I.B.3.

¹⁴⁶ See *supra* note 142.

¹⁴⁷ See Tate, *supra* note 132, at 534; Anne Blythe, *City of Durham Settles Long-Running Lawsuit with Former Duke Lacrosse Players*, THE CHARLOTTE OBSERVER (May 16, 2014, 10:13 PM), <https://www.charlotteobserver.com/news/local/crime/article9122669.html> [https://perma.cc/A826-DLGQ].

¹⁴⁸ Tate, *supra* note 132, at 543–44.

reviews.¹⁴⁹ Since the Commission began its work in 2007, it has received 2314 claims of actual innocence, held eleven hearings, and presided over the exoneration of ten individuals.¹⁵⁰

While the Innocence Inquiry Commission is a crucial step forward for recognizing, investigating, and remedying the epidemic of wrongful convictions—which helps relieve some of the burden from the nonprofits that shoulder the entirety of the work absent such a commission—it does not present significant potential for introducing greater accountability into prosecutions.¹⁵¹ Although the Commission may uncover instances of prosecutorial misconduct during its case-review process,¹⁵² this will not help prevent the misconduct before it occurs. Additionally, while it is possible that prosecutors at the trial level will tread more carefully now that all convicted defendants in North Carolina who claim actual innocence have a statutory right to at least some review of their claim, this is hardly a foregone conclusion.¹⁵³ Ultimately, although the Commission is a trailblazing and crucial step toward remedying wrongful convictions, a different type of reform that provides more tangible deterrence for prosecutors is better suited to curb the misconduct that sometimes leads to these wrongful convictions.

B. *New York*

1. *Brady Orders*

In 2009, New York State convened a Justice Task Force composed of prosecutors, defense attorneys, judges, legislators, police officials, and scientists for the stated mission of “eradicat[ing] the systemic and individual harms caused by wrongful convictions, . . . promot[ing] public safety by examining the causes of wrongful convictions, and . . . recommend[ing] reforms to safeguard against any such convictions in the future.”¹⁵⁴ In February 2017, the Task Force issued a

¹⁴⁹ See *id.* at 544–45.

¹⁵⁰ See THE N.C. INNOCENCE INQUIRY COMM’N, 2017 ANNUAL REPORT 6 (2018), <http://innocencecommission-nc.gov/wp-content/uploads/2018/02/2017-annual-report.pdf> [<https://perma.cc/LRC7-P36R>].

¹⁵¹ See Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 711–12 (2017) (discussing how although “[t]here is much to admire in this model[,] . . . there are also glaring problems: The Commission does not consider or pursue constitutional problems such as suppressed exculpatory evidence . . . [or] prosecutorial misconduct”).

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ N.Y. STATE JUSTICE TASK FORCE, REPORT ON ATTORNEY RESPONSIBILITY IN CRIMINAL CASES 1 (2017), <http://www.nyjusticetaskforce.com/pdfs/2017JTF-AttorneyDisciplineReport.pdf> [<https://perma.cc/MVC6-5ZK7>].

report with several recommendations for addressing attorney conduct issues in criminal cases, including one aimed at confronting the link between *Brady* violations and wrongful convictions.¹⁵⁵ Specifically, the Task Force recommended that all New York trial judges issue an order at the outset of criminal cases notifying and reminding prosecutors of their obligations under *Brady* and its progeny.¹⁵⁶ Shortly thereafter, Chief Judge Janet DiFiore adopted the Task Force's recommendation and promulgated new rules requiring all judges presiding over criminal cases in New York to issue these so-called *Brady* orders.¹⁵⁷ Chief Judge DiFiore's action was immediately applauded by many as a groundbreaking step in the right direction toward greater prosecutorial accountability.¹⁵⁸

Although New York's new rule is so recent that there has been little time to see how it plays out in practice, it is a reform many commentators have long called for.¹⁵⁹ This is because even though *Brady* and its progeny impose important constitutional obligations on prosecutors, *Brady* is not self-enforcing. Accordingly, unless a judge has specifically ordered certain evidence to be disclosed or for *Brady* to be complied with, a prosecutor who violates *Brady* is at no personal risk.¹⁶⁰ Federal District Judge Emmet Sullivan learned this the hard way after presiding over the

¹⁵⁵ See *id.* at 7–8, 12–13, 15–16; see also Scheck, *supra* note 3, at viii–xi; Janet DiFiore, *Preserving Due Process and Preventing Wrongful Convictions*, N.Y.L.J. (May 1, 2017, 12:00 AM), <https://www.law.com/newyorklawjournal/almID/1202784735555> [https://perma.cc/NEJ6-WTYD].

¹⁵⁶ See N.Y. STATE JUSTICE TASK FORCE, *supra* note 154, at 7–8, 12–13, 15–16; Scheck, *supra* note 3, at viii–xi. The Task Force noted that these *Brady* orders would help to “create a culture of disclosure, educate inexperienced prosecutors, serve as a reminder for more experienced prosecutors regarding their disclosure obligations, and ensure that judges have an ability to enforce compliance with disclosure requirements.” N.Y. STATE JUSTICE TASK FORCE, *supra* note 154, at 7.

¹⁵⁷ See Press Release, N.Y. State Unified Court Sys., Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases, (Nov. 8, 2017), https://www.nycourts.gov/PRESS/PDFs/PR17_17.pdf [https://perma.cc/N7CY-ZHDY]. The *Brady* orders are required to make specific reference as to the types of material required to be disclosed, including “information that impeaches the credibility of witnesses, exculpates or reduces the degree of the defense, or mitigates the degree of the defendant’s culpability or punishment.” *Id.*

¹⁵⁸ See *Innocence Project Applauds New York’s Presiding Judges for Landmark Statewide Rule Ensuring Comprehensive Brady Disclosure*, INNOCENCE PROJECT (Nov. 8, 2017), <https://www.innocenceproject.org/innocence-project-brady-disclosure> [https://perma.cc/AJK7-XSZN]; Beth Schwartzapfel, *New York Courts Say: Hand It Over*, MARSHALL PROJECT (Nov. 8, 2017, 4:20 PM), <https://www.themarshallproject.org/2017/11/08/new-york-courts-say-hand-it-over> [https://perma.cc/6Y3B-HHVF]; Sullivan, *supra* note 13.

¹⁵⁹ See Jones, *supra* note 96, at 110–113; Kozinski, *supra* note 8, at xxxiii–xxiv; Scheck, *supra* note 3, at vii–viii; Barry Scheck & Nancy Gertner, *Combating Brady Violations with an ‘Ethical Rule’ Order for the Disclosure of Favorable Evidence*, 37 CHAMPION 40 (2013); Sullivan, *supra* note 39; Sullivan & Possley, *supra* note 3, at 929; Sullivan, *supra* note 13.

¹⁶⁰ See Kozinski, *supra* note 8, at xxxiii–xxxiv.

botched prosecution of former Senator Ted Stevens in 2008.¹⁶¹ After Senator Stevens was found guilty of lying on Senate disclosure forms, it was revealed that federal prosecutors had concealed numerous pieces of favorable evidence that likely could have helped win his acquittal.¹⁶² Judge Sullivan appointed a special prosecutor to investigate this misconduct, who later concluded that Justice Department lawyers had “committed deliberate and ‘systematic’ ethical violations by withholding critical evidence pointing to Stevens’s innocence.”¹⁶³ Yet, the special prosecutor also found that Judge Sullivan was powerless to punish the wrongdoers because he had not directly ordered the prosecution to abide by their constitutional obligations.¹⁶⁴ As a result, Judge Sullivan adopted a personal practice of issuing *Brady* orders in each criminal case he presides over so he can personally hold accountable any prosecutor appearing before him who willfully flaunts *Brady*’s requirements.¹⁶⁵ As other commentators have noted, the ability to hold prosecutors personally responsible like this “will doubtless result in far greater compliance [with *Brady*].”¹⁶⁶

Much like open-file discovery, the issuance of *Brady* orders as a matter of course in criminal cases thus appears to help resolve another major flaw exposed in *Brady* in the years since it was handed down. That is, it finally gives the *Brady* rule some much-needed teeth for its enforcement and facilitates prosecutors being held accountable for any intentional misconduct.¹⁶⁷ Even more importantly, the requirement that the issued *Brady* orders make specific reference to the types of material that must be disclosed—such as information that impeaches the credibility of witnesses¹⁶⁸—helps to ensure that all stakeholders involved in a criminal case are aware of their legal obligations, encourages them to work together to discharge these duties, and helps to ameliorate the lack of training at some district attorney’s offices like Connick’s

¹⁶¹ See Sullivan, *supra* note 13; see also *supra* note 39.

¹⁶² See Sullivan, *supra* note 13; see also *supra* note 39.

¹⁶³ Sullivan, *supra* note 13; see also *supra* note 39.

¹⁶⁴ See Sullivan, *supra* note 13; see also *supra* note 39.

¹⁶⁵ See Sullivan, *supra* note 13.

¹⁶⁶ Kozinski, *supra* note 8, at xxxiv.

¹⁶⁷ See Scheck & Gertner, *supra* note 159, at 44 (noting that *Brady* orders will “both generally and specifically deter ‘bad apple’ prosecutors because [the order] is not subject to many of the practical and procedural hurdles that have obstructed punishment even for deliberate, intentional, and malicious *Brady* violations. . . . [*Brady* orders] offer[] a remedy through which the defense bar can take direct action against individual prosecutors who deserve to be sanctioned in front of the judge whose order was violated”).

¹⁶⁸ See *supra* notes 156–157.

OPDA.¹⁶⁹ Moreover, by reserving sanctions only for willful and deliberate violators of *Brady*, the order aims to engage judges in routinely inquiring about problems that arise in the *Brady* disclosure process and recording their findings, which should help to both discern broader systemic issues and identify bad-apple prosecutors who deliberately flaunt the rules.¹⁷⁰ Indeed, although the *Brady* order reform is an important step forward, it will ultimately fall to judges to do the lion's share of the work in terms of ensuring that compliance with *Brady* orders is routinely enforced.¹⁷¹

2. Prosecutorial Conduct Commission

Following close on the heels of New York's implementation of the *Brady* order rule, Governor Andrew Cuomo on August 20, 2018, signed a bill into law that created the nation's first state-wide commission aimed at addressing prosecutorial misconduct.¹⁷² The Commission is modeled after New York's successful Commission on Judicial Conduct, and will be comprised of eleven experienced criminal law practitioners empowered with investigating complaints about prosecutorial conduct—or initiating investigations on their own—to determine whether prosecutors have engaged in unprofessional, unethical, or unlawful

¹⁶⁹ See *Connick v. Thompson*, 563 U.S. 51, 96–105 (2011) (Ginsburg, J., dissenting); Scheck, *supra* note 3, at ix (noting how “the order serves as the sort of real-time checklist that cognitive scientists and safety experts recommend” in that it requires “reviewing all the categories of information required to be disclosed at each court appearance,” thereby “induc[ing] the prosecutor, the court, and the defense to communicate and make sure critical information is not missed, much in the way flight crews go through their checklists before an airplane takes off or an Intensive Care Unit team goes through a checklist in an emergency room”).

¹⁷⁰ See Scheck, *supra* note 3, at xii.

¹⁷¹ See *id.* (“The best way to ensure that all stakeholders work together to make sure favorable information is disclosed, and to avoid the intentional suppression of exculpatory evidence that caused so much damage to so many people in the Michael Morton and Ted Stevens cases, is to have a court system where a *Brady* order is fairly and systematically enforced by judges.”).

¹⁷² See *Governor Cuomo Signs Legislation to Establish Nation's First Commission on Prosecutorial Conduct*, *supra* note 13; see also Scheck, *supra* note 3, at xxv–xxvi (praising New York's attempt to create “a multi-stakeholder institution that comprehensively assesses prosecutorial misconduct as a system issue”); *Innocence Project Applauds Gov. Cuomo for Approving Landmark Legislation to Combat Prosecutorial Misconduct*, INNOCENCE PROJECT (Aug. 20, 2018), <https://www.innocenceproject.org/innocence-project-applauds-gov-cuomo-for-approving-landmark-legislation-to-combat-prosecutorial-misconduct> [https://perma.cc/PA24-WX5C] (noting that the law will “serve as a model for other states on how to address the lack of accountability for prosecutorial misconduct that too often results in innocent people being wrongly convicted for crimes they didn't commit”).

conduct.¹⁷³ The Commission will have broad investigative powers, including the power to conduct hearings;¹⁷⁴ issue subpoenas;¹⁷⁵ compel witnesses to testify;¹⁷⁶ demand any documents, records, or materials deemed necessary for its investigation;¹⁷⁷ receive assistance from any state agency whose cooperation will enable it to carry out its duties;¹⁷⁸ and compel prosecutors to testify and turn over documents.¹⁷⁹ Additionally, the Commission's findings, conclusions, and records of its proceedings must be made publicly available upon the completion of each of its inquiries.¹⁸⁰ Although the Commission will not be able to directly punish prosecutors it finds to have violated their legal and ethical obligations, it will have the power to censure them, suggest sanctions against them, and recommend that the governor remove them if they are found to have committed intentional misconduct.¹⁸¹

Unsurprisingly, the prospect of the new commission has generated vehement pushback from New York's district attorneys, who portray it as a "flawed" and "unconstitutional" plan that will ultimately do more harm than good by interfering with the duties of prosecutors and not bringing any meaningful oversight.¹⁸² Specifically, district attorneys claim that the law (1) violates the separation of powers between the three branches of New York's state government; (2) creates due process concerns by failing to set standards for initiating investigations; (3) improperly grants broad investigative powers that are not circumscribed to safeguard against exposing sensitive information related to ongoing criminal investigations; and (4) unconstitutionally vests appellate jurisdiction for the Commission's decisions with New York's highest court, the Court of Appeals.¹⁸³ Governor Cuomo acknowledged these and

¹⁷³ See N.Y. JUD. LAW § 499-a (McKinney 2019); Scheck, *supra* note 3, at xxvi; Jesse McKinley, *A New Panel Can Investigate Prosecutors. They Plan to Sue to Block It.*, N.Y. TIMES (Aug. 23, 2018), <https://www.nytimes.com/2018/08/23/nyregion/cuomo-prosecutors-oversight-commission.html> [<https://perma.cc/L838-SBFE>].

¹⁷⁴ See N.Y. JUD. LAW § 499-d(1).

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* § 499-d(3).

¹⁷⁹ See *id.* §§ 499-d(1), f(3).

¹⁸⁰ See *id.* § 499-f(7).

¹⁸¹ See *id.*

¹⁸² See McKinley, *supra* note 173.

¹⁸³ See Dan M. Clark, *DAs File Constitutional Challenge to NY Prosecutorial Conduct Commission*, N.Y.L.J. (Oct. 17, 2018), <https://www.law.com/newyorklawjournal/2018/10/17/das-file-constitutional-challenge-to-ny-prosecutorial-conduct-commission> [<https://perma.cc/79BQ-UG6B>]; see also CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY, COLUMBIA LAW SCH., *THE NEW YORK PROSECUTORIAL MISCONDUCT COMMISSION: WHAT COMES NEXT?* 2–3 (2018), https://www.law.columbia.edu/sites/default/files/microsites/public-integrity/prosecutorial_misconduct_commission.pdf [<https://perma.cc/9QAD-465F>].

other concerns when he signed the bill, making his support contingent upon the legislature amending the law to address these concerns before it was set to take effect.¹⁸⁴ Nonetheless, the District Attorneys Association of the State of New York (DAASNY) filed suit to halt the Commission's implementation,¹⁸⁵ to which Governor Cuomo temporarily agreed on December 7, 2018.¹⁸⁶

Shortly after the New York Legislature reconvened in January 2019, it addressed some of the concerns that had been raised by passing the chapter amendments Governor Cuomo conditioned his support upon.¹⁸⁷ The amendments make a number of changes. First, they address the separation-of-powers concerns by locating oversight of the Commission squarely within the executive department, rather than making it a standalone entity as had originally been envisioned.¹⁸⁸ The amendments also give the governor the power to appoint four members of the Commission, more appointments than any other individual possesses.¹⁸⁹ Second, the amendments set out specific procedures for requesting the withdrawal or modification of a subpoena issued by the Commission if a prosecuting agency feels that complying with it will interfere with an ongoing criminal investigation.¹⁹⁰ In the event this happens, a prosecuting agency must inform the Commission of the basis for its position, after which time the Commission is restricted from exercising its powers in

¹⁸⁴ See McKinley, *supra* note 173.

¹⁸⁵ See Clark, *supra* note 183.

¹⁸⁶ See Brendan J. Lyons, *Commission on Prosecutorial Conduct Shelved, for Now*, TIMESUNION (Dec. 10, 2018, 3:54 PM), <https://www.timesunion.com/news/article/Commission-on-Prosecutorial-Conduct-shelved-for-13455288.php> [<https://perma.cc/F6TQ-BZEP>]. Despite this agreement, "neither side retreated from their positions: [t]he governor's office said the law's constitutional defects will be repaired through legislative amendments and the commission will be established; the district attorneys association declared its members will 'not tolerate unconstitutional interference' in their work." *Id.*

¹⁸⁷ See Dan M. Clark, *NY Lawmakers Approve Constitutional Fix to Law Creating Prosecutorial Watchdog*, N.Y.L.J. (Jan. 15, 2019), <https://www.law.com/newyorklawjournal/2019/01/15/ny-lawmakers-approve-constitutional-fix-to-law-creating-prosecutorial-watchdog> [<https://perma.cc/WJJ3-R3TR>].

¹⁸⁸ Compare N.Y. JUD. LAW § 499-a (McKinney 2019) ("There is hereby created within the executive department a state commission of prosecutorial conduct."), with N.Y. JUD. LAW § 499-a (McKinney 2018) ("A state commission of prosecutorial conduct is hereby established.").

¹⁸⁹ See N.Y. JUD. LAW § 499-c(1) (McKinney 2019). The Chief Judge of the Court of Appeals is responsible for three appointments, and the majority and minority leaders in the legislature each make one of the four remaining appointments. *See id.* Of the eight combined appointments made by the governor and the legislature, the law requires that four of these eight appointees be individuals with at least five years of public defense experience, and the other four be active, former, or retired prosecutors with at least five years of experience. *See id.* § 499-c(1)(a), (c). The amendments also mandate that two of the Chief Judge's three appointees be retired judges, one with a public defense background and one with a prosecutorial background, and that the Chief Judge's final remaining appointee be an academic with significant criminal law experience. *See id.* § 499-c(1)(b).

¹⁹⁰ *See id.* § 499-d(1).

ways that might interfere with the active investigation and prosecution.¹⁹¹ Finally, the amendments vest appellate jurisdiction over the Commission's decisions in the Appellate Divisions of the State Supreme Court—rather than in the Court of Appeals—which can reject, affirm, or modify the decision at issue.¹⁹² This helps bring the Commission's workings in line with existing procedures, as each Appellate Division already houses grievance committees that accept complaints and recommend sanctions against attorneys.¹⁹³

Although Governor Cuomo approved the amended version of the law on March 27, 2019, he did so while expressing continuing concerns about the perceived separation-of-powers issues raised by the DAASNY legal challenge.¹⁹⁴ Several days later, DAASNY renewed its challenge.¹⁹⁵ In June 2019, after Governor Cuomo and other legislative leaders signaled their intent to assert individual immunity defenses in the litigation, DAASNY offered to drop them from the suit if they agreed to halt the Commission's creation and defer making appointments until the litigation was resolved.¹⁹⁶ DAASNY's offer was accepted, leaving Assembly Speaker Carl Heastie as the law's sole defender in the suit.¹⁹⁷ Shortly thereafter, DAASNY moved for summary judgment, largely reiterating the same arguments they had previously advanced.¹⁹⁸ Assembly Speaker Heastie responded with his own cross-motion for summary judgment, rebuffing DAASNY's separation-of-powers

¹⁹¹ See *id.* In such situations, the commission is specifically prohibited from exercising its powers prior to the earlier of: “(a) the filing of an accusatory instrument with respect to the crime or crimes that led to such prosecuting agency’s investigation and underlie the complaint [received by the commission]; or (b) one year from the commencement of the occurrence of the crime or crimes that led to such prosecuting agency’s investigation and underlie the complaint [received by the commission].” *Id.*

¹⁹² See *id.* § 499-f(7).

¹⁹³ See Clark, *supra* note 183.

¹⁹⁴ See Dan M. Clark, *Cuomo, Lawmakers Agree Not to Defend Prosecutorial Watchdog’s Constitutionality*, N.Y. L.J. (June 2, 2019, 2:22 PM), <https://www.law.com/newyorklawjournal/2019/06/02/cuomo-lawmakers-agree-not-to-defend-prosecutorial-watchdogs-constitutionality> [<https://perma.cc/C76G-DNMF>]; Rachel Silberstein, *Cuomo approves changes to Commission on Prosecutorial Conduct*, TIMESUNION (Mar. 27, 2019, 4:20 PM), <https://www.timesunion.com/news/article/Law-amended-for-Prosecutorial-Misconduct-13721324.php> [<https://perma.cc/GE4H-HUKJ>].

¹⁹⁵ See Verified Amended Complaint for Declaratory and Injunctive Relief, *Soares v. New York*, No. 906409-18 (N.Y. Sup. Ct. Apr. 1, 2019), NYSCEF Doc. No. 33.

¹⁹⁶ See Clark, *supra* note 194.

¹⁹⁷ See *id.*

¹⁹⁸ See Plaintiffs’ Memorandum of Law in Support of their Motion for Summary Judgment, *Soares v. New York*, No. 906409-18 (N.Y. Sup. Ct. July 22, 2019), NYSCEF Doc. No. 76; Dan M. Clark, *NY District Attorneys Formally Move to Strike Down Prosecutorial Watchdog Law*, N.Y. L.J. (July 24, 2019, 5:21 PM), <https://www.law.com/newyorklawjournal/2019/07/24/ny-district-attorneys-formally-move-to-strike-down-prosecutorial-watchdog-law> [<https://perma.cc/Z3DS-B2NF>].

concerns. In so doing, he highlighted both the common practice in New York of creating panels with appointees from different branches of government and the law's severability clause, which would allow the law to stand even if parts of it were invalidated.¹⁹⁹ Assembly Speaker Heastie also rejected DAASNY's assertion that the Commission's mere existence would interfere with prosecutors' discretion and chill the exercise of their constitutional function, pointing out that the argument is purely hypothetical and premature prior to the Commission's formation and that, in any event, the panel was merely intended to be an oversight tool to ensure prosecutors' compliance with ethical and professional standards.²⁰⁰ Numerous amici curiae echoed these arguments in a brief filed in support of Assembly Speaker Heastie's motion, in which they noted that DAASNY's objections to the law appeared more grounded in its policy preferences than in constitutional law, and argued that the demonstrated failure of existing oversight mechanisms gave the New York Legislature ample reason to exercise its authority to regulate prosecutors.²⁰¹

Even though the future of the Commission hangs in the balance as of this writing and its final composition may be subject to modification pending the outcome of DAASNY's legal challenge, the strong bipartisan support that conceived the Commission suggests the idea has staying power in one form or another.²⁰² The novelty of this commendable effort warrants comment on the prospective impact such a commission could have. There is no longer any doubt that the present lack of accountability for prosecutors—epitomized by Harry Connick's blasé attitude toward heeding *Brady*'s instruction in the face of overturned conviction after overturned conviction from his office—has played an alarming and serious role in contributing to many wrongful convictions.²⁰³ For this reason, a prosecutorial conduct commission like the one envisioned by New York is another reform that, much like the *Brady* order,

¹⁹⁹ See Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment & in Support of Defendant Carl E. Heastie's Cross-Motion for Summary Judgment at 34–55, 66–67, *Soares v. New York*, No. 906409-18 (N.Y. Sup. Ct. Aug. 26, 2019), NYSCEF Doc. No. 98; Dan M. Clark, *Attorneys for Assembly Speaker Move to Uphold Prosecutorial Watchdog Panel*, N.Y. L.J. (Aug. 28, 2019, 3:14 PM), <https://www.law.com/newyorklawjournal/2019/08/28/attorneys-for-assembly-speaker-move-to-uphold-prosecutorial-watchdog-panel> [<https://perma.cc/A2NT-823X>].

²⁰⁰ See Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment & in Support of Defendant Carl E. Heastie's Cross-Motion for Summary Judgment, *supra* note 199, at 23–33, 46–47; Clark, *supra* note 199.

²⁰¹ See Memorandum of Law of the N.Y. Ass'n of Criminal Def. Lawyers et al. as Amici Curiae in Support of Defendant Carl E. Heastie's Cross-Motion for Summary Judgment, *Soares v. New York*, No. 906409-18 (N.Y. Sup. Ct. Sept. 3, 2019), NYSCEF Doc. No. 104.

²⁰² See Scheck, *supra* note 3, at xxvi.

²⁰³ See *supra* Part I.

commentators have long called for.²⁰⁴ The mere existence of an independent commission like this, imbued with the sole mandate of holding prosecutors accountable as well as subpoena power to enforce that mandate, sends the message that blatant and intentional misconduct “will not be tolerated by the bar,” which should help to generally “deter the most blatant types of misconduct.”²⁰⁵ Especially important to this point is that the findings, conclusions, and records of the Commission’s proceedings must be made publicly available,²⁰⁶ unlike most state disciplinary proceedings where “secrecy is the hallmark” and whose deterrent effect is therefore almost entirely inhibited.²⁰⁷ The Commission’s deterrent effect will undoubtedly be amplified by the mandate that the Commission be composed of an equal mix of experienced practitioners from all sides of the criminal justice system,²⁰⁸ in recognition of the reality that “a system of highly regarded professionals independent of prosecutors’ offices is essential to a workable system of [prosecutorial] accountability. Only such a commission can assume the mantle of authority and engender the respect necessary to undertake such a task.”²⁰⁹

Another vital design feature of the Commission that must be noted is its potential for continually spurring transparent criminal justice reform, even in the absence of any prosecutors being formally censured or sanctioned.²¹⁰ This is possible because the Commission’s duties include issuing annual reports on its proceedings to the governor, the legislature, and the chief judge of the Court of Appeals, which can include legislative and administrative recommendations based on problems it has identified.²¹¹ Thus, the law empowers the Commission to root out and address broader systemic issues impeding greater prosecutorial

²⁰⁴ See Davis, *supra* note 33, at 463–64; Jeffrey L. Kirchmeier et al., *Vigilante Justice: Prosecutorial Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1370–71 (2009); Medwed, *supra* note 10, at 1549–50; Sullivan & Possley, *supra* note 3, at 933; Yaroshefsky, *supra* note 106, at 296–99; Gershman, *supra* note 30.

²⁰⁵ Medwed, *supra* note 10, at 1550 (noting also that “[e]xternal regulation has a profoundly positive effect on attorney behavior generally. There is no reason to doubt that more vigorous (and rigorous) supervision of prosecutors by regulatory bodies could achieve similarly constructive results”).

²⁰⁶ See N.Y. JUD. LAW § 499-f(7) (McKinney 2019).

²⁰⁷ Yaroshefsky, *supra* note 106, at 297 (emphasizing that “[i]f discipline is to serve as a deterrent to prosecutorial misconduct, the process and its results cannot be secret”).

²⁰⁸ See *supra* note 189.

²⁰⁹ Yaroshefsky, *supra* note 106, at 297. The requirement that the commission be composed of experienced criminal law practitioners is particularly important, given that, for instance, those not familiar with *Brady* and its progeny might misapply it, as initially occurred in the disciplinary proceedings of former OPDA prosecutor Roger Jordan. See *In re Jordan*, 913 So. 2d 775, 780, 782 (La. 2005).

²¹⁰ See Scheck, *supra* note 3, at xxvii.

²¹¹ See N.Y. JUD. LAW § 499-d(4).

accountability, regardless of whether it finds the need to sanction any individual prosecutor that comes before it.²¹² In light of this, the Commission appears more poised than any of the other individual reforms touched upon in this Note to usher in a new era of prosecutorial accountability once it (hopefully) is formed.²¹³ And even if New York's commission should never ultimately come to fruition, its model can nonetheless serve as a prescient blueprint for other states to follow in this ongoing era of criminal justice reform.

III. PROPOSAL: NEW YORK'S REFORMS ARE THE WAY FORWARD

Although there is much to laud about North Carolina's establishment of open-file discovery and its Innocence Inquiry Commission, neither of these reforms have the potential on their own or together to provide the kind of accountability and deterrence needed to curb the ongoing problem of prosecutorial misconduct.²¹⁴ Even the more promising of the two reforms—open-file discovery—has its own issues. While it looks quite promising on paper, commentators have pointed out that open-file discovery is far messier in practice, given (1) the extra burdens it saddles on already-overwhelmed public defenders, (2) the potential that prosecutors might weaponize the process to overwhelm the defense with documents in order to purposefully frustrate their efforts, and (3) the prospect that prosecutors may still choose to provide less than their whole file but nonetheless claim it is complete.²¹⁵ Thus, even though open-file discovery is an absolutely crucial step forward to assuage *Brady's* flawed delegation to prosecutors of the sole authority to determine what evidence is favorable to the defense and is thus necessary to disclose, it neither inherently provides any tangible deterrence to prevent intentional misconduct nor creates concrete mechanisms to hold to task those prosecutors who transgress.

By contrast, New York's two recent reforms appear to present the blueprint that all states should begin to follow. The key aspect of both reforms is that they each provide some of the teeth that the *Brady* rule has

²¹² See Scheck, *supra* note 3, at xxvii (noting how “[i]n many ways, this feature is the commission’s saving grace in terms of a systems-wide, all stakeholders approach to transparent criminal justice reform, as it allows for the commission’s proceedings to continually spur system reform”).

²¹³ See Scheck, *supra* note 3, at xxv–xxvii; Maura Ewing, *New York’s Prosecutorial Misconduct Review Panel Could Be Groundbreaking*, SLATE (Aug. 28, 2018, 2:00 PM), <https://slate.com/news-and-politics/2018/08/new-yorks-prosecutorial-misconduct-review-panel-could-be-groundbreaking.html> [<https://perma.cc/YT2X-UZG3>].

²¹⁴ See Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425 (2013); Scheck, *supra* note 151, at 711–12.

²¹⁵ See Fox, *supra* note 214, at 427–28.

long lacked as well as the deterrence necessary to weed out wrong-doing prosecutors.²¹⁶ That is, each reform implements mechanisms that will finally allow for prosecutors to be held to account for their intentional law-breaking when it occurs.²¹⁷ *Brady* orders do this by ensuring that, from the outset of each criminal case, the prosecutors are aware of their legal obligations and thus can be sanctioned if they are found to have deliberately disregarded them.²¹⁸ And New York's Prosecutorial Conduct Commission does this by sending the message loud and clear to prosecutors that they can and will be investigated, subpoenaed, and potentially removed from office should they choose to flagrantly disregard their duties.²¹⁹

Moreover, each of these reforms creates crucial mechanisms that will help all stakeholders in the criminal justice system identify error, investigate root causes, and learn from the mistakes that cause tragic failures like wrongful convictions.²²⁰ *Brady* orders, by their very nature, require judges, prosecutors, and defense lawyers to routinely ensure that all information constitutionally required to be disclosed in a criminal case has been so disclosed, and they induce judges to discover what went wrong when mishaps do occur so that only deliberate violators are sanctioned.²²¹ And the Prosecutorial Conduct Commission is vitally focused not just on investigating and potentially punishing deliberate rule breakers but also on identifying broader systemic issues in the criminal justice system and using information gleaned from its investigations to make recommendations about how these problems might be best addressed.²²²

Had a commission such as New York's existed in Louisiana during Harry Connick's tenure as head of OPDA, one can only imagine how things might have turned out differently. For example, it seems certain based on the extent of the misconduct emanating from his office that numerous complaints would have been made to such a hypothetical commission throughout Connick's incumbency.²²³ Upon investigating and discovering the state of affairs at OPDA that has been laid bare as of

²¹⁶ See discussion *supra* Sections II.B.1, II.B.2.

²¹⁷ See discussion *supra* Sections II.B.1, II.B.2.

²¹⁸ See discussion *supra* Section II.B.1. Judge Sullivan has found that issuing a detailed standing *Brady* order in each criminal case he presides over helps to "remind[] the prosecutors who appear before me exactly what is required of them, and . . . ensure[] that any who intentionally withhold evidence can be held accountable." Sullivan, *supra* note 13. Judge Sullivan has also advocated for amending the Federal Rules of Criminal Procedure to include a *Brady* order-like requirement. See Sullivan, *supra* note 39.

²¹⁹ See discussion *supra* Section II.B.2.

²²⁰ See Scheck, *supra* note 3, at iii–v.

²²¹ See discussion *supra* Section II.B.1.

²²² See discussion *supra* Section II.B.2.

²²³ See *supra* notes 67–71 and accompanying text.

late,²²⁴ the commission undoubtedly would have censured or recommended the removal of OPDA prosecutors like Gerry Deegan, who admitted to intentionally suppressing the blood swatch evidence in John Thompson's case.²²⁵ Seeing fellow prosecutors around them being punished or removed for violating *Brady* would have likely, in turn, prompted other prosecutors in the office to take their *Brady* obligations much more seriously.²²⁶ One would also expect that the repeated pattern of flagrant *Brady* violations coming out of Connick's office would eventually have caused the commission to become as consternated about OPDA and Connick's leadership of it as the Louisiana State Court of Appeal, Fourth Circuit, was when it wrote that it was "not unmindful of the storied, shameful history of the local prosecuting authorities' noncompliance with *Brady*."²²⁷ Sooner or later, the commission likely would have looked into Connick himself, possibly leading to his removal from office or, at the very least, his realization that properly training his prosecutors to comply with *Brady* would help stave off the commission's inquiries and make his job easier. Indeed, it is hard to imagine a world where, with such a commission in Louisiana, Connick could have remained as unconcerned about complying with the law as he did in the face of mounting investigations and the public airing of his office's malfeasance.

CONCLUSION

While most prosecutors are ethically scrupulous and law-abiding in their pursuit of justice,²²⁸ the present state of affairs makes clear that those prosecutors who do choose to cross the line face zero consequences.²²⁹ This is true even after their sometimes willful misconduct is exposed and the innocent people they put in prison—or on death row—have been freed.²³⁰ Although the number of prosecutors who engage in intentional misconduct may be comparatively small, the consequences are outsized, as any of the fifty-four percent of exonerees whose wrongful convictions have involved official misconduct can attest.²³¹ Prosecutors, as

²²⁴ See *supra* notes 67–71 and accompanying text.

²²⁵ See *supra* note 59 and accompanying text.

²²⁶ See, e.g., Medwed, *supra* note 10, at 1549–50.

²²⁷ *State v. Wells*, 191 So. 3d 1127, 1139 (La. Ct. App. 2016) (citations omitted); see also *supra* notes 67–71 and accompanying text.

²²⁸ See Kozinski, *supra* note 8, at xxvi; Yaroshefsky, *supra* note 106, at 294.

²²⁹ See *supra* text accompanying notes 12, 96–128.

²³⁰ See *supra* text accompanying notes 12, 96–128.

²³¹ See % of Exonerations by Contributing Factor, *supra* note 10; see also *Official Misconduct*, *supra* note 10.

“minister[s] of justice,”²³² have just as much of a duty as the courts to ensure that criminal defendants receive fair trials.²³³ Yet, when overzealous, undertrained, or unethical prosecutors flagrantly disregard this duty and face no resulting consequences, their actions grievously harm not only John Thompson and the many other innocent people like him, but also serve to undermine public confidence in the fairness and integrity of our justice system as a whole. If doing justice is to mean anything in this country, we must fix this. New York’s reforms are a much-needed step in the right direction.

²³² MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2018).

²³³ *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also supra* notes 24–25.