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Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives

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Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives

Cover Page Footnote

Assistant Professor, University of Chicago Law School. Special thanks to the following people who read earlier drafts and offered comments: Albert Alschuler, Sara Beale, Richard Craswell, Dan Kahan, Nancy King, Charles Ogletree, Stephen Schulhofer, Randolph Stone, and, especially, Paul Garcia. I must also thank Frank Vondrak, a former colleague at the Department of Justice, for conversations that led me to financial incentives as a topic. I am grateful to Jennifer Spruill for her research assistance and to the Russell Baker Scholars Fund for financial support.

ARTICLES

REWARDS FOR GOOD BEHAVIOR: INFLUENCING PROSECUTORIAL DISCRETION AND CONDUCT WITH FINANCIAL INCENTIVES

Tracey L. Meares*

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[T]he entire criminal justice system, from citizen to judge, is governed by perverse incentives. Though many of its members agree on what they wish to achieve, the incentives faced by each member acting individually directs him or her to act in ways inconsistent with what is implied by that agreement.¹

INTRODUCTION

THIS is a piece about prosecutorial incentives in our criminal justice system and ways to reconstruct those incentives. I describe a proposal to influence and structure a prosecutor's discretion and to limit prosecutorial misconduct through financial incentives. More specifically, I propose that a system of financial rewards could influence the public prosecutor's charging decisions and control prosecutorial misconduct occurring at trial. By exploring the potential of financial incentives as a mechanism to influence the manner in which the prosecutor approaches the various tasks of her job, I hope to better conceptualize the role of the public prosecutor in our criminal justice system.

The reward system I describe centers on the idea that motivating the public prosecutor through financial incentives accommodates the necessity for prosecutorial discretion in the American criminal justice system, while simultaneously recognizing the importance of encouraging the prosecutor to engage in conduct that exceeds constitutional minimums. I describe a financial incentive system of individual rewards² for public prosecutors.³ In particular, I focus on altering the incentives of federal prosecutors, though the more generalized application of the proposal to state prosecutors probably could easily be achieved under certain circumstances.⁴

1. James Q. Wilson, *Thinking About Crime* 258 (2d ed. 1983).

2. There are, of course, other incentive models that could be used, such as a group incentive model. But the individual incentive model is attractive for at least two reasons. First, it is well documented that individual incentives are effective motivators. See John M. Greiner et al., *Productivity and Motivation: A Review of State and Local Government Initiatives* 20 (1981) (noting that even the most conservative studies show that individual incentives increase productivity 10% to 20%). Second, as I explain in greater detail below, individual incentives can promote greater individual responsibility. Individual responsibility is a factor critical to the effectiveness of the financial incentive proposal to motivate prosecutors to better follow the rules of professional responsibility on a case-by-case basis.

3. An extended discussion of financial incentives for defense attorneys is beyond the scope of this Article. I should like to point out that my decision to focus on prosecutors does not mean that I believe such a system would be inapplicable to defense attorneys. For innovative perspectives on providing criminal defense attorneys with better financial incentives, see Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 595 (1993) and Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 Am. Crim. L. Rev. 73 (1993).

4. This Article focuses on federal prosecutors for three main reasons. First, the individual incentive model this Article describes probably will work best if the same actor handles the case from the beginning to end. In other words, a vertical prosecu-

The general thesis of this Article is that financial incentives should be considered and applied to various duties of the public prosecutor. The Article is divided into two parts. Each part addresses how the financial incentive system I propose has the potential to remedy two persistent problems in our criminal justice system. Part I discusses how the prosecutor's ability to control the dynamics of plea bargaining through her vast charging discretion can compromise the criminal defendant's ability to make a knowing and voluntary decision about relinquishing constitutional rights. Part II addresses the tendency of prosecutors to fail to adhere to rules of professional responsibility and the failure of disciplinary bodies, office supervisors, and courts to sanction prosecutors for inattention to these rules.

Part I focuses on the prosecutor's charging discretion. It describes an incentive system that rewards individual prosecutors financially on a case-by-case basis when that prosecutor obtains a conviction on a charge that is very similar, if not identical, to the charge or charges the prosecutor initially pursued against the defendant. Thus, the financial incentives model rewards a prosecutor for constraining her charging discretion within appropriate boundaries. Part I explains how the reward system should affect the dynamics of plea bargaining by motivating the prosecutor to limit her discretion at the charging stage. The prosecutor's ability to control the dynamics of plea bargaining is due in large part to her ability to exercise great discretion in charging.

Prosecutors can make, and tend to make, charge selections that influence a defendant's choice to plead guilty or go to trial. Prosecutors sometimes "overcharge"⁵ defendants to control the dynamics of plea bargaining. Under the rewards proposal, however, a prosecutor is rewarded for charging the defendant only with those charges the prosecutor believes she can prove at trial. As a consequence, overcharging should be reduced. Reduction of overcharging would then lead to a context in which defendants could plead guilty voluntarily and intelligently. For example, one benefit of reduced overcharging through the reward scheme I propose is that a prosecutor's charge would become a better signal to the defendant of the strength of the prosecution's case against him. Thus, the charge itself would convey information to

tion structure is likely to increase substantially the model's success. Many state and county offices are horizontally structured—different prosecutors handle a particular case at different stages. Federal prosecuting offices, on the other hand, almost always are organized along vertical lines. Second, the relevant case law of the federal system is simply more accessible for analysis than the case law of numerous and diverse state criminal justice systems. There are 94 federal districts, each of which has a U.S. Attorney and an office of Assistant U.S. Attorneys. However, there are several thousand different power centers in the states. The sheer numbers involved in the state criminal justice systems make it difficult to generalize predictions about the efficacy of the model of financial incentives I propose in this Article. Third, the organizational structure of federal prosecuting offices concentrates control over charging in prosecutors, as contrasted with many state systems where police control charging.

5. See *infra* note 57 and accompanying text.

the defendant. Consequently, under the reward system the defendant should be able to better assess whether to elect to go to trial or to plead guilty and forgo the right to a trial.

Part II addresses the problem of identifying and preventing prosecutorial misconduct occurring primarily at trial. Prosecutors often fail to adhere to rules of professional responsibility applicable to them generally as attorneys and specifically as prosecutors. Inefficacy of existing control mechanisms contribute to the persistence of prosecutorial misconduct. For instance, prosecutors are immune from civil damages for misconduct arising from their actions as advocates. Professional disciplinary institutions such as bar associations, state grievance committees, and prosecutorial supervisors rarely consider prosecutorial misconduct. And courts either fail to sanction prosecutors effectively, or they lack effective sanctions for prosecutorial misbehavior. Financial rewards could augment these weak systems.

Part II describes a model of financial incentives designed to invigorate rules of professional responsibility applicable to prosecutors. The goal of the model is to motivate prosecutors to pay more attention to standards of behavior that are higher than the floors set by the Constitution. The incentive system rewards prosecutors financially on a case-by-case basis, provided the appellate court finds that the prosecutor behaved properly. Appellate review of the prosecutor's conduct flows naturally from the appellate court's review of the defendant's conviction. To illustrate the predicted effects of this scheme, I use as examples ethical rules that prohibit prosecutors from engaging in improper argument at trial and rules requiring the prosecutor to disclose to the defendant evidence that tends to negate the guilt of the accused, mitigate the degree of offense, or reduce punishment. The reward system envisions that ethical rules will be invigorated because prosecutors will be rewarded on the basis of the appellate court's determination that an improper argument was made or that evidence favorable to the defendant was withheld without regard to whether the argument or lack of disclosure ultimately deprived the defendant of a fair trial. Prosecutors rewarded in this way should be motivated to comport their behavior with rules of professional responsibility rather than the more lenient constitutional standards.

The two parts of the reward system work together to shape prosecutorial choices and conduct occurring at important stages in a typical case. The financial incentives described in part I are designed to assist a prosecutor to prioritize efficiently her cases by placing a premium on the cases in which the evidence shows that the defendant is guilty beyond a reasonable doubt. If a prosecutor knows she will receive a reward for obtaining a conviction on a case-by-case basis, she will tend to choose those cases from her caseload in which conviction seems relatively easy to obtain based on the prosecutor's assessment of the admissible evidence and potential procedural hurdles.

Conversely, the prosecutor will tend not to choose cases in which the evidence of guilt is not strong, the amount of admissible evidence is scant, or the procedural hurdles are higher than she would like to jump. By addressing the potential for prosecutorial misconduct at the trial stage, the incentives described in part II pick up where the system described in part I ends.

The incentive system laid out in parts I and II considers the effect of rewarding a prosecutor on a case-by-case basis for achieving certain standards in charging and in trial conduct. By rewarding a prosecutor for obtaining a conviction on the same charge she pursued at the outset of the case, the reward system attempts to make more concrete ethical standards concerning the prosecutor's charging discretion. These standards are somewhat ambiguous by design so as not to interfere with the discretion necessary to the prosecutor's job function were these standards externally enforced. Encouraging higher standards of behavior through rewards is a middle ground that respects the necessity to avoid both the articulation of concrete rules for varying and complex situations and also the problems of external enforcement of standards, whether concrete or more fluid. Thus, rewards are a good way to achieve the benefits of external enforcement of rules while respecting the centrality of prosecutorial discretion in the American criminal justice system. Additionally, rewards are also useful to aid in the external enforcement of rules of professional responsibility that are clear but underenforced.

Finally, the incentive system set out in parts I and II is not based on a view of prosecutors as mere wealth maximizers. Rather, these rewards should be effective because, by linking a reward to ethical goals, they capitalize on a prosecutorial culture that values winning. In this way, the rewards system I describe can act as a mechanism to shape prosecutorial preferences⁶ for good behavior within the context of the naturally adversarial role the prosecutor plays in the criminal justice system.

* * *

A person is more likely to perform a certain task if he is given an incentive to do so. Similarly, we can intuit that people generally will perform better if they are given incentives to perform at a higher level. Following this reasoning, financial incentives have long been used in the private sector to motivate workers towards greater productivity;⁷ numerous studies indicate that individual financial incen-

6. For a related account of the criminal law as a mechanism to shape preferences, see Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law As a Preference-Shaping Policy*, 1990 Duke L.J. 1.

7. E. Brian Peach & Daniel A. Wren, *Pay for Performance from Antiquity to the 1950s*, in *Pay for Performance: History, Controversy, and Evidence* 5, 14-18 (Bill L. Hopkins & Thomas C. Mawhinney eds., 1992).

tives are effective motivators.⁸ While it is uncontroversial that sales executives at IBM may be paid a commission to motivate them to sell more computer systems, the same cannot be said for injecting similar incentive schemes into the public sector.

Skeptical attitudes towards motivating public employees with financial incentives exist for many reasons. Some laws and regulations entirely prohibit or limit the use of monetary rewards for public employees, and personnel regulations sometimes require that public employee salaries be uniform and comparable.⁹ Political constraints also may make it difficult for entrepreneurial governments to use financial bonuses to reward employees.¹⁰ Perhaps the greatest obstacle to the use of financial incentives in the public sector is the long-standing belief that it is extremely difficult or even impossible to measure public sector output.¹¹ In contrast, measuring the number of computer systems sold by IBM sales executives is a relatively simple task. The inability to measure performance can pose an insurmountable hurdle to the development of a successful financial incentive program for some public employees because a successful financial incentive plan depends on an explicit relationship between the reward and the performance desired.¹² Despite these issues greater numbers of governmental bodies, even with respect to criminal justice, are turning to financial incentives as motivators.¹³

The additional issue of "justice" adds complexity to the equation for public employees in the criminal justice system, especially the prosecutor. Justice is a term like fairness—it means different things to different people. It often depends on context, the individuals situated in that context, and the background that the individuals in a particular context bring to it. The prosecutor is expected to pursue the elusive

8. See Greiner et al., *supra* note 2, at 20.

9. *Id.* at 381-82 (stating that six states forbid such awards entirely and noting that several others legally restrict the use of monetary awards).

10. *Id.* at 103 (explaining that taxpayers may perceive bonus programs as "give-aways" of tax funds).

11. *But see* Marc Holzer, *Public Administration Under Pressure, in* Productivity and Public Policy 71, 71 (Marc Holzer & Stuart S. Nagel eds., 1984) (suggesting that the notion that outputs and outcomes cannot be measured in the public sector is "baseless" and a "myth").

12. See Greiner et al., *supra* note 2, at 20; *see also* David Osborne & Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* 139 (1992) ("Entrepreneurial governments seek [to fund output because they] know that when institutions are funded according to inputs they have little reason to strive for better performance. But when [governments] are funded according to outcomes, they become obsessive about performance.").

13. See generally Greiner et al., *supra* note 2, at 33-43 (describing numerous efforts at the local and state government level to use financial incentives); Robert Wood & Maria Maguire, *Private Pay for Public Work: Performance Related Pay for Public Sector Managers* 123-95 (1993) (discussing case studies linking pay and performance in the public sector of Organisation for Economic Co-operation and Economic Development countries).

and largely undefined goal of justice while at the same time pursuing the goal of convicting and incarcerating guilty criminal defendants to ensure the public's safety.¹⁴ Therefore, the goal of justice must be considered if a system of financial incentives is to capture all of the features of the prosecutor's job and, in so doing, spur the prosecutor to be a better public employee. Justice must be defined before it can be included as an assessable factor of the prosecutor's output. Of course, this is exceedingly difficult, as there is no ready definition of what it means for the prosecutor to do justice.

Whatever definition of justice is ultimately reached, it is not controversial to say that to achieve justice, the prosecutor must strive for a certain level of impartiality in pursuing criminal investigations and prosecutions. And if impartiality is a necessary component to justice, it is possible that injecting financial incentives into this context may be inconsistent with the prosecutor's goals. A financial reward system could introduce bias that affects the level of impartiality necessary to the prosecutor's pursuit of justice.¹⁵

On the other hand, a financial incentive system could provide a "correcting" bias that allows the prosecutor to achieve some notion of justice. This is the idea I explore in this Article.

Perhaps because of the problems identified in the preceding paragraphs, most financial incentives in the criminal justice system are directed at private actors to influence them to assist public employees. For example, the U.S. Secret Service is authorized to offer and pay rewards to private citizens who provide information leading to the apprehension of violators or potential violators of certain provisions of federal law.¹⁶ Similarly, many communities offer rewards to those who provide information about criminal offenses that lead to convic-

14. Compare Canons of Professional Ethics Canon 5 (1908) (applied, as amended, until the adoption of the Model Code of Professional Responsibility in 1970) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.") with Standards Relating to the Administration of Criminal Justice Standard 3-1.2 (1992) [hereinafter Standards for Criminal Justice], which states:

(a) The office of the prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict. . . .

Even the Standards noted above contain some ambiguity about the prosecutor's role—it is only in the *third* subpart of the first standard that the prosecutor learns of her duty to seek justice. *See id.*

15. *See, e.g.,* *Hoyne v. Danisch*, 106 N.E. 341, 343 (Ill. 1914) ("The fee system, where the salary of the public official depends *entirely* upon the amount of fees collected by him, is liable to result in many evils . . ." (emphasis added)).

16. 18 U.S.C. § 3056(c)(1)(D) (1994) (allowing officers and agents of the Secret Service, under the direction of the Secretary of the Treasury, to reward persons for providing information concerning "violation[s] or potential violation[s] of those provisions of law which the Secret Service is authorized to enforce").

tions.¹⁷ To motivate private citizens to assist the government in ferretting out fraud in government contracting, Congress recently revitalized the *qui tam*¹⁸ action under the False Claims Act ("Act").¹⁹ Commentary to the recently amended Act indicates that Congress intended "to increase financial and other incentives to private individuals to bring suits under the Act[, thereby] enlist[ing] the aid of the citizenry in combating the rising problem of 'sophisticated and widespread fraud.'" ²⁰ Each of these examples manifests a recognition on the part of public officials that a financial incentive can be an effective part of a law enforcement program.

Although the most numerous examples of financial incentives in the law enforcement area are directed at private individuals, examples of financial incentives given directly to public employees exist. Prosecutors for the U.S. Department of Justice, for instance, are eligible to receive various monetary incentive awards.²¹ The Attorney General may award an individual or group with the Attorney General's Award for Exceptional Service or the Award for Distinguished Service.²² Moreover, the Attorney General may reward individual attorneys with the John Marshall Award.²³ More commonly awarded are Special Achievement Awards, which essentially are yearly bonuses given to employees who achieve high performance ratings.²⁴ All of these awards are designed to emulate financial incentive programs in the private sector by using monetary rewards to increase motivation and

17. See, e.g., Caroline M. Cooney, *Hot Line to Preventing Crime*, Security Mgmt., Sept. 1991, at 50 (discussing Crime Stopper programs in which private citizens are rewarded for providing authorities with information that helps law enforcement agencies solve crimes and noting that such rewards are usually contingent upon a conviction being obtained).

18. See *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993) ("The term '*qui tam*' is short for '*qui tam pro domino rege quam pro se imposito sequitur*, [or] who brings the action as well for the king as for himself.'" (citation omitted)). *Qui tam* actions allow private litigants to maintain a civil suit on behalf of themselves and the government to recover damages and enforce penalties prescribed by statute. *Id.* at 745-46.

19. 31 U.S.C. §§ 3729-3731 (1988 & Supp. V 1993).

20. See *Kelly*, 9 F.3d at 745 & n.2 (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 2, 23-24 (1986), reprinted in 1986 U.S.C.A.N. 5266, 5267, 5288-89).

21. See, e.g., Antitrust Division, U.S. Dep't of Justice, Directive ATR 1451.1 (1990) [hereinafter ATR] (describing different types of rewards and recognizing the Attorney General's power to grant cash awards ranging from \$5000 to \$10,000).

22. The Award for Exceptional Service is the highest Department of Justice award, and the Award for Distinguished Service is the second highest. *Id.* § 2.1(a)-(b).

23. The John Marshall Award is granted annually in each of six areas: (1) trial of litigation; (2) preparation of litigation; (3) support of litigation; (4) handling of appeals; (5) providing legal advice or preparing litigation; (6) interagency cooperation in support of litigation. *Id.* § 2.1(c).

24. See *id.* § 3.2(a) ("A Special Achievement Award is a lump sum cash award granted in recognition of either: an employee's sustained performance of assigned tasks for a period of at least six months; or a specific act or service in the public interest connected with or related to official employment.").

morale.²⁵ However, neither the Attorney General's Awards nor the Special Achievement Awards are tied to specific cases or performance in a specific area. For that reason, these rewards may not be particularly controversial. Arguably, neither are they very effective.²⁶

A comparison between the Justice Department's bonus scheme for its employees on the one hand, and its policy of financially rewarding in a very direct manner private persons for assisting in investigations and convictions on the other, is revealing. The differences between the two policies might reflect the government's interest in achieving a balance between maintaining an adequate level of law enforcement and avoiding the compromise of justice by government employees. That a financial incentive scheme designed to motivate the prosecutor to be a better public employee may affect the prosecutor's goal of justice does not mean that financial incentives should be rejected outright. Some effect on the prosecutor's goal of justice does not necessarily mean that justice is destroyed. The effect of financial incentives on the prosecutor's pursuit of justice may very well be a welcome effect.

Professors Thomas W. Church and Milton Heumann have documented in a monograph one attempt to influence the manner in which prosecutors carry out their duties through financial incentives.²⁷ The Speedy Disposition Program was an ambitious financial incentive program directed at prosecutors in New York City undertaken from 1984 to 1985. The Speedy Disposition Program utilized financial incentives to motivate prosecutors to achieve a very specific goal, unlike the Department of Justice monetary incentive program. The Speedy Disposition Program initially was spurred by a federal court order requiring the number of detainees housed in New York jails to be decreased. The New York City Office of Management and Budget provided the prosecuting offices of the city's five boroughs and a Special Narcotics office with approximately \$1.5 million in seed money in 1984. In return for the seed money, the district attorneys in each of the six offices agreed to reduce the number of older felony cases on their dockets

25. See, e.g., *id.* § 1.3 ("The policies governing this program in the Antitrust Division are to: (a) Assure consistency and equity in the application of criteria established for awards; (b) Recognize employee achievements; (c) Regularly identify situations in which employee performance warrants consideration for awards.").

26. The Special Achievement Awards dispensed during my tenure at the Department of Justice were very small if compared on a percentage basis to an attorney's salary. They were meted out once per year, and there was little differentiation among the evaluations of those rewarded. As Wood and Maguire note, poor discrimination and inflation in ratings often result in universal receipt of achievement awards in government offices. See Wood & Maguire, *supra* note 13, at 35-37. Moreover, because the Department of Justice's rewards were not tied to any particular goal, they did not motivate the employee to meet any particular goal.

27. See Thomas W. Church & Milton Heumann, *Speedy Disposition: Monetary Incentives and Policy Reform in Criminal Courts* (1992) for an excellent, detailed description of the Speedy Disposition Program.

and the number of their offices' long-term detainees housed in pretrial detention facilities. The program also provided that the offices most successful in reducing the number of cases targeted by the program would receive cash bonuses from an incentive pool of several million dollars. The offices receiving these rewards were not required to spend the money on further efforts to decrease the number of targeted cases; rather, the rewards simply were bonuses for achieving results that the city desired.²⁸

The success of New York City's Speedy Disposition Program is somewhat ambiguous. If the figures for pretrial detainees are examined in the aggregate across all six prosecuting offices, it seems as if the Speedy Disposition Program was a failure.²⁹ Disaggregation of the figures for individual boroughs reveals a higher level of success. Manhattan reduced the number of older felony cases and long-term detainee cases, the program's target categories of cases, during both years of the program.³⁰ The Bronx prosecuting office distinguished itself in the first year of the program by making the greatest reduction in the number of targeted cases in both categories for all offices in both years of the program.³¹ Financial rewards, it seems, were effective in some cases. Later analysis of the program noted that success was not attributable only to money; rather, one characteristic of the successes of the program in Manhattan and to some extent in the Bronx was the "competitive element that linked the goals of the program to other interests of the district attorneys—financial, political, professional."³²

The results of the Speedy Disposition Program suggest that financial incentives, if properly constructed, can be beneficial policy tools. Monetary rewards change the behavior of the targets of the incentives by providing them with the motivation to obtain desired objectives. Moreover, monetary incentives can be used to capture certain organizational goals so that targets of the incentives will be motivated to

28. Thomas Church & Milton Heumann, *The Underexamined Assumptions of the Invisible Hand: Monetary Incentives as Policy Instruments*, 8 J. Pol'y Analysis & Mgmt. 641, 645-47 (1989).

29. The number of pretrial detainees went up over the two years of the Speedy Disposition Program from 6500 in January 1984 to 7600 in December 1985. *Id.* at 647.

30. *Id.* at 648. In 1984, Manhattan reduced the number of long-term detainee (those detained over nine months) cases by 22% and the number of targeted pending felony cases (those pending over eleven months) by almost 31%. The reductions for 1985 were less dramatic but still impressive. Manhattan posted reductions of 11% in the long-term detainee (those detained between six and nine months) category in 1985 and a 15% reduction in the targeted pending felony case category (those pending between six and eleven months) for the same time period.

31. In 1984, the prosecuting office in the Bronx posted the largest reductions for any county during the two years of the program, a 38.6% reduction in detainee cases and a 46.1% reduction in pending felony cases. However, the Bronx performed poorly the following year, posting significant increases in both targeted categories that essentially canceled out the gains made in the previous year. *Id.*

32. *Id.* at 654.

view those goals as priorities. By capturing organizational goals with financial incentives directed toward individuals, organizational leaders can encourage individuals to internalize organizational goals. This internalization should flow naturally from the alignment of the goal and the target's personal interest in obtaining a financial reward. In short, motivating a prosecutor to behave ethically might be achieved simply by explicitly rewarding the prosecutor to do so.

Alignment of organizational goals with financial rewards is not enough to achieve internalization. Targets of incentives also must have the capacity to attain desired objectives specified by a reward scheme. Capacity, both the expertise or know-how to obtain the desired goal and the material resources to do so,³³ is critical to any scheme of financial incentives. As I explain in greater detail below, many problems resulting from certain types of prosecutorial behavior and decision making exist primarily because the existing system does not provide incentives for prosecutors to change their behavior. Prosecutors often will act contrary to the American Bar Association's ("ABA") ethical canon's mandate to seek justice and not convictions. Prosecutors have the capacity to attain what I describe as desired behavior, but the current culture in which prosecutors operate simply does not place a premium on this behavior.

I. THE PROSECUTOR'S SELECTION OF THE CHARGE AND PLEA BARGAINING

The American prosecutor requires a great deal of discretion in order to carry out her duties effectively. Prosecutors regularly use their vast discretion to influence and control the decisions made by criminal defendants. In this part, I explain how financial incentives could influence the prosecutor's discretion. Part I has four sections. Section A, after summarizing the extent of prosecutorial discretion in the American criminal justice system, analyzes how this discretion allows the prosecutor to manipulate the charging decision to control the defendant's decision to plead guilty or go to trial. Section A then explains how the practice affects the defendant's ability to elect voluntarily to waive his right to trial. Section B outlines a proposal to inject a system of financial incentives into the factors the prosecutor regularly considers when making the decision to charge an accused with a criminal offense. Section C evaluates the predicted effects of the proposal on the relationship between the prosecutor and the defendant during plea bargaining and also on the criminal justice system generally. Section C demonstrates that a system of financial incentives could be used to influence the prosecutor's charge selection, leading to greater

33. Church and Heumann write, "Capacity can be assessed in two contexts: resources and technology. Resources are the material and human wherewithal necessary to achieve the policy aim. Technology involves the competence, information, and expertise to achieve the desired results." *Id.* at 643.

equity between the bargaining positions of the prosecutor and the defendant. Finally, section D answers several potential objections to the financial incentive system proposed in section B.

A. *Prosecutorial Discretion and Plea Bargaining*

The prosecutor's decision to charge an accused is largely subject to the prosecutor's discretion. The prosecutor's charging discretion is, for the most part, unreviewable. So long as the prosecutor has probable cause to believe that the accused committed an offense, the prosecutor is entitled to bring the charge.³⁴ The prosecutor's decision, moreover, is rarely second-guessed by the courts.³⁵ Similarly, the prosecutor's decision not to initiate a prosecution or to dismiss a prosecution is effectively unreviewable by the courts.³⁶

34. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (" '[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.' " (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)) (alteration in original)).

35. *Wayte*, 470 U.S. at 607-08. One area in which courts will second-guess prosecutors is selective prosecution, which is prohibited. *Wayte* sets out a two-prong test for a prima facie case of selective prosecution. First, the defendant must show that other similarly situated persons generally had not been prosecuted. Second, the defendant must show that the government's discriminatory selection was based on constitutionally impermissible grounds such as race or religion. *Id.* at 608-09. Few defendants successfully raise the defense because a prosecutor usually can claim she made her prosecuting decision in good faith, based on noninvidious grounds. See *Oyler v. Boles*, 368 U.S. 448, 456 (1962) ("[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.").

A prosecutor also is prohibited from initiating vindictive prosecutions. In *Blackledge v. Perry*, 417 U.S. 21 (1974), the Court held that the Due Process Clause of the Fifth Amendment prohibits the government from bringing more serious charges against the defendant after he has invoked his right to a jury trial, unless the prosecutor comes forward with evidence to show that the increased charges could not have been brought before the defendant exercised his rights. *Id.* at 28-29 & n.7. Like a claim of selective prosecution, a claim of vindictive prosecution is extremely difficult for a defendant to raise successfully.

36. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 376-77 (2d Cir. 1973) (affirming district court's dismissal of a class action complaint seeking to require federal and state officials to investigate and prosecute person who allegedly violated federal and state criminal statutes in their treatment of inmates following the Attica prison uprising); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (upholding U.S. Attorney's refusal to prepare an indictment at request of grand jury), *cert. denied*, 381 U.S. 935 (1965); see also Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. Chi. L. Rev. 246, 299 (1980) (stating that "the courts will almost never intervene to compel prosecution of a given offender").

Furthermore, though Federal Rule of Criminal Procedure 48(a) ostensibly provides for judicial review of the prosecutor's decision to dismiss a case, courts rarely will exercise the power of refusing to allow U.S. Attorneys to dismiss cases absent a showing that the dismissal is clearly contrary to a manifest public interest. *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

There may be internal constraints on the prosecutor's decisions. At the federal level the prosecutor's charging discretion is regulated to a certain extent by Depart-

The reasons underlying the prosecutor's vast discretion have been well documented by commentators,³⁷ and I will not elaborate on them at length here. The three most commonly cited reasons are legislative "overcriminalization,"³⁸ the need for prosecutors to shepherd limited resources,³⁹ and the need for individualized justice.⁴⁰ I note these common justifications merely to point out that the prosecutor's discretion is well-entrenched in the criminal justice system. Therefore, any reform of the system potentially could be subsumed by the prosecutor's discretion. Similar observations have led other scholars to suggest that reform of the existing system rarely will be successful, and transformation to an entirely different model is necessary.⁴¹ I am not such a pessimist. My goal here is to suggest methods to motivate prosecutors towards self-limitation in their decision making and in their conduct within the confines of the existing system.

The prosecutor's vast charging discretion necessarily translates into power in the plea bargaining context. The prosecutor can, and regularly does, use discretion in charging to influence greatly a defendant's decision to plead guilty in any particular case.⁴² The prosecutor's decision to initiate a prosecution determines whether the accused will face any punishment at all. Once a prosecution is initiated, the prosecutor can manipulate the offenses on which to charge the accused to control the defendant's exposure to punishment. By controlling the defendant's exposure to punishment, the prosecutor is able to control the dynamics of plea bargaining. That approximately eighty to ninety

ment of Justice policy, which directs U.S. Attorneys to seek approval before pursuing or declining the prosecution of certain offenses. See generally Harry I. Subin et al., *The Criminal Process: Prosecution and Defense Functions* § 5.1 (1993) (noting policy controls on charging discretion cited in the *U.S. Department of Justice Manual*).

37. See Wayne R. LaFare, *The Prosecutor's Discretion in the United States*, 18 *Am. J. Comp. L.* 532 (1970). For two more critical looks at the discretion of the prosecutor in the American criminal justice system, see Kenneth C. Davis, *Discretionary Justice: A Preliminary Inquiry* 188-214 (1969) and James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *Harv. L. Rev.* 1521 (1981).

38. That is, criminal codes sometimes criminalize conduct without reference to enforceability. In this way criminal codes at times reflect prevailing social norms more so than conduct the legislature actually intends to prohibit. A prosecutor, then, is said to require discretion in order to decline to prosecute such offenses. That the crime of fornication is still included in the Illinois criminal code, Ill. Ann. Stat. ch. 720, para. 5/11-8 (Smith-Hurd 1993), is a prototypical example of overcriminalization.

39. Limited resources require the prosecutor to act as a sieve and to direct attention only to a fraction of criminal conduct. It is the criminal justice system's version of medical triage.

40. See Herbert L. Packer, *Two Models of the Criminal Process*, 113 *U. Pa. L. Rev.* 1, 27 (1964) ("A totally efficient system of crime control would be a totally repressive one since it would require a total suspension of rights of privacy.").

41. See Davis, *supra* note 37, at 191-95.

42. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 *U. Chi. L. Rev.* 50, 52-53 (1968) (discussing the prosecutor's discretionary role in plea bargaining); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 *U. Ill. L. Rev.* 37, 38 (arguing that "the prosecutor substantially dictates the terms of plea agreements in most cases").

percent of convictions are obtained through guilty pleas⁴³ leads inescapably to the conclusion that the prosecutor greatly affects a very important component of the criminal justice system.

There are few rules of professional responsibility to guide the prosecutor's decision making in the plea bargaining arena. It is clearly unethical for a prosecutor to charge an accused with offenses for which the prosecutor knows there is no factual basis. The ABA's Model Rules of Professional Conduct ("Model Rules") Rule 3.8(a) provides that "[t]he prosecutor in a criminal case *shall* . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."⁴⁴ However, the ethical rules do not clearly prohibit the prosecutor from deciding to charge an accused with offenses which the prosecutor has probable cause to believe are factually justified but which the prosecutor believes she probably will not be able to prove beyond a reasonable doubt at trial. ABA ethical standards specifically geared to the prosecutor's function discourage this type of overcharging, but they do not prohibit it.⁴⁵ Similarly, a prosecutor who possesses enough admissible evidence to pursue successfully a prosecution on a certain serious offense against an accused but who nevertheless is willing to accept a guilty plea to a less serious offense is not proscribed by the ethical rules from charging the accused with the

43. See, for example, statistics collected by the Department of Justice Bureau of Statistics, indicating that the mean rate of convictions by plea of guilty obtained in federal courts from 1985 through 1990 was 87.2%. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1992, tbl. 5.35 (Kathleen Maguire et al. eds., 1993) [hereinafter Sourcebook of Criminal Justice Statistics].

44. Model Rules of Professional Conduct Rule 3.8(a) (1983) [hereinafter Model Rules] (emphasis added).

45. See Standards for Criminal Justice, *supra* note 14, Standard 3-3.9(a) ("A prosecutor *should* not institute, cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor *should* not institute, or cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." (emphasis added)). There may be internal office policy which constrains this type of charging. The Standards for Criminal Justice are exactly that—standards. Standard 3-1.1 states that they are not "intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction." *Id.* Standard 3-1.1. The same Standard also states that the Prosecution Standards "may or may not be relevant in such judicial evaluation, depending upon all the circumstances." *Id.* In fact, judges have referred to the Standards in published opinions in their evaluations of alleged prosecutorial misconduct and brought up by the defendant on appeal. See, e.g., *Davis v. Kemp*, 829 F.2d 1522, 1536 (11th Cir. 1987) (agreeing with defendant that prosecutor's arguments may well have violated ABA Standards for Criminal Justice even though they did not render defendant's trial fundamentally unfair), *cert. denied*, 485 U.S. 929 (1988); *United States v. Birdman*, 602 F.2d 547, 552 n.11 (3d Cir. 1979) (noting that a local court rule provided that the ABA's ethical guidelines, including the ABA Standards for Criminal Justice, were the standards of conduct for attorneys in that court), *cert. denied*, 444 U.S. 1032 (1980); *Malley v. Manson*, 547 F.2d 25, 28-29 (2d Cir. 1976) (district court held that prosecutor's conduct violated ABA Standards for Criminal Justice such that granting of habeas writ was justified, but court of appeals reversed), *cert. denied*, 430 U.S. 918 (1977).

more serious offense to induce the defendant to plead guilty to the lesser offense.⁴⁶

Each of the charging practices described in the preceding paragraph⁴⁷ could be characterized as overcharging. While all three of these charging practices affect the defendant's ability to waive meaningfully and voluntarily his right to trial in some way, arguably only the first two detrimentally affect the defendant. The third charging practice might generously be interpreted to be an inducement to the defendant to plead guilty because the practice allows the defendant to escape a sentence that could be imposed at trial that the defendant seemingly "deserves" on the evidence and that is more harsh, no doubt, than the sentence the defendant receives after pleading. Thus, the inducement is hardly contrary to the defendant's desires. Even though the third charging practice may not be contrary to the defendant's interests, it is nonetheless problematic. The public may desire that the defendant be convicted and punished on the more serious charge, a charge on which the prosecution indisputably can succeed in obtaining a conviction. We can better characterize the third charging practice by recognizing it as a manifestation of an agency problem that can exist between the prosecutor and the public (the prosecutor's "client"), as opposed to a practice that affects the defendant's right to meaningfully and voluntarily waive his right to trial.

Vast prosecutorial discretion at the charging stage allows the prosecutor to control the plea context because it enables her to trade on the continuum between the quantity and quality of evidence necessary to support a legitimate charge and the quantity and quality of evidence needed to prove that the defendant committed the charged offense. In short, there is a natural gap between the different standards of proof necessary to support an ethical charge and the standard of proof required to obtain a conviction at trial.

According to ethical rules, if a prosecutor can demonstrate that she has probable cause to believe that the accused committed the charged offense, then that charge is legitimate and ethical.⁴⁸ To meet this probable cause standard, a prosecutor may rely on evidence that

46. In fact, the Supreme Court has expressly acknowledged the legitimacy of this practice. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (affirming defendant's sentence to life in prison on a habitual offender charge which the prosecutor pursued after the defendant refused the prosecutor's offer to allow him to plead guilty to a charge with a penalty limit of five years).

47. These three charging practices are: (1) charging an offense with no factual basis; (2) charging an offense with probable cause to believe it is factually justified, even though the offense probably cannot be proved at trial; and (3) charging a serious offense that will likely lead to a conviction at trial in order to induce a plea to a lesser offense.

48. See Model Rules, *supra* note 44, Rule 3.8(a); see also Model Code of Professional Responsibility DR 7-103(A) (1981) [hereinafter Model Code] ("A public prosecutor . . . shall not institute . . . criminal charges when he knows or it is obvious that the charges are not supported by probable cause.").

might never be admissible at trial.⁴⁹ Of course, if a prosecutor wants to obtain a conviction against the defendant on the same offense, the prosecutor must prove beyond a reasonable doubt that the defendant committed the charged offense. To meet this burden the prosecutor must observe strict rules of evidence that often preclude her from showing to the jury evidence that bears directly on the defendant's guilt.⁵⁰

Therefore, the gap between the evidentiary requirements for legally adequate charges and convictions has been used to justify the wide discretion afforded to prosecutors as necessary to carry out effectively their responsibilities as prosecutors. The following argument can be made. A lower evidentiary standard is necessary to ensure public safety because some threshold must be met to respect simultaneously the interests of two different groups: those who are accused of crimes and those who are victimized or may be victimized. Requiring only probable cause to pursue a prosecution while requiring a much higher evidentiary standard to convict the accused later in the case strikes a balance between the interests of the two groups. Prosecutors and other law enforcement agents cannot be legally required to meet the evidentiary requirement for convictions at the charging stage, the argument continues, because law enforcement agents need flexibility to investigate alleged offenses and to pursue prosecutions only in those cases in which prosecution is most warranted.

The argument for discretion and flexibility is persuasive, but flexibility is purchased at a price. Vast prosecutorial discretion at the charging stage undeniably leads to negative consequences on the criminal defendant's ability to elect freely and intelligently to plead guilty to the charges presented by the prosecutor. Vast prosecutorial discretion allows the prosecutor to control, essentially unilaterally, the defendant's ability to plead guilty in most cases.

Despite the Supreme Court's characterization of plea bargaining as "the mutuality of advantage" by "give-and-take,"⁵¹ the incentives facing the different characters (prosecutor, defendant, defense counsel) in the plea bargaining drama combine to set the stage for prosecutorial control of the outcome. Initially, through exercise of discretion, prosecutors control the sample of cases to be bargained over because the prosecutor, before she decides what criminal of-

49. See Fed. R. Crim. P. 4(b) ("The finding of probable cause may be based upon hearsay evidence in whole or in part.").

50. For example, the exclusionary doctrine prohibits juries from hearing evidence that is the fruit of an illegal search or confession obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Also, evidence that tends to show that a defendant is guilty simply because he committed similar acts before usually is excluded at trial. Fed. R. Evid. 404(b). Furthermore, the jury is prohibited from hearing certain types of hearsay that do not fit an exception to the rule against the use of hearsay. Fed. R. Evid. 802.

51. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

fenses to pursue against the accused, must first decide whether to charge the accused at all. A prosecutor will naturally select the stronger cases to charge.⁵²

The criminal defendant's decision-making process also is conducive to unilateral control of plea bargaining by prosecutors. Criminal defendants are aware that they may face more severe penalties if they elect to go to trial on a particular offense, as compared to the penalty they may face if they plead guilty to the same offense. One commentator refers to this phenomenon as the "trial penalty."⁵³ Depending on the sentence differential that the defendant perceives, it might be very difficult for a risk-averse defendant to turn down a small, definite punishment in the face of the future possibility of a much larger one.

A few theories help to explain how a criminal defendant chooses between the following three outcomes: (1) a certain punishment now; (2) a more serious punishment in the future after a trial, which is less certain than the plea bargained penalty; and (3) a possible acquittal on some or all of the charges. First, a criminal defendant's preference for a certain penalty now against the future possibility of a larger punishment after a trial could be due, in part, to the fact that choosing trial simply prolongs uncertainty of the outcome, whatever that outcome is. A defendant could prefer a certain punishment offered by the prosecutor to a high likelihood of the same punishment after the trial.⁵⁴ Second, a criminal defendant may irrationally misperceive the future benefits of acquittal because he might irrationally discount the future.⁵⁵ Irrational discounting of the benefits of a possible acquittal on some or all of the offenses on which a defendant is charged may lead that defendant to choose the "benefits" of a certain punishment now. Third, a criminal defendant might "overvalue" the detriment of the

52. This is exactly the type of discretion that we would expect the prosecutor to exercise due to the combination of factors that lead to the necessity of prosecutorial discretion in the American criminal justice system (legislative overcriminalization, limited resources, and individualized equitable considerations). Moreover, it has been recognized that prosecutors as a group tend to be risk averse and seek means to avoid embarrassing losses at trial. See Alschuler, *supra* note 42, at 59-60; Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439, 445-48 (1971). Obviously, by selecting stronger cases at the outset, a prosecutor skewes the relevant sample of cases in her favor.

53. See Gifford, *supra* note 42, at 46-47.

54. Compare the problem posed in Richard H. Thaler, *The Psychology of Choice and the Assumptions of Economics*, in *Quasi-Rational Economics* 137, 145 (1987), illustrating the "certainty effect":

Problem 9. Which of the following options do you prefer?

A. A sure win of \$30 (78%)
 B. An 80% chance to win \$45 (22%)

The high frequency of responses in category A violates expected utility theory, which predicts that a rational person should be indifferent between A and B.

55. See Jon Elster, *Nuts and Bolts for the Social Sciences* 42-51 (1989) (explaining that the more distant in time a reward will be received in the future, the lower its present value).

future penalty after trial as compared to the future benefit of acquittal. The value function described by scholars of prospect theory explains the observation that many people tend to place a higher value on negative outcomes than positive outcomes of the same magnitude.⁵⁶ It might be that defendants whose choices conform to prospect theory's value function might be unable to estimate reasonably the probability that they will receive a particular punishment in the future after a trial. That is, because prospect theory says that the value function is steeper for losses than for gains, defendants might make mistakes in assessing the likelihood of success (the probability of acquittal or lesser punishment) at trial by failing to recognize the value of an acquittal as compared to the disadvantage of a conviction. All of these theories may combine to affect detrimentally a criminal defendant's ability to waive his right to trial voluntarily and intelligently because all three affect the defendant's ability to assess accurately the benefits and risks of going to trial.

Another factor that supports the prosecutor's ability to control unilaterally the dynamics of plea bargaining is the fact that a prosecutor can exacerbate the defendant's fear of the trial penalty by utilizing an "overcharging" strategy.⁵⁷ A prosecutor commonly overcharges in two ways. A prosecutor can charge a defendant with an offense more serious than the prosecutor believes is justified ("vertical overcharging"), or a prosecutor can charge a defendant with every offense that the prosecutor believes the defendant's conduct meets ("horizontal overcharging").⁵⁸ Also known as horizontal overcharging is the practice of breaking the defendant's conduct into several separate components, charging each component as a separate offense.⁵⁹

Overcharging is systemic. It flows from the structure of criminal law that facilitates this charging practice because many categories of crime contain lesser-included offenses and because the same criminal conduct is described by different overlapping offenses. The practice of overcharging also flows from the discrepancy between the amount of

56. One characteristic of the value function is that the function is steeper for losses than for gains. Moreover, the function is concave for gains and convex for losses. Thus, "The aggravation that one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount." Richard H. Thaler, *Toward A Positive Theory of Consumer Choice*, in *Quasi-Rational Economics* 3, 5-7 (1987). Although the example pertains to monetary gains and losses, the theory can be applied to a context involving gains and losses of freedom or punishment generally.

57. See Alschuler, *supra* note 42, at 85-105; Gifford, *supra* note 42, at 47-49; see also Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 539, 548 (1992) (explaining that Assistant U.S. Attorneys regularly drop excess robbery counts in return for pleas and reduce drug counts down to telephone counts).

58. See Alschuler, *supra* note 42, at 85-88 (describing the two types of overcharging).

59. *Id.*

information the prosecutor has at the outset of the case and what the prosecutor expects to be able to prove at trial. Because the prosecutor may not have as much information as she would like at the charging stage, she may often believe that it is in her best interests to charge the defendant with the most serious and as many crimes at the outset of the case to preserve options for prosecution at a later time.

Overcharging is also due in part to an abhorrence of losing that is central to prosecutorial culture.⁶⁰ By charging the defendant with the most serious offenses that the prosecutor believes the defendant's conduct supports, the prosecutor can push up the trial penalty and limit, as a consequence, the defendant's ability to waive his right to trial intelligently and voluntarily. A defendant, choosing between (1) a prosecutor's offer to allow him to plead guilty to fewer than the charged offenses (and a correlative diminution of a penalty) or to allow him to plead to offenses less serious than the charged offense (also with a correlative diminution of possible exposure to punishment) and (2) an offer to go to trial on all charges (with the correlative possibility of maximum exposure to penalty), will, not surprisingly, often accept the plea. This is especially true in cases in which the defendant believes that conviction on at least some charge is virtually certain.

Finally, defense counsel sometimes contribute to prosecutorial control of plea bargaining at the defendant's expense. Defense counsel may believe it is in her best interests to go along with a prosecutorially orchestrated plea.⁶¹ A heavy caseload and the prospect of a continuing relationship with the prosecutor in the future sometimes leads the defense counsel to agree to a plea on the prosecutor's terms. Defense counsel's acquiescence and a prosecutor's overcharging practice can lead to a situation in which defense counsel is able to represent to a client that a bargain was obtained simply because the prosecutor came down from the maximum. In fact, the "bargain" may be illusory.

The prosecutor's ability to almost wholly control plea bargaining, along with other factors, understandably has led some scholars to advocate the reform of plea bargaining.⁶² Other scholars have engaged in more extended analyses to justify the complete abolition of plea bargaining.⁶³ There are several arguments against plea bargaining:

60. See Dr. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 Sw. U. L. Rev. 98, 119 (1975) (describing the conviction mentality of prosecutors).

61. See Stephen J. Schulhofer, *Criminal Justice Discretion As Regulatory System*, 17 J. Legal Stud. 43, 53-56 (1988) (explaining that defense counsel compensation systems often motivate criminal defense attorneys toward quick disposition of cases, leading to a preference for plea bargains over trials).

62. See, e.g., Gifford, *supra* note 42, at 74-95 (recommending implementation of an administrative review system); White, *supra* note 52, at 453-62 (recommending internal controls).

63. Albert Alschuler and Stephen Schulhofer, two well-known critics of plea bargaining, have written numerous articles advocating the abolition of plea bargaining. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1909 n.4 (1992) (recognizing Albert Alschuler and Stephen Schulhofer as the

plea bargaining essentially "coerces" the defendant to relinquish important constitutional rights⁶⁴ (even perhaps an innocent defendant); plea bargains are an inadequate substitute for the trial process and ultimately undermine the public's interest in the trial process;⁶⁵ plea bargaining interferes with the victim's right to participate in a trial;⁶⁶ and plea bargaining controlled by prosecutors may lead to unequal treatment of defendants and may undermine sentencing legislation.⁶⁷

In contrast to the arguments against plea bargaining, many of the arguments in favor often seem to have the tenor of resigned acceptance.⁶⁸ Here I take a centrist view that recognizes both the very serious problems associated with plea bargaining and the potential benefits of plea bargaining if bargaining positions of the prosecutor and the defendant are relatively equal. Admittedly, this atmosphere does not always, if ever, exist.⁶⁹ To that end I propose a model that would limit prosecutorial discretion at the charging stage in order to promote greater equity between the prosecutor and the defendant in the plea bargaining context. One of the goals of the financial incentives model that I propose is to create an atmosphere that would promote the defendant's ability to plead guilty both voluntarily and intelligently.

What do I mean by voluntary and intelligent decisions about pleas? In *Brady v. United States*,⁷⁰ the Supreme Court upheld the constitutionality of a plea encouraged by the fear of a possible death sentence.

most influential critics of plea bargaining, citing their numerous articles on the subject, and recognizing that other scholars have joined them in their opposition to plea bargaining).

64. See Gifford, *supra* note 42, at 58-59; Schulhofer, *supra* note 61, at 70-74.

65. See Gifford, *supra* note 42, at 70-71. Gifford explains that society has a desire to reinforce socially desirable norms, important constitutional values, and participate in a ritual of retribution. Trials are more effective vehicles than plea bargains to satisfy these objectives. Direct public input by citizens in the form of a public trial also legitimizes state condemnation of the defendant. *Id.*

66. *Id.*

67. See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 926-28 (1991); Schulhofer, *supra* note 61, at 67-70.

68. See, e.g., Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 L. & Soc'y Rev. 509, 513 (1979) (arguing that plea bargaining need not be unfair to either the defendant nor the public).

69. See, e.g., *id.* at 512-13. Church argues that plea bargaining need not be unfair to either the defendant nor the public provided that four basic requirements are met:

- (1) The defendant must always have the alternative of a jury trial at which both verdict and sentence are determined and can be justified solely on the merits of the case.
- (2) The defendant must be represented throughout negotiations by competent counsel.
- (3) Both defense and prosecution must have equal access to all available information likely to bear on the outcome of the case should it go to trial.
- (4) Both should possess sufficient resources to take the case to trial if an acceptable agreement does not result from the negotiations.

Id.

70. 397 U.S. 742, 745 (1970).

The *Brady* Court said that the plea was legal because it was both voluntary and intelligent.⁷¹ After *Brady* it is difficult to imagine a plea that would not be voluntary. A group of people with diverse opinions about the validity of guilty pleas probably could easily reach a consensus if such a group were asked whether a plea induced by physically violent torture was voluntary. I have little doubt that the diverse group would conclude that such a plea was involuntary. Aside from this easy example, voluntariness is more difficult to evaluate.⁷²

The interpretation of voluntariness is further muddled by the fact that voluntariness takes on different meanings in the criminal justice system, depending on the context. Courts have settled on a standard for voluntariness in the plea context that is different from the standard in the confession context.⁷³ The voluntariness standard for confessions is much more stringent than that for voluntariness of plea bargains. *Bram v. United States* explicitly states that confessions extracted by implied promises are impermissible.⁷⁴ However, an implied promise in the form of a reduced sentence in exchange for the defendant's agreement to waive his right to trial is the acceptable norm in the plea bargaining context.⁷⁵ Courts have justified the difference between the two standards by looking to the fact that the defendant who pleads guilty does so in open court where he can be protected by a judge who can assess the plea's voluntariness, unlike the defendant who confesses. The defendant who confesses may be susceptible to self-incrimination while in police custody and away from family, friends, and legal counsel.⁷⁶ Moreover, courts may be concerned that an illegally obtained confession might illegitimately interfere with the jury's determination of the defendant's guilt. In contrast, the defendant presumably has accepted guilt by the time he makes a plea.

71. *Id.* at 758.

72. One scholar has suggested that modern prosecutorial inducements to the criminal defendant to plead guilty are much like medieval proof systems that relied on torture to coerce confessions. John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3 (1978).

73. See *Bram v. United States*, 168 U.S. 532, 542-43 (1897) (holding that the admissibility of a confession depends upon whether it is free and voluntary; the "confession . . . must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." (emphasis added) (citation omitted)). Voluntariness for pleas is evaluated under the standard set out in *Brady v. United States*, 397 U.S. 742, 755 (1970) (stating that a plea entered by one fully aware of the direct consequences must stand, unless a very narrow set of circumstances is present).

74. *Bram*, 168 U.S. at 542-43.

75. See *Bordenkircher v. Hayes*, 434 U.S. 357, 358 (1978).

76. See, e.g., *Brady*, 397 U.S. at 754 ("*Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.").

The *Brady* Court's requirement that a plea be both voluntary and intelligent implies that the two standards are independent. However, the voluntariness standard for pleas is difficult to understand as a separate notion from intelligence. Courts sometimes use yardsticks to evaluate voluntariness of a plea that seem to be better characterized as evaluations of the intelligence of the plea. For example, counseled pleas are more likely to be found voluntary than uncounseled pleas.⁷⁷ The implicit assumption is that a counseled defendant is more likely to be informed about legal standards, possible sentences, and the likelihood of prevailing at trial than the uncounseled defendant. Moreover, there is an assumption that this information increases the likelihood that the counseled defendant is making a voluntary choice to waive his right to trial. A court's reliance on whether a defendant's plea is counseled as a critical factor to determine whether the plea is voluntary makes sense only if there is a very strong correlation between intelligence and voluntariness. This suggests that the two factors are interrelated and not independent. From this analysis we can infer that if the defendant has more information about his case, it is more likely that his decision about waiving his constitutional rights will be voluntary.

There is an existing structure of procedures designed to protect the defendant's ability to elect intelligently and voluntarily to plead guilty and waive the right to trial. The Supreme Court's decisions in this area require the trial judge to ask the defendant a routine litany of questions to ensure that the defendant's plea is voluntarily and intelligently made.⁷⁸ These decisions are reflected in the Federal Rules of Criminal Procedure.⁷⁹ So long as the trial judge engages in the litany of questions and receives satisfactory answers from the defendant, the plea is deemed voluntary and intelligent; there is no deeper investigation by the court into practices that the government may have engaged in to obtain that plea. If anything, the courts implicitly assent to a great deal of governmental influence.⁸⁰ Section C explains in

77. See *Ray v. Rose*, 491 F.2d 285, 290 (6th Cir.) ("In recent cases in which the Supreme Court has found guilty pleas to be voluntary, it has assiduously pointed to the presence of competent counsel." (citing *Brady v. United States*, 397 U.S. 742, 756 (1970))), *cert. denied*, 417 U.S. 936 (1974); *Dorough v. United States*, 385 F.2d 887, 890 (5th Cir. 1967) (explaining that a more exacting inquiry into the voluntariness of the plea should be made when defendant is uncounseled), *cert. denied*, 394 U.S. 1019 (1969).

78. See *Brady*, 397 U.S. at 743 & n.2; *Boykin v. Alabama*, 395 U.S. 238, 240-41 (1969).

79. See Fed. R. Crim. P. 11(d) ("The court shall not accept a plea of guilty or *nolo contendere* without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.").

80. See *McMann v. Richardson*, 397 U.S. 759, 784 (1970) ("As long as counsel is present when the defendant pleads, the Court is apparently willing to assume that the government may inject virtually any influence into the process of deciding on a plea." (Brennan, J., dissenting)).

greater detail the problems that exist in the current system despite procedures constructed to insure voluntariness of a plea. Section C also explains how the financial reward system set out in the next section could ameliorate some of these problems.

B. *Financial Incentives to Control Prosecutorial Charging Decisions*

Even if the procedures that are in place are enough to ensure that the defendant's rights are protected at a constitutional minimum, problems still exist. Greater recognition of the prosecutor's ability to control the dynamics of plea bargaining would lead to greater recognition of the impact of the prosecutor's control on the defendant's ability to plead guilty voluntarily and intelligently. Viewing plea bargaining through the lens of the incentives facing the relevant actors leads naturally to a focus on prosecutorial practices and the possibility of encouraging prosecutors to change those practices so that defendants may voluntarily and intelligently plead guilty.

The problems of inequity that I have identified could be remedied if prosecutors were motivated to constrain their charging discretion in a manner that led to the elimination of overcharging, or at least its reduction. An ideal charging practice would aid the defendant in intelligently and voluntarily pleading guilty to the charges if he wants. In this ideal scenario the prosecutor's ability to exert leverage over the defendant by overcharging would be limited. Limiting the prosecutor's ability to exert leverage in plea bargaining through overcharging would, in turn, reduce the defendant's susceptibility to the trial penalty and limit the defense counsel's ability to make representations to the defendant about the sweetness of deals that may really be sour. Moreover, such a practice also would take into account the public's interest in effective law enforcement.

An ideal charging practice could be achieved if the prosecutor were motivated to charge the defendant with *only* those offenses the prosecutor believed she could prove at trial and with *all* those offenses the prosecutor believed she could prove at trial. The current structure of the system does not give a prosecutor an incentive to charge in this way. However, financial incentives could be structured to motivate prosecutors to engage in this ideal charging practice.

I propose a model that financially rewards prosecutors for obtaining convictions either by trial or by plea under the condition that the defendant is convicted on the same charge or charges that the prosecutor pursues at the outset of the case. Consider the following thought experiment: A federal prosecutor is presented with evidence that five grams of crack cocaine were found in a paper bag in Jane Doe's apartment. Jane Doe shares her apartment with her teenaged son, John. Officials are aware that Jane Doe's boyfriend, James Roe, sometimes stays with her in the apartment. Both James and John have criminal records, though James' record is longer. There is a single thumbprint

on the paper bag. Records indicate that it belongs to James Roe. The prosecutor must decide whether to charge James Roe with possession or with possession with the intent to distribute. The prosecutor is fairly certain that conviction is attainable on the possession charge, but conviction on the trafficking charge is less certain. The prosecutor is likely to charge James Roe with the trafficking charge in the hope of persuading Roe to plead guilty to the lesser possession charge. The stakes for Mr. Roe are substantial. Provided that his record does not include previous drug or narcotic offense convictions, a conviction of simple possession carries a maximum of one year in prison.⁸¹ However, a conviction on a trafficking charge involving five grams of crack cocaine exposes Mr. Roe to the statutory mandatory minimum sentence of five years.⁸² But the evidence to support the trafficking charge is weak. Under the reward model that I propose, I predict that the prosecutor will be motivated to charge James Roe with the offense for which she has the most evidence—possession—rather than charge the trafficking offense.

In this example, if James Roe pleads guilty to the simple possession charge, the outcome in the world of rewards likely is no different from the outcome in the world in which the prosecutor has no incentive to refrain from overcharging. In both worlds James Roe is likely to plead guilty. If the result in both worlds is the same, one might ask what is the point of giving the prosecutor an incentive to limit her own bargaining power? One difference between the two worlds is that Roe's plea is more meaningfully voluntary and intelligent. The plea is more meaningfully voluntary precisely because the prosecutor is motivated to limit her leverage in the plea bargaining context. When she limits her leverage in the manner prescribed by the rewards system, her charge will tend to convey information to Roe about the strength of her case. As I already have explained, Roe's access to information is critical to the assessment of the voluntariness of his plea.

There are other important differences between the world of rewards and the current state of affairs. For instance, an important feature of the reward system I propose is that it should motivate the prosecutor to assess her evidence at an earlier stage than she does in a world without incentives. Additionally, in a world in which prosecutors are motivated by financial rewards, the prosecutor should subject evidence to a higher standard than the probable cause standard, the minimum floor for a legal, ethical charge, because a higher standard will raise the probability that she will obtain a conviction and the reward that follows. Because the prosecutor should make earlier and more stringent assessments of evidence in the world of incentives, it is likely that some cases currently charged will be set aside in a world with

81. 21 U.S.C. § 844(a) (1988 & Supp. V 1993).

82. *Id.* § 841(b)(1)(B).

rewards. Moreover, the James Roe example described above is a simple case. Only two charges were considered, and the evidence was relatively uncomplicated. Cases in the real world are seldom so simple. It is likely that the outcomes in the more typical cases that federal prosecutors handle in the world of rewards will be different from outcomes that currently exist simply because most cases involve more than one charge. Cases involving multiple charges lead inevitably to the possibility of variegated outcomes. We should expect that charges will be more streamlined and precise because the financial reward system described here steers the prosecutor away from front-loading charges and waiting to separate the wheat from the chaff.

In addition to ensuring that the prosecutor proceeds only with the strongest cases, I predict that the reward system will have other benefits. The following section points to specific examples of asymmetry inherent to the current structure of plea bargaining that hamper the criminal defendant's ability to relinquish his constitutional rights voluntarily and intelligently. Section C also explains how motivating prosecutors to better conform their charges to the evidence they have at the time of charging would enhance the criminal defendant's ability to make more voluntary and intelligent decisions about pleading guilty. In the rewards world there will be less opportunity to make adjustments by reducing charges later in the bargaining process (because of the risk of losing the reward), so the prosecutor's tendency to overcharge will be limited. If the prosecutor's ability to overcharge is limited, the prosecutor's leverage against the defendant in plea bargaining will be diminished.

C. *Benefits of the Financial Incentives Model*

One very negative side effect of the prosecutor's one-sided control of plea bargaining situations is the tendency of some prosecutors to exert the most pressure on defendants in weak cases. The prosecutor may have evidence that supports her belief that the defendant committed a certain offense, but, because of procedural hurdles⁸³ or evidentiary problems,⁸⁴ the prosecutor's trial case may be weak. Rather than dismiss the case, some prosecutors try to convince the defendant

83. The statutes of limitations for certain offenses often present prosecutors with a procedural hurdle. The Department of Justice's Antitrust Division sometimes does not learn of Sherman Act conspiracies until well after those conspiracies have ended. During my tenure at the Justice Department, I was involved in a case in which a person admitted his involvement in a Sherman Act conspiracy. The documentary evidence corroborated his story. Unfortunately, he retired from the industry and withdrew from the conspiracy well beyond the five-year statute of limitations. It was therefore impossible to prosecute him, no matter the strength of the evidence against him.

84. The prosecutor's case may be weak because evidence critical to a successful conviction at trial is inadmissible. Hearsay problems and illegal search problems are examples.

to plead guilty to some lesser charge.⁸⁵ Of course, it is precisely in these marginal cases that the defendant has the greatest likelihood of acquittal at trial. These cases are also the ones in which the defendant is most likely to be induced to plea because of the influence the certainty effect, irrational discounting, and the value curve have on his decision-making process.⁸⁶ In other words, these cases are the cases in which we should be most suspicious about the voluntariness of the defendant's plea.

The reward system is designed to encourage the prosecutor to conform her charges to the evidence the prosecutor believes she can prove at trial. To charge in this manner, the prosecutor must possess enough evidence at the charging stage to support offenses on which the accused can be convicted, not merely enough evidence to support a charge by probable cause. In this way the system is designed to motivate the prosecutor to subject her charging decisions to a higher standard than the ethical rules require. Naturally, the prosecutor's existing incentive to select only the strongest cases for prosecution should be enhanced. The prosecutor should lean towards charging what her evidence reveals rather than charging what the evidence might possibly reveal.⁸⁷

One great benefit of a system that effectively motivates prosecutors to refrain from overcharging defendants likely to be acquitted at trial is that these defendants should be better distinguished from those who are not likely to be acquitted. This can happen in two ways. First, the prosecutor motivated by financial rewards may not bring the marginal case at all. She will choose instead to pursue stronger cases. Second, even if the prosecutor decides to pursue the marginal case, her charge should be more conservative because she will otherwise risk losing the financial incentive. She will have an incentive to constrain her discretion to exert leverage against the defendant in the marginal case. As a result, the defendant will be more likely to test the prosecutor's case at trial, because the defendant should be more confident that he will not face an added penalty for going to trial.⁸⁸

One predicted effect of this regime is that there will be an increase in trials in marginal cases. This is a positive outcome. The marginal cases are the cases in which we obtain the greatest benefit from the

85. See Alschuler, *supra* note 42, at 60 (noting that prosecutors proceed on a "half a loaf is better than none" philosophy).

86. See *supra* notes 54-56 and accompanying text.

87. There may be cases in which the evidence is not extremely strong but policy reasons dictate that the case should be prosecuted. A date rape case or a domestic violence case may be examples. Organizational leaders can signal the policy importance of such cases to line prosecutors by linking obtained convictions in such cases to higher rewards. In this scenario the financial incentives motivate prosecutors to gather more evidence to make the potentially "weak" case stronger.

88. The added penalty is, of course, the possibility of an enhanced trial penalty flowing from overcharging.

accuracy-enhancing procedures of the adversarial trial.⁸⁹ The trial process also guarantees the defendant a greater number of constitutional safeguards, which may be especially important when guilt is in doubt.⁹⁰

Charges in a world of rewards also address the potential deficiencies in the voluntariness of a plea by increasing the defendant's access to information about his case. The criminal defendant does not have the same access to information that the prosecutor does.⁹¹ More importantly, the defendant does not have access to the prosecutor's information. This is due in part to rules of discovery that do not allow the defendant to have free access to the prosecutor's information.⁹² Without access to information, it is difficult for the defendant to distinguish between the charges that the prosecutor can reasonably prove at trial and those the prosecutor cannot.

The inability to investigate and build a defense is a particularly large impediment in the cases involving poor criminal defendants. Because poor defendants comprise such a large percentage of criminal defendants,⁹³ the impediment of a poor defendant is a problem of the criminal defendant generally. Poor defendants in many cases do not have the resources to hire attorneys of their choice⁹⁴ or investigators.

89. Professor Schulhofer has argued that trial is a better mechanism than plea bargaining for resolving questions of doubtful guilt. Schulhofer, *supra* note 61, at 74-77.

90. See Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 *Hastings L.J.* 957, 997 n.114 (1989) (suggesting that trial is a method that is morally superior to plea bargaining in cases of questionable guilt since the defendant is protected by a greater number of constitutional safeguards, as compared to the lesser safeguards offered to the defendant who pleads guilty).

91. The prosecutor often has a distinct advantage over the defendant in her ability to gather evidence. The prosecution may use the grand jury and the subpoena power as investigatory tools. They may also rely on the police to identify witnesses and obtain statements. See generally Wayne R. LaFare & Jerold H. Israel, *Criminal Procedure* § 19.4(a) (1984) (discussing the difficulty courts have in determining the extent to which to allow prosecutorial discovery). Moreover, the prosecution usually has the cooperation of citizens in obtaining evidence. See Barry Nakell, *Criminal Discovery For the Defense and The Prosecution—The Developing Constitutional Considerations*, 50 *N.C. L. Rev.* 437, 440 (1972).

92. In contrast to rules of civil discovery, which provide for extensive mutual exchange of information between litigants, defendants in criminal cases often have little access to the prosecutor's evidence prior to trial, unless the office has an open file policy or the individual prosecutor decides to be generous. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for "Brady" Violations: A Paper Tiger*, 65 *N.C. L. Rev.* 693, 695 n.4 (1987). In part II of this Article, I discuss how financial rewards might be used to motivate prosecutors to better adhere to ethical rules pertaining to their obligation to disclose exculpatory evidence to the defendant.

93. See Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 *U. Chi. L. Rev.* 1, 29 n.76 (1990).

94. See *United States v. Ely*, 719 F.2d 902, 904 (7th Cir. 1983) (holding that the Sixth Amendment only requires competent counsel, not counsel of the defendant's choice), *cert. denied*, 465 U.S. 1037 (1984); *United States v. Davis*, 604 F.2d 474, 478-79 (7th Cir. 1979) (holding that restriction of free choice was a necessary element of

Instead, they are assigned public defenders, who may be underpaid and overworked.⁹⁵ Additionally, poor defendants face a higher likelihood of incarceration before trial compared to other defendants because poor defendants are less likely to be able to post bail. The inability to post bail affects a defendant's ability to select counsel of his choice because pretrial incarceration inevitably prohibits the defendant from working. Consequently, without income from a job, the defendant may not be able to retain private counsel. And when a criminal defendant is unable to post bail, he will be less able to assist his counsel, private or public, in preparing and investigating the defense's case.⁹⁶ In contrast, defendants who post bail obviously have greater opportunity to assist their counsel by contacting and interviewing witnesses and by performing other aspects of the investigative legwork of building a case.

The charge in the reward system would convey better information to the defendant about the prosecutor's case than the information conveyed in a world where prosecutors regularly overcharge. In the reward system world the charge itself would reflect the evidence that the prosecutor possesses, rather than notifying the defendant of mere possibilities the defendant is unable to test. Because the charge will reflect the offenses the prosecutor believes she can prove at trial, the defendant will be able to make a more meaningful decision regarding relinquishment of his right to trial than he is able to presently.

Poorer defendants should benefit from charging structured by financial rewards because the prosecutor's one-sided control of plea bargaining impacts poorer defendants to a greater extent than it impacts wealthier defendants.⁹⁷ To put it simply, overcharging is time-consuming and expensive for the defendant. Defense counsel must respond to all of the prosecutor's charges in motions.⁹⁸ It also takes time to bargain the charges down to a charge or charges to which a defendant will plead guilty—often the only ones that the prosecutor

the public defender system). *But see* Schulhofer & Friedman, *supra* note 3, at 105-12 (criticizing these cases).

95. Stephen J. Schulhofer, *Access to Justice for the American Underclass*, *The World & I* Mag., June 1991, at 463, 470-73 (explaining that most defender offices are "swamped by a staggering caseload" and are underfunded).

96. *See* Richard A. Cohen, *Wealth, Bail, and the Equal Protection of the Laws*, 23 *Vill. L. Rev.* 977, 1007 (1978). Cohen notes that the detained defendant may be the only one able to locate reluctant witnesses, and even if the defendant's attorney is able to locate these witnesses, they may be unwilling to talk to the attorney. Moreover, a detained defendant's access to phones and other methods of communication with the outside world is often limited. With limited access to information and assistance on the outside, the detained defendant's defense is necessarily impeded. *See also* Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 *Harv. C.R.-C.L. L. Rev.* 289, 348-49 (1971) (giving statistical evidence that incarcerated defendants are more likely to be found guilty than defendants who are not incarcerated).

97. *See* Alschuler, *supra* note 42, at 98 (noting the economic effects of overcharging).

98. *Id.*

believes to be justified in the first instance. If the defendant has retained an attorney with his own funds, the overcharging practice may lead to increased expenses for the defendant. If the defendant is indigent, the overburdened, underpaid public defender may not have much time to develop a counterstrategy to the charging practice. As a result, counsel may convince the defendant to agree to a plea on the prosecutor's terms. The problems of the indigent defendant are of overwhelming significance to this discussion, for they comprise seventy-five percent of those charged in federal cases.⁹⁹

D. *Answering Possible Objections to Influencing Prosecutors with Monetary Rewards*

There are many questions that must be answered in order to assess the viability of the plan that I propose, many of them empirical. The questions fall into two general categories. The first group of questions are relevant to the effectiveness of the proposal itself: Are prosecutors really going to be motivated by financial incentives? What kind of financial incentives will be necessary to create the proper incentives? How large should they be? The second group of questions comes into play once we assume that the proposal will work: How, if at all, will the system affect trial rates? Won't financial rewards motivate prosecutors toward prosecuting those cases in which prosecution is a "sure thing"? What about race and gender effects? What effect will conviction bonuses have on prosecutorial misconduct? Won't such bonuses induce prosecutors to engage in more misconduct simply to acquire the financial reward?

In this section I will address some of these concerns. Some of the questions may be impossible to answer at this point without a test program to provide empirical data. Some of these questions, I think, are unnecessary to answer at this time, as the primary purpose of this work is to submit into the arena of discussion the topic of financial incentives as a mechanism to influence the behavior of actors in the criminal justice system.

* * *

Significant evidence indicates that the behavior of prosecutors could be affected by financial incentives. Federal and state cases and statutes from the turn of the century reveal that it was common to pay prosecutors conviction fees for their services. The Supreme Court has commented on the effectiveness of financial incentives in criminal cases. For example, in *United States v. Murphy*,¹⁰⁰ the defendants contested the competence of an informer's testimony because the informer had received a portion of the monetary criminal penalty im-

99. Stith, *supra* note 93, at 29-30 n.76.

100. 41 U.S. (16 Pet.) 203 (1842).

posed on the defendants from the U.S. Government.¹⁰¹ The Supreme Court praised the value of a monetary incentive as a motivator, stating:

The case of reward is clear on the grounds of public policy, with a view to the public interest; and because of the principle upon which such rewards are given. The public has an interest in the suppression of crime and the conviction of guilty criminals. It is with a view to stir up greater vigilance in apprehending, that rewards are given

...¹⁰²

Similarly, *United States v. Matthews*, a case decided in 1899, concerned the payment of rewards to deputy marshals for assisting in the arrest and conviction of criminal offenders.¹⁰³ The Court again noted the value of rewards in the criminal justice system, while explaining the crucial difference between awards authorized by the legislature and "sanctioned by the executive officer to whom the legislature has delegated the discretion to offer the reward" and awards provided by private individuals, which could be bribes.¹⁰⁴

Supreme Court cases are not the only evidence of historical use of financial incentives in criminal cases. In 1853, federal district attorneys were paid by the case,¹⁰⁵ much in the same way that modern appointed defense attorneys are paid. In addition to other fees, federal prosecutors received as much as thirty dollars as a reward for obtaining a conviction.¹⁰⁶ The district court bestowed the reward upon the district attorney appearing before it,¹⁰⁷ and a sliding scale was applied to determine how much the prosecutor should receive.¹⁰⁸ State prosecutors also enjoyed the benefits of financial incentives. State prosecutors commonly collected conviction fees payable accord-

101. *Id.* at 208-09.

102. *Id.* at 211 (quotation omitted).

103. 173 U.S. 381, 382-83 (1899).

104. *Id.* at 385.

105. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161, 161 (providing a fee schedule for attorneys retained to prosecute on behalf of the government, but specifically allowing the prosecutor to have clients other than the government, the compensation from which was not to be affected by the fee schedule).

106. *Id.* at 162 ("When an indictment for crime shall be tried before a jury, and a conviction is had, in addition to the attorney's fees allowed by this act, the district attorney may be allowed a counsel fee in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.").

107. See *United States v. Waters*, 133 U.S. 208, 215-16 (1890) (holding that the district court's reward of a counsel fee could be not be revoked or reduced by the attorney general); *accord Hillborn v. United States*, 27 Ct. Cl. 547, 548 (1892) (following *Waters* and holding that the attorney general cannot reduce the fee paid to the prosecutor).

108. One court explained the value of the sliding scale by noting that counsel fees corrected inequities in compensation between attorneys who appeared for the United States and those appearing on behalf of defendants in criminal cases. The court stated that counsel fees enabled the United States to "command the services of the most industrious, talented, and learned members of the bar." *Weed v. United States*, 65 F. 399, 401 (D. Mont. 1894).

ing to statutory schedules.¹⁰⁹ It is important to note that the fee schedules discussed in these cases were enacted at a time when state and federal officials did not work for government bodies full-time. Piecemeal compensation was the norm.

Times changed. In 1905, Congress abolished the fee system providing district attorneys with a conviction fee up to thirty dollars.¹¹⁰ The new statute provided that district attorneys be paid salaries.¹¹¹ State governments, too, recognized the possible dangers inherent in the fee-based compensation system common in the early twentieth century. The Supreme Court of Illinois in *Hoynes v. Danisch*,¹¹² noted that "[t]he fee system, where the salary of the public official depends entirely upon the amount of fees collected by him, is liable to result in many evils and is contrary to the spirit of this section of the Constitution."¹¹³ Many states, like the federal government, have now abolished or repealed fee schedules for prosecutors.¹¹⁴

The historical evidence provides at least anecdotal evidence that monetary bonuses were effective motivators for prosecutors. As constructed early in this century, they were, perhaps, too effective.¹¹⁵ The lesson to be learned from the old cases is not that rewards are bad, however. The lesson we should take from history is that financial rewards can induce prosecutors to modify their behavior to conform to the incentives created by the rewards. The point is that financial in-

109. See, e.g., *Parker v. Laws*, 460 S.W.2d 337, 338-41 (Ark. 1970) (referring to statutory conviction fees payable to prosecuting attorney in misdemeanor cases only); *Huddleston v. Craighead County*, 194 S.W. 17, 18 (Ark. 1917) (involving prosecutor who brought suit to recover statutory conviction fee); *Edwards v. County of Fresno*, 16 P. 239, 240 (Cal. 1887) (noting that prosecutor could charge and receive from the defendant, or from the county if the defendant is unable to pay, \$15 for each conviction of a misdemeanor); *Board of Comm'rs v. Walker*, 181 P. 195, 195-96 (Colo. 1918) (discussing district attorney's fees in the event of a felony trial or prosecution); *State ex rel. Loftin v. McMillan*, 45 So. 882, 883 (Fla. 1908) (noting that the Florida prosecutor was allowed to collect a conviction fee of five dollars to be paid either by the defendant or the county in all misdemeanor cases); *State ex rel. Broussard v. Henderson*, 45 So. 430, 431 (La. 1907) (quoting a state statute entitling the attorney general and the district attorney to receive \$15 on each criminal prosecution in which the accused is convicted); *State v. Hill*, 43 Tenn. 98, 99 (1866) (holding that the district attorney general was permitted a fee of \$20 when there is a conviction of a defendant where the punishment is death, else the fee is \$10 for each felony conviction).

110. Appropriations Act of March 3, 1905, ch. 1483, 33 Stat. 1156, 1207.

111. *Id.*

112. 106 N.E. 341 (Ill. 1914).

113. *Id.* at 343.

114. See Dirk G. Christensen, Comment, *Incentives vs. Nonpartisanship: The Prosecutorial Dilemma in an Adversary System*, 1981 Duke L.J. 311, 326 & n.115 (noting that in 1981, 34 states had no prosecuting or conviction fees and that some of the laws providing for such fees had been only recently repealed). Many of the fees were abolished once federal, state, and local governments began to retain prosecutors on a salary basis. However, some jurisdictions also concluded that paying prosecutors for obtaining convictions interfered with these officials' impartiality. *Id.* at 328.

115. See *Hoynes*, 106 N.E. at 343-44; see also Wyo. Const. art. XIV, § 1 (prohibiting prosecutors from collecting extra fees in addition to salaries).

centives, *if properly constructed*, can motivate prosecutors to engage in proper behavior.

Thus, the important question for purposes of my analysis is whether prosecutorial behavior will be affected by financial incentives in the nuanced manner that I predict it will. History indicates that financial incentives motivate prosecutors to obtain more convictions when obtaining more convictions is the purpose of the reward. Church and Heumann's contemporary work,¹¹⁶ however, suggests that financial incentives can motivate prosecutors to achieve other tasks related to the process of criminal justice and *indirectly* tied to the prosecutor's bottom line—winning the case. It is this evidence that I wish to draw on as the foundation for the system of financial rewards that I describe in this Article.

One of the important findings of the Church and Heumann study is that a primary motivator of the prosecutors who participated in the Speedy Disposition Program was their natural competitiveness.¹¹⁷ The Speedy Disposition Program provided no individual attorney with a financial incentive, yet there still were effects in some offices. It is likely that even though the prosecutors received no individual reward, the prosecutors perceived the program as providing them with an opportunity to "win." My hypothesis is that the prosecutorial culture centered on winning can be redirected towards self-restraint and ethical behavior if prosecutors are motivated to "win" in their pursuit of the reward.

Because my argument is that prosecutorial culture can be changed in certain ways by coupling rewards and a central characteristic of prosecutorial culture (the desire to "win"), it is not obvious that the reward should be monetary. In fact, the crux of my argument is that the reward scheme will be effective because of what the money represents, not because of the amounts of money involved. Nevertheless, there are at least two reasons why the reward scheme should be implemented with financial rewards rather than gold stars. First, although the great majority of government workers do not take the job for money, most prefer monetary incentives over almost any type of motivator.¹¹⁸ Second, using money as a reward allows clear distinctions to be made relative to the effectiveness of the task completed. Perceptions about the difference between alternative rewards, such as a gold star or being the first to get new furniture or receiving extra vacation days, may not be so clear. These ambiguities would impair the effectiveness of the reward scheme.

That prosecutors naturally are motivated by competitiveness embedded in their culture means that the rewards need not be particu-

116. See *supra* notes 27-33 and accompanying text.

117. See *supra* note 32 and accompanying text.

118. See Greiner et al., *supra* note 2, at 18.

larly large. They must be large enough so as not to be insignificant, but they should not be so large that the size of the financial reward overcomes what the rewards are supposed to represent. Initially, perhaps the total annual reward a prosecutor could receive should be a percentage of her salary, say five to ten percent. Department of Justice attorneys' salaries range from approximately \$40,000 annually at the entry level to approximately \$90,000 at the more senior levels. The rewards given for each conviction obtained under proper conditions would then be some fraction of the total amount.¹¹⁹

Assuming the proposal is effective and motivates a prosecutor to engage in what I have called an accurate charging practice, questions from the second category of questions outlined above must be addressed.

1. Trial Rates

One question that must be addressed is how a streamlined charging practice induced by financial rewards would affect trial rates. One might suspect that trial rates would drastically increase under the system that I propose because the system encourages the prosecutor to limit her bargaining discretion. If bargaining discretion is constrained, presumably there will be less room for concessions. Consequently, there will be fewer bargains and more trials. If we accept the fact that plea bargains are necessary for the criminal justice system to function effectively, then the prospect of more trials under the system that I propose might be considered problematic.

It is, of course, exceedingly important to recognize the type of trial that would be more numerous in the world I have described. I have already explained that prosecutors should be motivated by the reward system to limit their discretion in the cases in which they usually exert the most pressure—the marginal cases. These are the cases in which trials will become more numerous. Furthermore, because these are also the cases in which legal guilt may be most doubtful, a trial would be most useful to determine whether the defendant should be punished. If the increase in trials is comprised primarily of these types of cases, it should be of little concern.

We might also expect trial rates to increase in nonmarginal cases under a system of financial incentives that promotes “accurate” charging. If prosecutors charge defendants with the same offense to which the prosecutors ultimately expect the defendants to plead guilty, why should a defendant plead guilty if he will not face the added penalty associated with overcharging should the defendant choose to go to trial? Reconsider the James Roe example. If James Roe is a repeat

119. These percentages translate into total annual awards of \$2000 to \$9000. In the Northern District of Illinois, the typical Assistant U.S. Attorney indicts 6 to 10 cases per year, so the per case reward there could range, on average, from \$200 to \$1500.

player, aware of the informational advantages of the charge in the world of rewards, why would he not choose to go to trial on the possession charge? James Roe will elect to go to trial only if he is completely indifferent between pleading guilty to a charged offense and requiring the prosecutor to prove that offense beyond a reasonable doubt at trial. However, even under the system I propose, a defendant should not be completely indifferent between pleading guilty to an offense and electing to go to trial on the same offense. If the rewards system completely deters a prosecutor from overcharging so that she pursues prosecutions only on those charges that she believes she can win, the defendant still will face the trial penalty for the particular offense if he elects to go to trial. If the reward scheme motivates the prosecutor to charge the defendant "accurately," the defendant will avoid the trial penalty based on *overcharged* charges, but he very probably still will face increased penalties after being convicted of an offense after trial.¹²⁰

The federal system has a built-in mechanism that explicitly accommodates sentencing concessions when the defendant elects to plead guilty. The Federal Sentencing Guidelines specify levels that correspond to certain offenses.¹²¹ These levels, in turn, correspond to a range of sentences to which a defendant can be subjected once the defendant's criminal history category is calculated.¹²² A defendant who pleads guilty and accepts responsibility is eligible for a two- or three-level discount from the offense level specified in the Federal Sentencing Guidelines, depending on the initial level of the offense.¹²³ The discount translates roughly into a fifteen percent reduction in the sentence that the defendant will serve.¹²⁴

2. Undercharging

Financial rewards for "accurate" charging might lead to undercharging. For obvious reasons undercharging conflicts with the typically cited goals of punishment (deterrence, incapacitation, or just deserts).¹²⁵ Under the rewards system a prosecutor will be rewarded

120. See Gifford, *supra* note 42, at 46-47.

121. See U.S. Sentencing Comm'n, Guidelines Manual § 1B1.1, at 11 (1993) [hereinafter USSG].

122. *Id.* The defendant's sentence is determined by using a grid that contains different ranges of sentences. The possible sentencing range for an offense is determined by locating the offense level of the offense for which the defendant is convicted and the defendant's criminal history category, and then looking to see at what point these two indicators intersect on the grid. See *id.* (displaying the Sentencing Table on the back cover).

123. See *id.* § 3E1.1(a), at 248.

124. See *id.* (displaying the Sentencing Table on the back cover).

125. Undercharging conflicts with both specific and general deterrence. If the charge is not severe enough, we cannot be confident that the punishment the defendant receives will be adequate to deter the defendant's similar conduct in the future. If the goal is general deterrence, we could expect that too lenient charges will not ade-

only if the offense of conviction is very close to the offense charged, regardless of whether that conviction is obtained by trial or plea. It is possible that a prosecutor, in the interest of collecting many rewards, will charge only the cases she believes are easy to prove and then *undercharge* those cases. The defendant in such a case will plead guilty to the exact charge because the charge will not reflect the seriousness of the crime that the defendant committed. The defendant will recognize that he is getting a good deal. The prosecutor will take home her bonus.

There are at least three mechanisms that could counteract undercharging: internal controls, prosecutorial culture, and reward structure. Some prosecuting offices already have internal checks to prevent the prosecutor from undercharging. One example is the federal internal guideline requiring Assistant U.S. Attorneys to charge defendants with all readily provable offenses.¹²⁶ There is no reason to think that such internal controls would be abandoned under a reward system designed to augment them. An additional, and related, internal limitation on undercharging could flow from a combination of supervisory review of trial attorneys and the structure of the financial rewards system as I have described it. The reward that I have described would be available only to the trial attorneys in particular cases on a case-by-case basis and not to supervisors who do not actually participate in a case. The nonparticipating supervisors will have an interest in ensuring that the trial attorneys are effective law enforcement officials, primarily because their future as supervisors is dependent upon the success of the attorneys they supervise. This interest should not be affected whether the supervisor is evaluated by a bureaucratic hierarchy, as in the federal system, or at the polls, as is usually the case of chief prosecutors in state systems. One way that effectiveness can be measured is by a combination of the prosecutor's conviction rate and the severity of sentences on those convictions. Gross undercharging, then, would undermine the supervisor's perception of the line attorney's effectiveness because even if that prosecutor had a very high conviction rate, her overall sentence severity evaluation would be quite low. Because the supervisors control promotion of trial attorneys, and since promotion is dependent upon effective-

quately deter others from engaging in criminal conduct. There is a similar story with respect to incapacitation. If the defendant is undercharged, he will not be punished as severely and will return to the community sooner. The just deserts theory of punishment presents probably the most apparent conflict with undercharging. If the prosecutor charges the defendant with a lesser crime than the defendant's conduct obviously supports, the defendant clearly will not receive the punishment the community, through the legislature, has decided that he deserves.

126. See Nagel & Schulhofer, *supra* note 57, at 506-12 (discussing Justice Department initiatives to prevent charge bargaining by instituting a Department policy requiring that Assistant U.S. Attorneys charge all "readily provable" charges).

ness, undercharging can be controlled in part through supervisor review.

In addition to internal controls, there are characteristics of the prosecutorial culture that should help to counteract any potential incentive to undercharge created by the financial incentive system I propose here. First, the prosecutorial ethos that leads to "highest and most" charging in the first place is generated, at least in part, from self-selection. This ethos suggests that a reward for constraining charging discretion would operate as a kind of one-way ratchet. Second, many prosecutors desire to convert their success as prosecutors into lucrative jobs as private attorneys. Prosecutors make themselves attractive to solicitous firms in part by relying on their extensive trial practice, which distinguishes them from the bulk of private attorneys. Again, gross undercharging would undercut a prosecutor's ability to trade her experience as a trial attorney for a lucrative job in the private sector if undercharging leads to a very high percentage of pleas and a low percentage of trials.

Undercharging could also be addressed in the details of the reward scheme. As an initial and relatively simple matter, the financial incentive system should place a premium on trials over pleas.¹²⁷ That is, the system should be constructed so that the financial reward for obtaining a conviction for trial is greater than the reward received for obtaining a conviction by plea.¹²⁸ A more complex reward system could be further differentiated based on the seriousness of the crime and the difficulty of the case. One method for differentiation is a scoring system for determining how much reward an individual prosecutor could receive for a prosecution. For example, the scoring system could be comprised of a seriousness scale and a difficulty scale, and the reward could be determined by a product of the two. The seriousness scale could simply reflect the seriousness of the crime. To evaluate seriousness, an office could look to the Federal Sentencing

127. One obvious reason for placing a premium on trials over pleas is that trials usually take longer than pleas do. A comparison of the median amounts of time from filing to disposition in all of the federal circuits for the year ending June 30, 1991, reveals that the ratio of jury trial disposition time to guilty plea disposition time ranges from 1.3 to 1.9, with 1.6 as the median for the 12 relevant courts of appeals. Sourcebook of Criminal Justice Statistics, *supra* note 43, tbl. 5.29.

128. The line between a trial and a plea may not always be crystal clear. A confessional stipulation may be for all intents and purposes a de facto guilty plea. See Maurita E. Horn, *Confessional Stipulations: Protecting Waiver of Constitutional Rights*, 61 U. Chi. L. Rev. 225, 226 (1994). For purposes of my analysis, a confessional stipulation probably should be treated as a plea. A so-called "slow plea" (a bench trial conducted after a defendant has waived his right to a jury trial) might either be the functional equivalent of a guilty plea, or it might be better characterized as a deliberate, though swift, trial of the evidence. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. Chi. L. Rev. 931, 1033-36 (1983).

Guidelines, where offense level represents the seriousness of the crime.¹²⁹

A scale for difficulty might be more burdensome to develop. Many factors determine what makes a case easy or difficult to try. Some factors are relevant to the evidence of the case, some are relevant to procedural hurdles, and some are relevant to public perception. Prosecuting offices regularly evaluate cases during the intake process for the purpose of routing them to various attorneys. More senior attorneys usually receive more difficult cases, while rookies get the easier ones. This routing practice indicates that internal office policies already contain mechanisms for differentiating between difficult cases and easy cases. It would be a simple matter to assign a number system to this evaluation and use such numbers in the scoring system.

Utilizing a scoring system that accommodates seriousness of offenses and case difficulty would allow supervisors to better align their interests with those of the line prosecutors who try cases. If offense level is taken seriously as an indication of the seriousness of the case, cases involving high-publicity offenders on relatively nonserious charges would receive a lower score and, correspondingly, a lower bonus than a case involving an undistinguished defendant in a frequently-occurring drug sale case. A scale that reflected offense seriousness would place a premium on prosecution and deterrence of criminal offenses rather than publicity.¹³⁰

3. Other Forms of Bargaining Adaptation

Even if undercharging were eradicated or reduced by the reward scheme, other forms of prosecutorial inducements to obtain pleas could arise. In a system without the constraints of determinate sentencing, sentence bargaining could replace charge bargaining. In a determinate sentencing scheme, such as the guideline-based federal system, there are few opportunities to manipulate sentences without manipulating charges. The majority of sentencing schemes in the United States are not guideline-based, though more states are adopting determinate sentencing schemes.¹³¹

129. For example, the offense of Obstruction of Justice, prohibited by 18 U.S.C. § 401, has a Base Offense Level of 12, USSG, *supra* note 121, § 2J1.2, at 148, while Criminal Sexual Abuse, prohibited by 18 U.S.C. § 2241, has a Base Offense Level of 27. USSG, *supra* note 121, § 2A3.1, at 42. If the Sentencing Guidelines were adopted as a guide to determine the seriousness of the case for purposes of a financial incentive system, there would be a higher score for Criminal Sexual Abuse than for Obstruction of Justice.

130. For an explanation of the ways in which the interests and incentives of a chief prosecutor in a typical public prosecutor's office may diverge from the interests and incentives of the line assistants, see Schulhofer, *supra* note 61, at 50-51.

131. Professor Richard Frase reported that, as of the fall of 1993, 15 states and the federal government had either adopted or were in the process of adopting sentencing guidelines. Richard S. Frase, *The Uncertain Future of Sentencing Guidelines*, 12 Law & Ineq. J. 1, 1 (1993).

A restriction on charge bargaining still would be desirable even if some sentence bargaining remains. Manipulating charges allows the prosecutor two methods of sentence manipulation. She can control the maximum sentence exposure prescribed by the particular offense. She also can control the charges, which can be translated into very heavy punishment if the sentences for the various charges are imposed consecutively rather than concurrently. Limiting charge bargaining necessarily limits the prosecutor's power because the only tool left to manipulate is a tool over which she must share her power with judges.

Even though the financial incentive model I have described should interact well with a system of determinate sentencing to limit charge bargaining, prosecutors in these systems might attempt to move the bargaining process to earlier stages in the process. For example, prosecutors might be motivated to cut deals prior to the indictment stage. One could make the argument that, at least in today's world, manipulative bargaining practices are out in the open, which is better than a world in which such practices are pushed underground.

If the present federal practice can be used as an example, it may be unlikely that preindictment bargaining will occur. Little preindictment bargaining now occurs because of institutional pressure from superiors. There is a logical basis for this pressure. As Professor Schulhofer has pointed out, the prosecutor must be sure that the defendant will abide by the bargain once the case is filed if the bargain is struck prior to indictment.¹³² Once the case is filed, the prosecutor cannot easily remedy the situation by filing more serious and numerous charges previously withheld if the defendant reneges on a preindictment bargain. That a federal indictment may not be amended is a well-settled rule.¹³³ A federal court may permit a federal information to be amended at any time before a verdict or finding, provided that no additional or different offense is charged and the rights of the defendant are not substantially prejudiced.¹³⁴

4. The Problem of Race and Gender in Charging Decisions

The proposed system's potential to exacerbate race and gender effects cannot be overlooked in assessing the potential objections to using financial incentives to reward prosecutors for making accurate charging decisions. In addition to the strength of the admissible evidence against the defendant, prosecutors might illegitimately consider factors such as the race of the defendant, the victim, and the potential jurors to determine whether the case is an easy or difficult one to win. Evidence collected in scholarly articles indicates that the race of the

132. Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. Pa. L. Rev. 733, 788 (1980).

133. Charles A. Wright, *Federal Practice and Procedure: Criminal 2d* § 127 (2d ed. 1982 & Supp. 1995).

134. Fed. R. Crim. P. 7(e).

defendant and the victim sometimes affects the prosecutor's decision to file charges at all, her selection of the severity of charges to file, and which charges to file.¹³⁵ Empirical studies have shown that prosecutors do not always treat cases with black victims and white victims in the same manner.¹³⁶ Similarly, a prosecutor may tend not to prosecute certain cases because juries often are biased against convicting defendants of certain offenses. Domestic violence and date rape prosecutions may be examples.¹³⁷ By offering rewards for convictions, prosecutors, already reluctant to prosecute certain cases, may become even more reluctant.

Injecting financial incentives into prosecutorial charging decisions might in some way exacerbate race and gender bias that currently exists. For example, prosecutors may place even more emphasis on race and gender factors in considering which cases to bring or what charges to assert. Though a financial incentive system arguably might in some way make these problems worse, it is hard to imagine that financial incentives would make any race and gender bias problems currently in the system much worse than they are now.

It is also possible that in a world with rewards, prosecutors will pay more attention to cases they previously scorned, such as domestic violence cases or date rape cases, if the rewards are structured with an emphasis on seriousness of offense while deemphasizing publicity.¹³⁸ Moreover, the benefits that the system creates in alleviating the unequal bargaining positions of the defendant and the prosecutor cannot be overlooked. Put another way, a more level playing field in the plea context would benefit all defendants. Although it seems that a system of financial incentives may have the effect of both aggravating and alleviating race effects, there is a sense in which the benefits of rewards might outweigh the drawbacks.¹³⁹

135. Randolph N. Stone, *The Criminal Justice System: Unfair and Ineffective*, 2 Harv. J. Afr. Am. Pub. Pol'y 53, 63-64 (1993) (citing several sources).

136. *Id.* at 64.

137. See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. Crim. L. & Criminology 46, 71 (1992) (noting that a very small percentage of people arrested for domestic violence in a Milwaukee domestic violence experiment were eventually prosecuted); see also Susan Estrich, *Real Rape 8-26* (1987) (explaining that prosecutors may decline to prosecute rape cases if the circumstances of the case do not fit the "stranger" rape scenario).

138. See *supra* note 87.

139. The primary remedy to the problems of race and gender effects lies in consciousness raising and education of law enforcement officials. The ABA Task Force on Minorities and the Justice System suggests the following: (1) increase the number of minority judges, prosecutors, and defenders; (2) promote cross-cultural awareness by funding pilot programs designed to reduce the high incarceration rate of African-American males; (3) monitor prosecutorial charging and plea bargaining discretion; (4) provide adequate funding and resources for indigent defense services; (5) reexamine bail, sentencing, and jury selection policies; and (6) review criminal legislation for disparate impact on minorities. See ABA Task Force on Minorities and the Justice System, *Achieving Justice in a Diverse America* 13-27 (1992).

II. PROSECUTORIAL MISCONDUCT

Prosecutorial misconduct is readily apparent to any lawyer who keeps abreast of appellate review of criminal convictions.¹⁴⁰ Case after case demonstrates the persistent reoccurrence of misconduct, such as forensic misconduct and prosecutorial disclosure violations.¹⁴¹ Figuring prominently in the persistence of prosecutorial misconduct is the lack of effective sanctions for prosecutorial misconduct. This part focuses primarily on the misconduct of prosecutors occurring at trial, such as improper comments in opening statements and closing arguments and misconduct relating to the prosecutor's duty to disclose evidence to the defense. I argue that financial incentives could be used to motivate prosecutors to attain the high standards of conduct embodied in the rules of professional responsibility, offsetting the lack of vigorous enforcement of ethical rules.

The discussion of financial incentives in part II proceeds in four sections. Section A reviews currently available sanctions and evaluates the effectiveness of these sanctions in deterring prosecutorial misconduct. Section A concludes with a model of financial incentives to motivate prosecutors to comport their behavior with the rules of professional responsibility. Section B illustrates the predicted effects of the model by applying it to two recurring types of prosecutorial misconduct: improper argument and failure to disclose evidence to the defendant under *Brady v. Maryland*.¹⁴² Section C specifies the role the appellate courts must play for the model to be efficacious. Finally, section D evaluates possible objections to the financial incentive model.

140. It is very difficult to assess accurately the frequency of prosecutorial misconduct. Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 970 (1984) (noting that no practical method has been developed to measure the frequency of misconduct, except to rely on impressions gained from the volume of appellate opinions and the language contained in them). Relying on reported cases alone, it would seem that the incidence of prosecutorial misconduct is staggering. Of course, once one compares the numbers of reported cases to the cases that are actually litigated and then to the number of criminal cases overall, where the vast majority are disposed of without trial, the percentage of cases involving misconduct looks rather small. The anecdotal evidence indicates that prosecutorial misconduct occurs at a rate higher than is indicated in reported cases—both those cases that go to trial and those that do not. *Id.* at 975. Even if we assume that the vast majority of prosecutors abide by the ethical rules, it still would be beneficial to provide all prosecutors with incentives to pay attention to them. It has been recognized time and again that government lawyers, because they wield the power of the state, must be held to a higher standard than other lawyers. Prosecutors rightly must comply with an entirely different set of standards than those applicable to the defense bar.

141. See generally Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 630-33 (1972) (discussing the prevalence of prosecutorial misconduct); Rosen, *supra* note 92, at 697-703 (collecting cases discussing prosecutorial disclosure violations).

142. 373 U.S. 83 (1963).

A. *Existing Checks on Prosecutorial Misconduct and a New Model*

Civil damages are useful to deter unlawful conduct or unreasonable behavior. In *Imbler v. Pachtman*, however, the Supreme Court held that prosecutors are not subject to civil actions for damages arising from their wrongful conduct as advocates.¹⁴³ Thus, a prosecutor is absolutely immune from civil suits arising from her conduct at trial even when a court holds that, for example, the prosecutor's comment in closing argument deprived a defendant of his right to a fair trial under the Sixth Amendment. Delivery of a closing argument is one of the duties of a prosecutor as an advocate; therefore, *Imbler* requires that the prosecutor be protected by the shield of immunity. The defendant's remedy in such a case is a new trial. Additionally, *Imbler* dictates that even when a prosecutor's conduct clearly violates the rule set out in *Brady v. Maryland*, which protects the defendant's right to due process of law, the prosecutor is absolutely immune from civil damages. The *Imbler* Court reasoned that the necessity of ensuring that the prosecutor could effectively execute her official duties outweighed the importance of providing the defendant with a civil damages remedy under 42 U.S.C. § 1983.¹⁴⁴

The Court provided several justifications for its decision in *Imbler*. The Court was concerned that criminal defendants would initiate civil

143. The Court noted the long-standing common law tradition of affording prosecutors immunity from civil suits arising from acts taken within the scope of their duties. *Imbler v. Pachtman*, 424 U.S. 409, 422-24 (1976). The prosecutor's historical common law immunity from civil suits was one of the bases for the Court's decision to extend to prosecutors absolute immunity from actions under 42 U.S.C. § 1983. *Imbler*, 424 U.S. at 424. The *Imbler* Court held that the prosecutor's knowing suppression of evidence that exculpated the defendant and the prosecutor's knowing use of perjured testimony were entitled to absolute immunity from an action under 42 U.S.C. § 1983. See *Imbler*, 424 U.S. at 427. In *Buckley v. Fitzsimmons*, 113 S. Ct. 2606 (1993), the Supreme Court reiterated the rule set out in *Imbler* that prosecutors are entitled to absolute immunity from actions under 42 U.S.C. § 1983 for conduct that is "intimately associated with the judicial phase of the criminal process," *Buckley*, 113 S. Ct. at 2613-14 (quoting *Imbler*, 424 U.S. at 430), but the Court declined to extend to prosecutors absolute immunity for conduct that is not closely associated with the judicial process. Rather, the Court stated that prosecutors are entitled only to qualified immunity when they act as administrators or investigators. *Buckley*, 113 S. Ct. at 2614-16. Thus, prosecutors are not entitled to absolute immunity for giving legal advice to police officers. See *Burns v. Reed*, 111 S. Ct. 1934, 1942-43 (1991). Nor are prosecutors entitled to absolute immunity when they function in the same manner as detectives under circumstances in which a detective would be entitled only to qualified immunity. *Buckley*, 113 S. Ct. at 2616-17.

144. See *Imbler*, 424 U.S. at 427. There is a strong counterargument. In a concurring opinion, Justice White, joined by Justices Brennan and Marshall, argued that absolute immunity should not be granted to prosecutors who knowingly suppress favorable evidence in violation of *Brady*: "Denial of immunity for unconstitutional withholding of evidence would encourage such disclosure. A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But, this will hardly injure the judicial process. Indeed, it will help it." *Id.* at 443 (White, J., concurring).

rights suits merely for revenge.¹⁴⁵ Defending these suits would be unreasonably and unnecessarily time consuming for the prosecutor.¹⁴⁶ The Court believed that civil rights suits would be virtual retrials of the defendant's criminal liability, and the Court concluded that *habeas* proceedings and appeals were more appropriate remedies because these proceedings focused on the fairness of the trial rather than the prosecutor's misconduct.¹⁴⁷ The *Imbler* Court emphasized that subjecting prosecutors to civil suits was not the only means of deterrence the public had at its disposal. The Court looked to the criminal law (the existence of criminal sanctions under 18 U.S.C. § 242)¹⁴⁸ and to ethical standards promulgated by professional associations of lawyers to provide the deterrence to prosecutorial misconduct that civil liability could have provided.¹⁴⁹

It is not clear that civil damages would curb effectively the persistence of prosecutorial misconduct, even if such damage actions were available. The poor are disproportionately represented among criminal defendants, and generally speaking, there is no right to appointed

145. *Id.* at 425.

146. *See id.*

147. *See id.* at 425-27.

148. 18 U.S.C. § 242 (1994) reads:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

An exhaustive search for cases in which prosecutors were prosecuted under this section revealed not a single example.

There are several explanations for the fact that an on-line search revealed no prosecutions of prosecutors under 18 U.S.C. § 242. It could indicate that prosecutorial misconduct is never severe enough to warrant criminal prosecution. Or it could indicate that federal prosecutors, in their broad discretion, do not prosecute such cases, even when there is evidence that a criminal violation exists. But it could also indicate that prosecutors who are convicted under § 242 always plead guilty to the offense and never challenge their sentences on appeal. This last scenario is highly unlikely, however. It is much more likely that the low number of cases tends to support the hypothesis that the existence of the sanction is not a meaningful deterrent to prosecutorial misconduct and prosecutorial violation of criminal defendants' constitutional rights—a conclusion that is contrary to the Court's assertion in *Imbler*.

149. The Court stated: "Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

counsel in civil cases.¹⁵⁰ Unless these civil damage suits reap lucrative damage awards, it is unlikely that many attorneys would accept them on a contingency fee basis. Because many of those who are affected by prosecutorial misconduct do not have the means to hire attorneys to represent them in civil suits, the availability of a damage action to remedy a constitutional violation might not mean very much. Moreover, the ineffectiveness of civil rights damage suits against other government officials illuminates the predicted effectiveness of these same suits for prosecutors. Police officers have only qualified immunity¹⁵¹ and thus are subject to civil damage actions for individual rights violations in many more cases than are prosecutors. Nonetheless, empirical research seriously questions whether civil damage actions are an effective deterrent against police misconduct.¹⁵² Still, the existence of damages actions may be useful as a symbol of the public's intolerance of the violation of individual rights by government officials, even if civil damage awards have very limited practical impact.

The threat of contempt sanctions, in theory, should provide some deterrence against prosecutorial misconduct, as courts are empowered to hold in contempt prosecutors who engage in prosecutorial misconduct before them.¹⁵³ Few courts, however, exercise this power.¹⁵⁴ As-

150. *Branch v. Cole*, 686 F.2d 264, 266 (5th Cir. 1982); *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983).

151. *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2615-16 (1993) (explaining that qualified immunity is the norm for public officials).

152. *See, e.g.*, Jonathan D. Casper et al., *The Tort Remedy in Search and Seizure Cases: A Case Study in Juror Decision Making*, 13 *Law & Soc. Inquiry* 279 (1988) (reviewing empirical literature on the incidence and outcomes of civil suits against police officers for police misconduct and finding that defendant officers often prevail and that awards obtained by prevailing plaintiffs do not seem large enough to provide a deterrent effect). Prosecutors are protected only by qualified immunity when they act as investigators rather than as prosecutors. *Buckley*, 113 S. Ct. at 2614-16. However, this limited window of opportunity for plaintiffs affects only a very small minority of instances of prosecutorial misconduct since prosecutors spend most of their time acting as prosecutors!

153. *See* 18 U.S.C. § 401 (1994). Section 401 states:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

154. *See* Bennett L. Gershman, *Prosecutorial Misconduct* § 13.3, at 13-13 n.69 (1989) (collecting a very small number of state cases in which prosecutors were held in contempt by the court for misconduct). Perhaps trial courts reluctantly exercise their contempt power over prosecutors because these courts fear reversal on appeal. *See, for example*, *Weiss v. Burr*, 484 F.2d 973 (9th Cir. 1973), where the prosecuting attorney was cited for five counts of contempt by the trial court, but the appellate court set aside all five counts on the basis that one citation was based on noncontemptuous behavior, one citation was insufficiently specific, and the final three were defective because the prosecutor was not permitted to speak in mitigation before sentencing. *Id.* at 980-81, 984, 987.

suming courts are concerned about effectively controlling prosecutorial misconduct, their reluctance to use contempt as a mechanism to combat prosecutorial misconduct is somewhat curious. A court can use the contempt power to sanction the prosecutor specifically, and the court can tailor the sanction to fit the conduct.

One explanation for courts' reluctance to employ contempt to control prosecutorial misconduct is that courts are reluctant to resort to contempt generally. Courts traditionally have viewed contempt as an extraordinary sanction for attorney misconduct rather than an ordinary one, employing the sanction only as a last resort.¹⁵⁵ This tradition is supported by more than court rhetoric. Federal courts have developed rules for the exercise of contempt that require the court to find that an attorney "deliberate[ly intended] to pursue a course of improper argument or prohibited conduct."¹⁵⁶ Other cases seem to indicate that a lesser standard will suffice to punish contumacious conduct.¹⁵⁷ A more strict *mens rea* standard requires a court considering a contempt citation to make more exacting findings. Thus, it is probable that the likelihood of a court imposing contempt against a prosecutor is negatively correlated to the strictness of the *mens rea* requirement for contempt in a given jurisdiction.

Though the courts are reluctant to use it, contempt is a more attractive sanction for prosecutorial misconduct than reversal¹⁵⁸ for at least two reasons. First, contempt is directed specifically at the misconduct of the prosecutor, where reversal operates to give the defendant the primary benefit—the prosecutor's "sanction" is simply a by-product of the new trial. Second, reversal of a conviction imposes the costs of a new trial on the public at large, but contempt arguably does not consume the same large amounts of judicial and public resources.

While probably not as costly as a new trial, exercise of the contempt power is not cheap. In most instances in which contempt would be appropriate, the contempt would be characterized as criminal rather than civil.¹⁵⁹ A criminal contempt proceeding is much like any other

155. See, e.g., *Colon v. U.S. Att'y*, 576 F.2d 1, 4 (1st Cir. 1978) (affirming the district court's refusal to hold hearings on Colon's allegations that the government engaged in misconduct in prosecuting him; the court of appeals enumerated its arsenal of disciplinary weapons, noting that citation for contempt was at the "severe end of the spectrum").

156. *United States v. Sopher*, 347 F.2d 415, 418 (7th Cir. 1965); see also *United States v. Seale*, 461 F.2d 345, 367-68 (7th Cir. 1972) (requiring a showing of specific intent in all contempt cases).

157. In these cases, the disregard of authority must be willful; willfulness may be inferred if a lawyer's conduct discloses a "reckless disregard for his professional duty." *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973) (quoting *Sykes v. United States*, 444 F.2d 928, 930 (D.C. Cir. 1971)).

158. See *infra* notes 186-90 and accompanying text (explaining reversal as a quasi-sanction for prosecutorial misconduct).

159. See *United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2556-59 (1994), for the Supreme Court's most recent exposition of the differences between civil and criminal

criminal proceeding in that the contemnor must be given the protections of the code of criminal procedure.¹⁶⁰ The costs involved with providing a prosecutor charged with criminal contempt procedural protections similar to the elaborate procedural protection that we would provide in any other criminal case could be a reason for the courts' reluctance to utilize it as a sanction for misconduct. Not every criminal contempt sanction imposed by a court would have to be accompanied by the full panoply of procedural protections, however. For example, a federal court may punish summarily a prosecutor whose conduct constitutes contempt when the judge certifies that the contumacious conduct was committed in the judge's presence.¹⁶¹ Any other criminal contempt, however, may be prosecuted only on notice and with a hearing.¹⁶² Such a hearing probably would not be as costly as a new trial for the defendant based on prosecutorial misconduct, but it would still impose costs on the public by tapping limited judicial resources.¹⁶³

contempt. Whether the contempt is criminal or civil has less to do with the contemnor's conduct and more to do with the type of sanction the court wishes to impose. Determinate sanctions, such as a fixed sum or imprisonment for a fixed period, are usually considered criminal sanctions imposed to preserve the dignity of the court because criminal contempt punishes past conduct. Civil contempt is designed to coerce future conduct. The test is easier to state than it is to utilize in practice.

160. As in any other criminal case, the contemnor (the defendant) is presumed innocent until he is proven guilty beyond a reasonable doubt, and a criminal contempt case in federal court must be prosecuted by a public prosecutor or an appointed member of the bar as a special prosecutor if the U.S. Attorney declines to prosecute. See *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 801-02 (1987) (invoking the supervisory powers of the Court to reject the practice of appointing the plaintiff's attorney as special prosecutor because the plaintiff's lawyer's duty to her client will sometime conflict with the proper exercise of prosecutorial discretion). Moreover, a defendant who is prosecuted for criminal contempt cannot be compelled to testify against himself. And if the sanction is considered serious enough, a defendant prosecuted for criminal contempt may be entitled to a jury trial. See Dan B. Dobbs, *Law of Remedies* § 2.8(4), at 146-47 (2d ed. 1993). Finally, sanctions meted out in criminal contempt must be limited to criminal sentences provided by statute, in contrast to civil contempt sanctions, which theoretically could last indefinitely. *Id.* at 147.

161. See Fed. R. Crim. P. 42(a). These "direct contempts" require no separate trial or presentation of evidence. See Dobbs, *supra* note 160, § 2.8(1) n.5. The judiciary has the power to impose summary punishment without notice or hearing to quell disruption or to maintain the integrity and authority of the court. See *Cooke v. United States*, 267 U.S. 517, 537 (1925) (stating that except for those contempts committed in the presence of the court, due process requires that the accused be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation).

162. See Fed. R. Crim. P. 42(b).

163. See Joseph F. Lawless, Jr., *Prosecutorial Misconduct* § 13.21 cmt. (1985) ("From a pragmatic perspective, counsel must consider the plight of the trial judge having to deal with a rambunctious prosecutor in the midst of a heated murder trial. The moment the assistant prosecutor is held in contempt, his boss will be in the appellate court asking for and probably obtaining a stay order and meeting the press to castigate the judge for interfering with a dedicated prosecutor trying to 'put away two ruthless killers.'"). Mr. Lawless's comment is especially applicable to the plight of judges and prosecutors who are elected. It may be extremely difficult for those in

Based on the foregoing, judges understandably may be reluctant to reverse convictions and impose on the public the costs of a new trial for the defendant based on the prosecutor's misconduct, unless they are absolutely sure that the misconduct has reached the point at which judicial tolerance would simply be unacceptable. Certainly, misconduct is unacceptable when it reaches constitutional dimensions. However, misconduct often fails to reach constitutional levels because the evidence of the defendant's guilt is very strong.

A court might rely on sanctions other than contempt, such as fines without resort to the contempt power, to control prosecutorial misconduct. The Supreme Court of Nevada, for example, has fined prosecutors for misconduct.¹⁶⁴ The Nevada court's strategy is an attractive alternative to contempt.¹⁶⁵ It is cheaper because the costs of hearings

elected office to explain to the average voter that limited judicial resources should be spent on keeping prosecutors in line when many citizens believe that criminal defendants are afforded too much protection. A survey of first-year college students indicates that approximately 69% of men and 65% of women "agree[d] strongly" or "agree[d] somewhat" that there is "too much concern in the courts for the rights of criminals." See Sourcebook of Criminal Justice Statistics, *supra* note 43, tbl. 2.83.

164. See *McGuire v. State*, 677 P.2d 1060, 1065 (Nev. 1984) (fining prosecutor personally \$500 for misconduct and requiring the prosecutor to remit the fine to the Washoe County Law Library Book Fund). In a subsequent decision, the Nevada Supreme Court reiterated its power to impose fines for prosecutorial misconduct. See *Williams v. State*, 734 P.2d 700, 704 n.6 (Nev. 1987). The *Williams* court cited *McGuire* for the proposition that the court is empowered to impose monetary sanctions on attorneys for misconduct, and the court also warned attorneys that in the future the court would be less hesitant to sanction attorneys by identifying them in opinions. *Id.* Thus, after *McGuire*, it seems as if Nevada courts might rely on monetary sanctions as a measure intermediate to reversal and affirmation through harmless error in the face of misconduct. However, after reading the Nevada cases discussing the power and willingness of the courts there to sanction prosecutors for misconduct, I am not convinced that Nevada courts will be willing to impose monetary fines as an intermediate sanction for prosecutorial misconduct, even when a conviction is upheld. First, there have been no cases discussing the power to fine since *Williams*. Second, in *Moser v. State*, 544 P.2d 424 (Nev. 1975), on which *McGuire* and *Williams* rely, Chief Justice Gunderson stated:

[I]n cases tried after this date, where the trial transcript discloses improper argument, I understand that this court will consider referring the offending attorney to the local administrative committee for determination of an appropriate penalty. Where a *retrial is necessitated*, I suggest the penalty might properly include payment of court costs to the state, and an appropriate assessment to cover the cost of public or private defense counsel.

Id. at 428 (emphasis added). Third, after *Moser*, the Nevada Supreme Court decided *Talancon v. State*, 621 P.2d 1111 (Nev. 1981). There, the court highlighted the improper comments made by the prosecutor but upheld the defendant's conviction in light of the overwhelming evidence of guilt. *Id.* at 1112. The court then reiterated its willingness to impose monetary sanctions against prosecutors where their misconduct requires reversal for a new trial. *Id.* I could locate no case in which a Nevada court imposed sanctions for prosecutorial misconduct in absence of a conviction reversal, which probably means that Nevada's sanction will be no more efficacious as a deterrent to misconduct than reversal itself.

165. Of course, under Federal Rule of Criminal Procedure 42(a), it would be possible for a federal court to summarily impose a fine for criminal contempt based on the misconduct of a prosecutor that occurred in the court's presence. In the *McGuire*

are saved. Additionally, it is intuitively obvious that a fine should more effectively deter misconduct than a verbal reprimand. Unfortunately, it appears that no jurisdiction other than Nevada imposes fines for prosecutorial misconduct without resort to the contempt power.¹⁶⁶

Appellate court comments on, and reprimands for, prosecutorial misconduct in published opinions are probably the most widely used sanction mechanism.¹⁶⁷ If the prosecutor's conduct is particularly egregious, the court might mention the prosecutor's name.¹⁶⁸ The theory behind these published citations is public embarrassment.¹⁶⁹ Public reprimands are cheap. They do not take much time to mete out, nor do they take up inordinately large amounts of judicial resources or burden the public. Public reprimands would be a wonderful remedy for prosecutorial misconduct for these reasons if they were effective. The very courts that employ them as a sanction, however, have lamented the method's ineffectiveness.¹⁷⁰

case the court imposed the fine at the appellate level, whereas the misconduct occurred before the trial court. 677 P.2d at 1062-63, 1065.

166. Research for this Article revealed little reluctance on the part of the courts to rely on their inherent powers to financially sanction attorneys in civil cases. *See, e.g., Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 566 (3d Cir. 1985) (noting that the sanctions available under the Federal Rules of Civil Procedure are inadequate to regulate a wide range of attorney misconduct). Moreover, numerous commentators have explored the subject of sanctions imposed directly upon attorneys as opposed to their clients. *See, e.g., Michael S. Cooper, Comment, Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. Rev. 855 (1979) (analyzing conceptual and practical problems which have attended the employment of traditional sanctions in litigation); David W. Pollak, *Comment, Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. Chi. L. Rev. 619 (1977) (discussing the variety of sanctions available to courts against attorneys who have abused the judicial process). In contrast to these numerous opinions, the dearth of similar sanctions imposed on prosecutors in the criminal context is stunning.

167. *See, e.g., United States v. Kojayan*, 8 F.3d 1315, 1318-23 (9th Cir. 1993) (upbraiding both the Assistant U.S. Attorneys and their supervisors); *United States v. Pallais*, 921 F.2d 684, 691-92 (7th Cir. 1990) (acknowledging both repeated use of rebukes for improper argument and the ineffectiveness of such rebukes), *cert. denied*, 502 U.S. 842 (1991); *United States v. Modica*, 663 F.2d 1173, 1182 (2d Cir. 1981) (citing several cases in which courts resorted to comments on prosecutorial misconduct in an attempt to deter future misconduct), *cert. denied*, 456 U.S. 989 (1982).

168. *See Modica*, 663 F.2d at 1185 (noting the additional sanction of naming the prosecutor as an alternative to reversal). Ironically, even the *Modica* court declined to reveal the prosecutor's name. *Id.* at 1185 n.7.

169. *See, e.g., Williams v. State*, 734 P.2d 700, 704 n.6 (Nev. 1987) (recognizing that identifying "perpetrators" of misconduct can do "lasting professional injury" by "diminishing their prospects when they may later be considered for judgeships or other public offices").

170. *See Pallais*, 921 F.2d at 691-92 ("We rebuke prosecutors repeatedly for commenting on a defendant's failure to take the stand . . . Ten years ago we were commenting on a 'sense of futility from persistent disregard of prior admonitions.' These rebukes seem to have little effect, no doubt because of the harmless error rule, which in this as in many other cases precludes an effective remedy for prosecutorial misconduct." (quoting *United States v. Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980) (citation omitted))).

Given the dearth of effective sanction machinery, one might think that the prosecutor's colleagues in the bar might be counted on to check prosecutorial excesses by subjecting prosecutors to scrutiny. In fact, the *Imbler* Court explicitly relied on the existence of sanctions by professional associations as a reason to grant to prosecutors absolute immunity from civil damages resulting from constitutional violations.¹⁷¹ After the review of various other existing sanctions in the preceding paragraphs, it should not be surprising that prosecutors rarely are sanctioned by their colleagues in the professional regulation entities.

Prosecutors, as all lawyers, are subject to some version of professional regulation in every state.¹⁷² Violations of these ethical rules could expose a prosecutor to discipline from the legal profession through state bar associations or disciplinary committees for misconduct. These professional disciplinary bodies have the power to sanction prosecutors and impose sanctions as serious as disbarment.

171. *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (“[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”).

172. Rosen, *supra* note 92, at 712 n.103. Federal as well as state prosecutors look to rules of professional responsibility that govern lawyers practicing in the various states. Accordingly, a Justice Department attorney can be subject to discipline under the Department's own internal rules for violating a bar ethics rule in appropriate cases. 28 C.F.R. § 45.735-1(b) to (c) (1995). What is less clear is the amenability of federal prosecutors to regulation by the various state disciplinary bodies.

Recently, there has been a dispute as to how far state bars may go in sanctioning federal prosecutors for violations of state ethics rules. Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 *Geo. J. Legal Ethics* 1083, 1092-98 (1994). One very public dispute involves the federal government's policy regarding contacts with unrepresented persons dictated by former Attorney General Richard Thornburgh's position that Model Code Disciplinary Rule 7-104(A)(1) and Model Rule 4.2 (both pertaining to contacts with represented parties) did not apply to federal prosecutors, *see id.* at 1093, because the Supremacy Clause prevents states from enforcing ethical rules that are inconsistent with a federal prosecutor's duties. Research for this Article revealed no instance in which federal prosecutors claimed the Supremacy Clause exempted them from disciplinary action by state bar associations for violations of the ethical rules pertaining to improper argument and disclosure obligations, which are the focus of this Article. However, there is an additional hurdle that must be cleared to effectuate state sanction of a federal prosecutor, even if the Justice Department does not assert the Supremacy Clause to block state-based discipline of a federal attorney. The Department of Justice requires only that its attorneys be licensed to practice in any one of the United States. *United States v. Ferrara*, 54 F.3d 825, 826 (D.C. Cir. 1995) (citing relevant statutory provisions). Consequently, a federal attorney may commonly practice in a federal court of a state in which she is not licensed to practice. This situation can create interesting “choice of jurisdiction” problems that can impede the prompt and certain discipline of federal attorneys as the recent case *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992), illustrates.

The practical reality is that few prosecutors are ever disciplined by these regulatory entities.¹⁷³ Professor Richard Rosen's study of prosecutorial *Brady* violations highlights this problem. Professor Rosen set out to review decisions of state disciplinary commissions regarding the prosecutor's duty to disclose evidence to the defense under *Brady v. Maryland*.¹⁷⁴ After noting many instances of misconduct in appellate opinions,¹⁷⁵ Professor Rosen expected to locate similarly numerous instances of review by disciplinary bodies.¹⁷⁶ Professor Rosen was disappointed.¹⁷⁷ To be sure, many state bar associations have neither the funds nor the staff to seek out and punish instances of prosecutorial misconduct.¹⁷⁸ Many of these associations act only on complaint.¹⁷⁹ Unfortunately, few defense counsel or defendants complain to disciplinary bodies about prosecutorial misconduct.¹⁸⁰

The hole left by the sparse review of prosecutorial conduct by state disciplinary entities theoretically could be filled by internal review offices. For example, the Department of Justice Office of Professional Responsibility ("OPR") reviews the conduct of federal prosecutors.¹⁸¹ OPR is charged with investigating allegations of misconduct on the part of Justice Department attorneys, as well as Justice Department personnel involved in criminal investigations.¹⁸² OPR receives complaints from such diverse sources as prison inmates, congressional referrals, private parties, and Department employees.¹⁸³ With eight attorneys to patrol the activities of well over 7500 Department lawyers, it would be exceedingly generous to say that OPR has its hands full.¹⁸⁴ OPR recently has been the subject of intense criticism by the

173. See Rosen, *supra* note 92, at 731-32 (explaining that the persistence of *Brady*-type misconduct is due in part to the lack of review by disciplinary bodies of prosecutor's misconduct).

174. *Id.* The prosecutor's duty under *Brady* to disclose evidence to the defense applies to three situations: (1) the use of perjured testimony at trial; (2) nondisclosure of exculpatory evidence that the defense has specifically asked for; and (3) nondisclosure of exculpatory evidence absent any request (or a general request) by the defense. *United States v. Bagley*, 473 U.S. 667, 678-81 (1985).

175. See Rosen, *supra* note 92, at 700-02.

176. *Id.* at 720.

177. *Id.* ("What is most surprising about the published reports of disciplinary actions against prosecutors for *Brady*-type violations is their limited number.").

178. *Id.* at 736 n.252 (pointing out that limited resources and staff make it practically impossible for disciplinary bodies to review reported decisions and institute proceedings against prosecutors whenever the opinion indicates possible prosecutorial misconduct).

179. *Id.* at 716.

180. See *id.* at 730-31, 734-35.

181. Office of Professional Responsibility, 1992 Ann. Rep. to the Att'y Gen. 1 [hereinafter OPR Report].

182. *Id.* at 1-2.

183. *Id.* at 4.

184. See Jim McGee, *Prosecutor Oversight Is Often Hidden From Sight*, Wash. Post, Jan. 15, 1993, at A1. OPR had a staff of six attorneys from 1979 until January of 1993.

media, members of Congress, and the judiciary for its failure to investigate promptly incidents of misconduct reported to it.¹⁸⁵ Because federal prosecutors are unlikely to be disciplined by their own internal ethics police, it is unlikely that the remote threat of OPR reviews provides a significant deterrent to misconduct.

There is one additional method currently available to "sanction" prosecutors for misconduct. An appellate court has the power to reverse a defendant's conviction and award the defendant a new trial if the court determines that the prosecutor's misconduct has deprived the defendant of a constitutional right.¹⁸⁶ Reversal is not a true sanction, as it is not specifically directed towards punishing the prosecutor. Rather, it is a mechanism to ensure that the defendant is afforded the minimum constitutional protections during the criminal justice process. Reversal cannot be counted on as a deterrent to prosecutorial misconduct. Indeed, it should not be. Whether or not reversal of a conviction should be "counted" as a sanction for misconduct, reversal affects the prosecutor's behavior.

Prosecutorial culture dictates that the prosecutor is heavily invested in winning her case.¹⁸⁷ The prosecutor's professional success inevitably is linked to success at trial and on appeal. Winning trials and appeals is rewarded by promotions over time. Even more important than office promotions may be the respect and admiration of her peers that the prosecutor acquires when she wins cases. That a prosecutor's professional success is dependent in part on winning trials and appeals is hardly a remarkable assertion. Prosecutors, after all, work within the adversarial system. In any given case someone has to win and someone has to lose. Thus, if a conviction obtained by a prosecutor is reversed on appeal, the prosecutor acquires a check on the loss side of her record. This check in turn can affect, usually indirectly, the prosecutor's chances for advancement in the office, raises, and perhaps even future job opportunities should the prosecutor decide to leave the prosecutor's office.

The effectiveness of reversal as a sanction is tempered greatly by the harmless error rule. A conviction will be reversed only if the appellate court finds the error very serious.¹⁸⁸ Not surprisingly, appellate courts regularly uphold convictions in the face of prosecutorial

Id. During this time the Department of Justice increased its army of attorneys from 4076 to 7881. In December 1993, Jim McGee reported that OPR increased its staff by two lawyers. Jim McGee, *Justice Dept. Sets Changes on Discipline: Prosecutors' Conduct Had Led to Complaints*, Wash. Post, Dec. 14, 1993, at A1.

185. Morton, *supra* note 172, at 1111-13 (discussing criticisms of OPR, as well as recent reform implemented by OPR).

186. See *infra* notes 199-201 and accompanying text.

187. Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 Am. Crim. L. Rev. 383, 414 (1976) (emphasizing that prosecutors' emphasis on winning influences charging decisions).

188. See *infra* note 221 (listing tests for reviewing improper argument allegations).

misconduct.¹⁸⁹ Consider a portion of the text of an opinion written by Judge Posner: "The expansive code of constitutional criminal procedure that the Supreme Court has created in the name of the Constitution is like the grapes of Tantalus, since the equally expansive harmless error rule in most cases prevents a criminal defendant from obtaining any benefit from the code."¹⁹⁰

My review of current mechanisms to control prosecutorial misconduct reveals that these tools are very weak. They probably could be made stronger. Infusing the professional disciplinary bodies with more money and resources to identify and sanction prosecutorial misconduct is one way to remedy the inadequate scrutiny that prosecutors currently receive.¹⁹¹ Even more aggressive disciplinary entities might not sufficiently cabin federal prosecutors, who sometimes practice before federal courts in states other than the one in which they are licensed.¹⁹² To address this problem, OPR, the federal ethics police, could be given more resources. Unfortunately, the current ratio of OPR personnel to reviewed attorneys is about 1 to 1000.¹⁹³ OPR would require a very substantial increase in staff just to have a fighting chance.¹⁹⁴ Another answer might be to encourage trial courts to take a more aggressive stance towards prosecutors who engage in misconduct before them. Federal courts of appeals have noted that it is the primary responsibility of trial courts to tame the prosecutors who practice in their courts.¹⁹⁵ Whatever the solution, it is a common sense proposition that serious sanctioning of prosecutors on a more regular basis would affect their conduct and, correspondingly, their level of misconduct.

Financial incentives could motivate prosecutors to behave ethically. The hypothesis is simple: Rewarding prosecutors for behaving ethi-

189. See *infra* notes 221-24 and accompanying text.

190. *United States v. Pallais*, 921 F.2d 684, 692 (7th Cir. 1990), *cert. denied*, 502 U.S. 842 (1991).

191. See *supra* notes 178, 184 (pointing out that professional disciplinary bodies often are underfunded and understaffed).

192. See *supra* note 172 (explaining possible jurisdictional problems that may arise when states seek to enforce state ethics rules against federal prosecutors).

193. As I mentioned earlier, OPR also oversees review of law enforcement agents under the auspices of the Department of Justice. See *supra* notes 181-84 and accompanying text.

194. OPR requested 35 positions in 1990, but this request was denied. OPR Report, *supra* note 181, at 6 n.4 (1992). Although the Attorney General approved five additional positions, Congress refused to authorize them. *Id.* OPR requested two additional staff persons in 1991, and OMB denied the request. *Id.* Finally, OPR was authorized to hire two additional staff people in 1992. *Id.*

195. See, e.g., *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) ("This court has repeatedly stated that the task of ensuring that attorneys conduct themselves pursuant to recognized ethical precepts falls primarily upon district courts." (citing *Lefrak v. Arabian Amer. Oil Co.*, 527 F.2d 1136, 1140 (2d Cir. 1975) and *NCK Org., Ltd. v. Bregman*, 542 F.2d 128, 131 (2d Cir. 1976))), *cert. denied*, 456 U.S. 989 (1982).

cally will motivate them to do so. Specifically, I propose a financial incentive scheme that ties financial rewards to the standards of conduct embodied in the ethical rules. If a prosecutor is rewarded only if her behavior comports with these rules, then it is more likely that her behavior will reflect the standards the rules prescribe. A second hypothesis is that the prosecutor's supervisor, who is responsible for her compensation, will be more cognizant and less tolerant of improper behavior if part of the trial prosecutor's compensation is contingent upon her successfully abiding by rules of proper conduct. This is because the supervisor will control the trial attorney's compensation based on the trial attorney's observance of ethical rules.

I propose linking a financial reward, an individual bonus presented on a case-by-case basis, to appellate review of the defendant's conviction. The onus will fall on the defendant to raise instances of improper behavior on the prosecutor's part, thus initiating scrutiny of the prosecutor's conduct. If the defendant raises error due to prosecutorial misconduct, the prosecutor will not be entitled to receive a bonus unless the appellate court reviewing the merits of the defendant's contentions in the normal course finds that the prosecutor behaved properly. If, on the other hand, the defendant does not appeal his conviction, then the prosecutor will receive the bonus because in such a case it must be assumed that the prosecutor's behavior was proper. Under the proposal then, whether a prosecutor is rewarded is contingent upon the appellate court's finding that the prosecutor did behave properly. By structuring the prosecutor's incentive in this way, the prosecutor will not be rewarded for improper behavior, even if the appellate court decides, through the operation of the harmless error rule, that the conviction should stand. To illustrate the predicted effects of the reward system, I focus on two types of commonly occurring prosecutorial misconduct: improper argument and failure to disclose evidence to the defendant under *Brady v. Maryland*.¹⁹⁶

B. *Predicted Effects of the Financial Rewards Model*

1. Improper Argument

Prosecutors are prohibited from engaging in improper argument at trial to prevent them from drawing on the power and status of their positions as government attorneys and using that power and status to influence the jury's decision.¹⁹⁷ The different types of improper argument are myriad, including inflammatory remarks, violations of the defendant's privilege against self-incrimination, references by the

196. Improper argument, which encompasses a broad range of different types of prosecutorial misconduct, and *Brady*-type violations are two very common types of prosecutorial misconduct. The analysis in this Article very possibly can be applied to other misconduct. I chose these two categories because they are commonly occurring types of prosecutorial misconduct.

197. See *Berger v. United States*, 295 U.S. 78, 88 (1935).

prosecutor to matters outside the record, and further breakdowns of subcategories under the categories listed here.¹⁹⁸ This list is by no means all-inclusive. No matter the category, each type shares the characteristic of possible prejudice to the defendant's constitutional rights.

As noted earlier, a prosecutor's conduct is subject to several layers of regulation. First, the Constitution prohibits certain prosecutorial misconduct. For example, a prosecutor cannot engage in arguments at trial that are determined to deprive the defendant of a fair trial guaranteed by the Sixth Amendment to the Constitution¹⁹⁹ and applied to the states by the Fourteenth Amendment.²⁰⁰ The Constitution similarly proscribes a prosecutor from making arguments that improperly comment on the defendant's right against self-incrimination.²⁰¹ Second, prosecutors are subject to standards of professional responsibility, applicable to them generally as lawyers and specifically as prosecutors, with respect to the arguments that they make at trial.²⁰² Third, there may be internal constraints on a prosecutor's activities.²⁰³ This section focuses on the rules of professional responsibility because these rules satisfy the constitutional standards. It is specifically these rules that the reward scheme described here seeks to invigorate.

The ABA has published three sources of ethical guidelines for prosecutors regarding improper argument. First is the ABA's Model Code of Professional Responsibility ("Model Code"). The Model Code prohibits a lawyer, including a prosecutor, from "allud[ing] to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence,"²⁰⁴ "[a]ssert[ing] his personal knowledge of the facts,"²⁰⁵ and "assert[ing] his] personal opinion as to the justness of a cause, as to the credibility of a witness . . . or as to the guilt or innocence of an accused."²⁰⁶ A second source, the ABA Model Rules under the title, "Fairness to Opposing Party and Counsel," contains proscriptions similar to those found in the Model Code.²⁰⁷ In addition to the Model Code and the

198. See Gershman, *supra* note 154, at 10-1 to 10-46, for a more exhaustive list and descriptive examples of various types of improper argument by prosecutors.

199. See *Berger*, 295 U.S. at 88 ("[A prosecutor] may strike hard blows, [but] he is not at liberty to strike foul ones.").

200. See *Darden v. Wainwright*, 477 U.S. 168, 178-83 (1986) (evaluating an improper prosecutorial comment made in a state trial and upholding defendant's death sentence).

201. *Griffin v. California*, 380 U.S. 609, 613 (1965).

202. See *infra* notes 204, 209 and accompanying text.

203. Federal prosecutors, for example, are subject to investigation by the Department of Justice's OPR. See *supra* notes 181-82 and accompanying text.

204. Model Code, *supra* note 48, DR 7-106(C)(1).

205. *Id.* DR 7-106(C)(3).

206. *Id.* DR 7-106(C)(4).

207. See Model Rules, *supra* note 44, Rule 3.4 (e) ("A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in

Model Rules, both of which explicitly forbid prosecutors from engaging in argument deemed improper (and therefore, in theory, exposing a prosecutor who violates the rules to an appropriate sanction by a state disciplinary commission), there are the ABA Standards for Criminal Justice ("Standards"). Unlike the Model Code and the Model Rules, these Standards are intended to be used as a blueprint for proper behavior rather than as criteria for judicial evaluation of alleged misconduct.²⁰⁸ Standard 3-5.8 contains language similar to the Model Rules and the Model Code, although softer in tone, and the Standards advise the prosecutor not to make arguments calculated to appeal to the prejudices of the jury.²⁰⁹ Taken as a group, the Model Code, the Model Rules, and the Standards provide the prosecutor with clear guidelines for proper conduct.

Prosecutors do not always observe these clear rules. One of the most detailed and schizophrenic opinions on this topic is *United States v. Modica*.²¹⁰ In *Modica* the Court of Appeals for the Second Circuit took the time in a per curiam decision to vent its frustration at "the inability of some federal prosecutors to abide by the well-established rules limiting the types of comments permissible in summation."²¹¹ After detailing the manner in which the prosecutor's statements failed to comport with the ABA Standards for Criminal Justice, the court, nevertheless, declined to reverse *Modica*'s conviction because it deter-

issue except when testifying as a witness, or state a personal opinion as to . . . the culpability of a civil litigant or the guilt or innocence of an accused . . .").

208. See Standards for Criminal Justice, *supra* note 14, Standard 3-1.1, which points out, however, that the Standards may be relevant in a judicial evaluation of the prosecutor's conduct. Such an evaluation might occur during appellate review of a criminal defendant's contention of improper argument.

209. See *id.* Standard 3-5.8. This Standard states:

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

(b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

In keeping with its stated purpose as a guide, the Prosecution Standards often are phrased in terms of "A prosecutor *should not* . . ." in contrast to the Model Code and the Model Rules, which often are phrased similarly to the following: "A lawyer *shall not* . . ." See, e.g., *supra* note 207 (quoting Model Rule 3.4(e)).

210. 663 F.2d 1173 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

211. *Id.* at 1183-84. The prosecutor in the *Modica* case vouched for the prosecution witness's veracity, implied that the witness was threatened by the defendant or someone connected with the defendant, and used an argument calculated to inflame the jury by stating: "Don't let Mr. Modica walk out of this room laughing at you." *Id.* at 1180. The panel in the *Modica* case decided that all three of the prosecutor's statements did not meet the ABA Standards for Criminal Justice. *Id.* at 1178-80.

mined that Modica had not been deprived of a fair trial.²¹² The court did not stop there. The court recognized that upholding the conviction implicitly communicated some level of approval to the offending prosecutor, but the court concluded that a better remedy lay in the trial court's hands.²¹³ The court opined that the trial judge is in the best position to control the dynamics of the courtroom drama taking place before her.²¹⁴ The court then listed a variety of sanctions the trial court could employ, ranging from in-court reprimands to granting motions for mistrial.²¹⁵ Additionally, the court noted that referring prosecutors to grievance committees for disciplinary actions might curb misconduct.²¹⁶ Though its focus was on the control mechanisms the trial court could use, the *Modica* panel also said a few words about the appellate court's role in controlling prosecutorial misconduct: "A reprimand in a published opinion that names the prosecutor is not without deterrent effect."²¹⁷ The court of appeals opted not to explore fully the options available to it.

A careful examination of the rhetoric of the *Modica* case is extremely useful because it highlights courts' perceived inability to address the pervasive problem of improper argument misconduct. The district court in the *Modica* case not only failed to reprimand the prosecutor, it overruled defense counsel's objections based on the prosecutor's comments.²¹⁸ The court of appeals, while trying to address the problem of misconduct in a serious manner, ultimately softened the hard edges of the message by refusing to name the prosecutor.²¹⁹ Yet, in the same breath, the court recognized this tactic as an effective deterrent to misconduct. Another indication of the court's perception of its own helplessness was its failure to consider seriously the sanctions available to appellate courts for control of prosecutorial misconduct.

That courts seemingly are reluctant to tackle directly the issue of disciplining prosecutors for misconduct supports the idea that courts may be more likely to address misconduct if they could do so indirectly. Under the financial incentive system proposed here, the appellate court simply provides the information that would allow the prosecutor's employer to sanction her by withholding the reward if misconduct occurs. In the *Modica* case the status of the prosecutor's reward would be clear. The court stated, "His summation was indeed

212. *Id.* at 1182. Somewhat ironically, the *Modica* court remarked: "Yet, just as this Court has often brandished the sword of reversal only to resheath it in the absence of substantial prejudice, here, too, we find no basis to reverse the underlying conviction." *Id.*

213. *Id.* at 1183-85.

214. *Id.* at 1184-85.

215. *Id.*

216. *Id.* at 1185.

217. *Id.*

218. *Id.* at 1181.

219. *Id.* at 1185 n.7.

improper in several respects."²²⁰ The prosecutor in *Modica* would not be rewarded for the conviction obtained in that case, even though the court upheld the conviction on appeal.

The *Modica* case, of course, is not unique in its admonishment of the prosecutor, while upholding the defendant's conviction. All eleven United States Courts of Appeals and the D.C. Circuit use tests identical or substantially similar to the *Modica* test.²²¹ In every case, the courts first determine whether the prosecutor's remark is improper, and then the courts apply a harmless error review.²²² Though

220. *Id.* at 1178.

221. *United States v. Carroll*, 26 F.3d 1380, 1383-87 (6th Cir. 1994) (indicating that the Sixth Circuit has utilized three different tests to evaluate prosecutorial misconduct in the last two years, but that each test first required the court to determine whether there was in fact misconduct before making a determination as to the reversibility of the conviction); *United States v. Manning*, 23 F.3d 570, 574 (1st Cir. 1994) (listing the following factors for consideration of whether improper comments warrant a new trial: (1) the severity of the misconduct; (2) the context in which it occurred; (3) whether the judge gave any curative instructions; and (4) the strength of the evidence against the defendant); *United States v. Edelin*, 996 F.2d 1238, 1243 (D.C. Cir. 1993) (noting that in determining whether to reverse a conviction on grounds of misstatement in closing argument, the court must determine whether the remarks were improper and whether they substantially prejudiced the jury, along with measures taken to cure the prejudice and the certainty of conviction absent the remarks), *cert. denied*, 114 S. Ct. 895 (1994); *United States v. Goodapple*, 958 F.2d 1402, 1409 (7th Cir. 1992) (stating that first the court determines whether the conduct was improper, and, if so, the court then determines whether the conduct, in light of the entire record, warrants reversal); *United States v. Lonedog*, 929 F.2d 568, 572 (10th Cir.) (same as *Goodapple*), *cert. denied*, 502 U.S. 854 (1991); *United States v. Anchondo-Sandoval*, 910 F.2d 1234, 1237 (5th Cir. 1990) (observing that once misconduct is found, the court considers three factors to determine whether defendant is entitled to reversal); *United States v. Brockington*, 849 F.2d 872, 875 (4th Cir. 1988) ("The test for reversible prosecutorial misconduct generally has two components: that '(1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial.'") (quoting *United States v. Hernandez*, 779 F.2d 456, 458 (8th Cir. 1985)); *United States v. Rodriguez*, 765 F.2d 1546, 1559 (11th Cir. 1985) (stating that the conduct "must be both improper and prejudicial to a substantial right of the defendant" to warrant a new trial); *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981) (listing same factors as *Manning* but omitting factor (2)), *cert. denied*, 456 U.S. 989 (1982); *United States v. Berry*, 627 F.2d 193, 196-97 (9th Cir. 1980) ("Our discussion of his argument follows the three-step analysis outlined in *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980). We address these questions: (1) Did any error or prosecutorial misconduct occur? (2) Were the issues preserved for appeal? (3) Was the defendant prejudiced? If all are answered affirmatively, we must reverse."), *cert. denied*, 449 U.S. 1113 (1981); *United States v. Homer*, 545 F.2d 864, 867-68 (3d Cir. 1976) (stating that once determination of improper argument is made, court should consider scope of the objectionable comments and their relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant's conviction), *cert. denied*, 431 U.S. 954 (1977).

222. *See supra* note 221. Harmless error review is used if the error was preserved with an objection. Otherwise, plain error review will be used. *See Fed. R. Crim. P. 52(b)*. "Under this standard, reversal of conviction is justified only if the reviewing court is convinced that it is necessary in order to avoid an actual miscarriage of jus-

there is some inconsistency in the various courts' analyses of harmlessness,²²³ the courts are relatively consistent in their determinations of what constitutes improper comment.²²⁴ Thus, numerous cases documenting incidents of prosecutorial misconduct provide ready yardsticks of proper behavior for judges and prosecutors alike. The reward system proposed here depends to a much greater extent on the appellate court's analysis of the impropriety of the prosecutor's misconduct than on an analysis of the harmlessness of identified misconduct. Thus, the fact that many courts are inconsistent in their analysis of the latter should not affect the efficacy of the reward system.

There are other potential obstacles to the success of linking a reward scheme for prosecutors to appellate review of allegations of error. These obstacles are addressed in section D. The next subpart briefly demonstrates the applicability of the reward scheme to ethics rules regarding the prosecutor's disclosure obligations.

2. *Brady*-type Violations

The *Brady*²²⁵ doctrine requires reversal of a defendant's conviction for violation of the defendant's due process rights if the prosecutor is determined to have failed to disclose to the defense evidence that (1) tends to negate the defendant's guilt or (2) mitigates the defendant's punishment, if that evidence is material to the defendant's guilt or punishment.²²⁶ The *Brady* doctrine, in turn, forms the basis of a cate-

tice." *United States v. Torres*, 965 F.2d 303, 307 (7th Cir.), *cert. denied*, 113 S. Ct. 237 (1992).

223. *Alschuler*, *supra* note 141, at 658-60.

224. Bennett L. Gershman provides an illustrative example by pointing to two cases decided by state courts. In each case the prosecutor made improper comments to the jury that were almost identical. Each court found the prosecutor's remarks improper, but only one court reversed for error. Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 Crim. L. Bull. 131, 139 (1986).

225. *Brady v. Maryland*, 373 U.S. 83 (1963).

226. *Id.* at 87. The *Brady* decision involved evidence that was relevant only to whether the defendant would receive the death penalty for a felony murder conviction—that is, evidence that tended to mitigate the defendant's punishment. *Id.* at 88-91. The Court derived its ruling in *Brady* from its decision in *Mooney v. Holohan*, 294 U.S. 103 (1935), in which the Court held that a prosecutor's use of false testimony could constitute a due process violation. *Brady*, 373 U.S. at 86 (citing *Mooney*, 294 U.S. at 112); *see generally* LaFave & Israel, *supra* note 91, § 19.5, at 534 (explaining that *Mooney* and its progeny "establish a constitutional obligation of the prosecution as an entity not to knowingly deceive the jury or allow it to be deceived by prosecution witnesses"). The *Brady* Court took the reasoning in *Mooney* one step further by stating that the prosecution is equally responsible for deception of the jury when it withholds evidence requested by the defendant that would tend to exculpate him or mitigate his punishment, irrespective of whether the withholding results from good or bad faith. *See Brady*, 373 U.S. at 87. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court expanded the category of evidence included under *Brady's* umbrella of exculpatory to include evidence that the defense could use to impeach the prosecution's witnesses. *Bagley*, 473 U.S. at 676-77. In addition, the *Bagley* Court reformulated the materiality standard of *Brady* from a test that incorporated different levels of scrutiny depending on the type of request from the defense, *id.* at 675-76, to the

gory of rules of professional responsibility applicable only to prosecutors because the *Brady* rule itself applies exclusively to prosecutors. Because one contention of this Article is that lax enforcement of the disciplinary rules supporting the *Brady* doctrine leads to inadequate respect for these rules by prosecutors, I will focus on the rules rather than the constitutional doctrine itself.

The Model Code devotes one disciplinary rule entirely to the duties of the public prosecutor. This rule was promulgated after the Supreme Court's decision in *Brady*.²²⁷ Disciplinary Rule 7-103(B) requires a prosecutor to make "timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."²²⁸ The later-developed Model Rules contain a corollary to Disciplinary Rule 7-103(B) at Rule 3.8(d), which is substantially similar to Disciplinary Rule 7-103(B) except that Rule 3.8(d) makes clear that the prosecutor should *turn over* evidence to the defense rather than simply *notify* the defense of the existence of evidence.²²⁹ The rule also recognizes that a prosecutor may seek a protective order to relieve herself of the responsibility of turning over to the defendant information that could result in substantial harm to an individual or to the public.²³⁰

Both Disciplinary Rule 7-103(B) and Model Rule 3.8(d) require the prosecutor to turn over evidence that *tends* to negate the defendant's guilt or mitigates the defendant's punishment *without* the limitation that the evidence also be material. The constitutional *Brady* doctrine, on the other hand, provides that a defendant's conviction will be overturned only if the favorable evidence withheld by the prosecution is material.²³¹ In this way the *Brady* doctrine operates much like a

more flexible standard used today. Under this standard, nondisclosed evidence that exculpates the defendant's guilt or mitigates his punishment is considered material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. The *Bagley* majority looked to the definition of "reasonable probability" set out in *Strickland v. Washington*, 466 U.S. 668 (1984)—" 'probability sufficient to undermine confidence in the outcome.' " *Bagley*, 473 U.S. at 682 (quoting *Strickland*, 466 U.S. at 66).

227. The ABA Model Code became effective in 1970. Stephen Gillers & Roy D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards* at x (1994). *Brady* was decided in 1963. 373 U.S. at 83.

228. Model Code, *supra* note 48, DR 7-103(B).

229. Model Rules, *supra* note 44, Rule 3.8(d).

230. *Id.* Rule 3.8(d) cmt. 3 ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . .").

231. *Brady v. Maryland*, 373 U.S. 83 (1963). The materiality concept of the *Brady* doctrine was developed in *United States v. Bagley*, 473 U.S. 667, 682 (1985)

harmless error rule for *Brady*-type violations. This is an important point. A significant gap exists between the performance the Constitution requires of a prosecutor and the higher standard compelled by the rules of professional responsibility. This gap is similar to the gap between the constitutional requirements regarding the prosecutor's arguments to the jury and the rules of professional responsibility prohibiting such conduct explained above. Reported cases indicate that instances of "*Brady*-type"²³² misconduct, like instances of improper argument, frequently occur.²³³ The frequency of *Brady*-type misconduct, like the frequency of improper argument, likely is due in part to the lack of effective sanctions for such conduct.

Professor Richard Rosen has studied the problem created by the lack of effective sanctions by disciplinary bodies for a prosecutor's failure to observe rules of professional responsibility. Professor Rosen reviewed cases covering a fairly broad range of *Brady*-type misconduct—from instances in which the prosecutor deliberately concealed evidence that another suspect committed the crime instead of the defendant to cases in which the defense failed to ask a prosecution witness specifically about any agreements that witness had with the government.²³⁴ Although Rosen catalogued numerous cases, it must be noted that many, if not most, instances of *Brady*-type misconduct are discovered only after the trial is over. Proceedings involving *Brady*-type misconduct often are proceedings for post-conviction relief rather than direct appeals.²³⁵ Consequently, it is probably fair to say that many instances of *Brady*-type misconduct are never discovered and hence never reported. The fact that many instances of *Brady*-type misconduct are never discovered supports more strict enforcement of rules prohibiting such conduct in the few cases in which the misconduct comes to light.

("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

232. I borrow this term from Richard Rosen who describes "*Brady*-type" misconduct as a prosecutor's failure to abide by ethical rules based on the *Brady* doctrine, even when the prosecutor's failure to turn over *Brady* evidence does not rise to constitutional proportions because the evidence is not considered material to the defendant's guilt or punishment. Rosen, *supra* note 92, at 696. Under this nomenclature, a technical *Brady* violation occurs only when the prosecutor's failure to disclose evidence favorable to the defense results in a violation of the Due Process Clause of the Fifth or Fourteenth Amendment.

233. See *id.* at 697-703 (citing and discussing scores of cases involving *Brady* violations).

234. See *id.* 700-03.

235. This is true because defendants often do not discover that the prosecution withheld favorable evidence until such evidence is revealed outside the context of the defendant's trial, such as in the trial of a codefendant or through a Freedom of Information Act request.

The financial reward system applied above to improper argument could also be applied in the disclosure context. Prosecutors could be rewarded for their adherence to rules of professional responsibility that mandate disclosure of favorable evidence to the defense. The reward could be linked to review of the defense's allegations of *Brady*-type misconduct. The procedure would be similar to the review procedure for allegations of improper argument described above. A prosecutor would receive a reward for proper behavior only if a reviewing court finds that the prosecution did not fail to turn over evidence that was favorable to the defense, whether or not the reviewing court ultimately finds that the favorable evidence was material. A finding of materiality, of course, justifies a new trial in much the same way that a finding of substantial prejudice to the defendant resulting from the prosecutor's improper comment justifies a new trial.²³⁶

C. *The Role of Appellate Courts*

Prosecutors rarely are sanctioned for their failure to observe the rules of professional responsibility pertaining to improper argument or *Brady*-type violations that hold them to a higher standard than do the constitutional rules on these issues. Appellate courts seldom impose the quasi sanction of reversal because criminal defendants must clear the almost insurmountable hurdle of the harmless error rule on appeal. Relatively toothless enforcement of rules prohibiting prosecutorial misconduct results from the conflation of the most effective "sanction" currently utilized by the courts to deter prosecutorial misconduct with constitutional standards, which specify only minimum requirements for fair trials.

To give the tiger teeth, courts must make a greater effort to separate the ethical requirements imposed on a prosecutor's conduct from what is required of the prosecutor to ensure that a defendant receives a trial that comports with constitutional minimums. Until these standards are cleaved apart, prosecutors will have very little incentive to achieve higher standards of ethical behavior. Thus, an important key to the efficacy of the reward system I propose is the appellate courts' response to the system. The desired response of prosecutors to the reward for good behavior depends on whether the appellate court reviewing allegations of misconduct on appeal actually engages in that review and whether the review is sufficiently rigorous enough to provide the target prosecutor's superiors with information on which to base a reward.

The linchpin of my argument is that courts of appeals must divorce constitutional standards from higher ethical standards. The link between the reward system proposed here and review of prosecutorial

236. See Rosen, *supra* note 92, at 705 & n.66; Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 85 & n.31 (1988).

misconduct will achieve the greatest efficacy if an appellate court's notions of the proper ethical behavior of a prosecutor in the improper argument and disclosure contexts are well developed and distinct from that court's notion of the minimally adequate—constitutional—behavior.

Appellate courts' conceptions of proper ethical notions already are developed and distinct from their views of minimally adequate and constitutional behavior. The separate notions are, in fact, part and parcel of the tests that the appellate courts use to review allegations of trial error based on misconduct. The tests used by the various courts of appeals require the courts to first determine whether the prosecutor behaved in a manner compliant with ethical rules before applying a harmless error analysis. That is, the courts determine whether the prosecutor's comment was improper before deciding whether the remark, if improper, deprived the defendant of a fair trial. The analysis that the courts currently engage in mirrors the analysis the financial reward proposal here requires in order for the proposal to be most effective.

D. Possible Objections

1. Nonrigorous Appellate Review

One problem that may undercut the effectiveness of the proposed financial incentive system is that courts do not consistently apply the step-by-step analysis that would generate the necessary information for supervising prosecutors to make decisions about rewards. For example, sometimes when dissecting *Brady*-type misconduct allegations, a court will pass over the first factors of the test dealing with suppression and favorability and simply state that the evidence the defendant alleges he was denied is not material.²³⁷ The problem of nonrigorous analysis of defendant's allegations on appeal seems to be more frequent in the case of *Brady*-type allegations than in improper argument allegations, although the problem is not unknown in that context.²³⁸

237. See *Nelson v. Nagle*, 995 F.2d 1549, 1555 (11th Cir. 1993) ("We will not address the first two prongs of the [*Brady*] test because we find that the evidence was not material . . ."); *Ruff v. Armontrout*, 993 F.2d 639, 641 (8th Cir. 1993) (same holding as in *Nelson*). *But see* *United States v. Douglas*, 874 F.2d 1145, 1163 (7th Cir.) (emphasizing that although the trial judge essentially collapsed the two-part test for analysis of *Brady*-type misconduct, a court ideally should "articulate findings under both prongs of the *Brady-Bagley* test"), *cert. denied*, 493 U.S. 841 (1989).

238. See, e.g., *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1372 (11th Cir. 1994) ("We need not decide whether the prosecutor's question . . . was improper [vouching] because even if it was, that error was harmless beyond a reasonable doubt."). The cases in which collapse of the test for improper argument are likely to be seen are those cases in which the defendant failed to object at trial, so that appellate court review is under a plain error standard rather than a harmless error analysis. See, e.g., *United States v. Thomas*, 8 F.3d 1552, 1561 (11th Cir. 1993) ("Without deciding whether the argument in this case was improper, we conclude that it did not constitute plain error.").

It is very difficult to make a claim about the frequency with which this occurs. My review of many of these cases at the federal level leads me to be sufficiently confident that in the substantial majority of cases, appellate courts would engage in an analysis that is rigorous enough to provide the prosecutor's superiors with enough information to make a decision regarding the prosecutor's reward.

To the extent that courts do not engage in sufficiently rigorous analysis, the existence of a reward system for good behavior, of which judges obviously would be aware, would provide the judges with an incentive to engage in a more exacting level of review of prosecutorial misconduct. Court statements concerning the ineffectiveness of the sanctions currently employed support the argument that courts would be willing to expend a very small amount of additional time to review cases involving misconduct in greater detail. Courts will be aware that the detail will make it possible for the prosecutor's superiors to sanction the attorney for misconduct in a manner that the courts could not, or have not been willing to, sanction.

2. Court Bias in Favor of Prosecutors

Appellate courts may be reluctant to engage in rigorous review of misconduct allegations because they may not want to shoulder direct responsibility for withholding rewards from prosecutors. Prosecutors, both at the federal and state level, often are repeat players in appellate tribunals. Moreover, appellate judges are sometimes former prosecutors. These current and historical relationships might support an argument that appellate courts will be reluctant to impose sanctions on prosecutors, even indirectly, through a more strict review of prosecutorial misconduct allegations on appeal. While familiar relationships might present less than optimum conditions for review, I doubt these relationships would cause the system to be completely undermined. To give this argument that much credence assumes that appellate courts care much less about deterring ethical violations of prosecutors than they care about rewarding prosecutors.

It would be very difficult for appellate courts to justify engaging in substantially less rigorous review than these courts currently engage. Thus, the most likely result of a familiarity problem is that rigor at much higher levels than we currently have may not be attained. That would not be a bad state of affairs, as courts currently provide a substantial amount of information in their opinions on which to base a reward. If the courts, in an obvious manner, did anything less than follow the rules that the courts have set up for reviewing allegations of prosecutorial misconduct, the courts would undermine judicial integrity and public confidence in the criminal justice system.

3. Delay of Review

The length of time it takes for an appellate court to review the defendant's claims also could be a problem for the reward system. If too much time elapses between the prosecutor's trial conduct and its review on appeal, the motivating force of the reward for good behavior may decay. Decay may result because the prosecutor will not perceive a very strong link between her behavior and the reward if the interval before review is lengthy. Even worse, the prosecutor may have left for new job opportunities outside the office. Either way, the effect of the reward would be diminished.

Limiting the reward system to cases in which errors are brought up on direct review would ameliorate some of the decay effects that inevitably would be associated with a system that included collateral appeals since collateral appeals sometimes take several years to be resolved.²³⁹ Statistics compiled by the Administrative Office of the United States Courts ("Administrative Office") reveal that the time lag between filing of notice of appeal to final disposition is not so long that a link between appellate review and a reward would be preposterous. For the twelve month period ending June 30, 1994, the median time interval between filing notice to final disposition was as high as 16.7 months in the District of Columbia and Eleventh Circuits.²⁴⁰ However, three Circuits, the Second, Third, and Eighth, had disposition time intervals of less than nine months for the same period.²⁴¹ Both the mean and median for all twelve circuits was close to eleven months.²⁴²

The Administrative Office data, combined with data concerning the length of service of the average federal prosecutor, suggest rewards linked to appellate review could operate effectively. The median appellate disposition time is long enough to accommodate most federal prosecutors, who are required to pledge at least four years of service. Many Assistant U.S. Attorneys stay longer.²⁴³

239. I performed an informal survey by selecting all of the pretrial suppression cases decided by the U.S. courts of appeals between 1990 and 1993. During this time period direct appeals ranged from about 5 months to 6 years from indictment to appellate decision, while collateral appeals ranged from 8 to 17 years.

240. Telecopy from Gwendolyn Coleman, Technical Information Specialist, Statistics Division, Admin. Office of the U.S. Courts, to Tracey L. Meares, Assistant Professor, University of Chicago Law School (Sept. 16, 1994) (reprinting tbl. 4, U.S. Court of Appeals, Median Time Intervals in Cases Terminated After Hearing or Submission) (on file with the *Fordham Law Review*).

241. *Id.*

242. *See id.*

243. Forty percent of the Assistant U.S. Attorneys in the U.S. Attorneys Office for the Northern District of Illinois had been with the office for more than four years in 1992. *See* 1992 U.S. Att'y N.D. Ill. Ann. Rep. 137-42. I should note, however, that while I have targeted this proposal to federal prosecutors, I have argued that the proposal also may be applicable to state prosecutors. Two factors potentially could make application of this proposal to state prosecutors very problematic. First, there

4. Prosecutorial Conflicts on Appeal

The potential for conflict of interest on the prosecutor's part might pose problems for a reward system based on appellate review. The system specifies that the prosecutor will fail to receive a reward only if the appellate court finds her conduct to be improper, regardless of whether the improper conduct is later found to be harmless. Because the prosecutor in a world without rewards still can win a case when her behavior is wrongful, no real harm (in the form of reversal) results if she admits an error to the appellate court so long as her error was not harmful. The world of rewards, on the other hand, accommodates sanction of the prosecutor without resort to the extreme sanction of reversal. Because denial of a reward for a conviction will be a significant "intermediate sanction" as compared to reversal, a prosecutor may not readily admit that she has done wrong. To do so would invite the intermediate sanction. One possible consequence, then, of an individual reward system keyed to appeals is that the prosecutor may deny any wrongdoing at all on appeal, as opposed to serving the government's broader interest in preserving the ethics of the office by admitting error on appeal while arguing that the error was harmless.

Interestingly, the impact of the prosecutor's reluctance to admit her own wrongdoing should differ depending on whether the error alleged is the improper argument type or the *Brady*-type. In the improper argument context, there is little reason to be concerned about the consequences of the prosecutor's failure to admit her own wrongdoing. There should be a record to provide the appellate court with material for review since these errors occur at trial. The nature of this type of misconduct makes it unlikely that detection would be difficult; hence, there is little need to rely on the prosecutor's admissions.

The *Brady* context is somewhat different. In order to show that *Brady*-type misconduct has occurred, the defendant must allege that the prosecution *suppressed* favorable evidence.²⁴⁴ If the prosecutor admits suppression, the defendant's case obviously is that much easier. In the current system there is no obvious disincentive for a prosecutor to admit her mistake, so long as the error is harmless. She still will obtain a conviction. But in the world of rewards, the prosecutor will know that if she admits an error, she will not capture a reward even if the error turns out to be harmless. Thus, the specter of losing the reward might induce the prosecutor to cover-up wrongdoing.

often is high turnover of personnel in state prosecuting offices. Second, the time interval between conviction and a decision on direct appeal in the state system may dwarf even the seemingly long time to disposition in the D.C. and Eleventh Circuits. In recognition of this latter issue, The MacArthur Justice Center at the Mandel Legal Aid Clinic filed a class action on behalf of persons convicted of state felonies whose appeals have been pending for over a year with no brief filed. See *United States ex rel. Green v. Peters*, 153 F.R.D. 615, 617 (N.D. Ill. 1994).

244. See *supra* text accompanying note 226 (setting out prongs of the *Brady* test).

The previous analysis assumes, however, that a prosecutor would not be motivated to produce the evidence initially by the possibility, if the not probability, of being rewarded for doing so. Justice White, joined by Justices Brennan and Marshall, reasoned in his concurrence to the *Imbler* decision that sanctions for failure to produce evidence initially would induce the opposite response from prosecutors.²⁴⁵ Justice White argued that a prosecutor should not be protected by absolute immunity from suits based on claims of unconstitutional suppression of evidence because such a rule would injure the judicial process and interfere with Congress' purpose in enacting 42 U.S.C. § 1983.²⁴⁶ Justice White looked to the contours of absolute immunity granted to prosecutors at common law to provide part of the basis for his argument that civil claims brought for the prosecutor's use of false testimony should be treated differently from suits charging the prosecutor with unconstitutional suppression of evidence.²⁴⁷ Justice White also looked to the effects of granting prosecutors absolute immunity from suits charging *Brady* violations,²⁴⁸ and it is this analysis that is pertinent to the assessment of a reward scheme tied to appellate evaluation of *Brady*-type errors. After noting that the single justification for granting prosecutors absolute immunity from liability for defamation is to encourage prosecutors to bring information to the court to resolve a criminal case,²⁴⁹ Justice White went on to explain that "[i]mmunity from a suit based upon a claim that the prosecutor suppressed or withheld evidence would *discourage* precisely the disclosure of evidence sought . . . by the rule granting prosecutors immunity from defamation suits. *Denial* of immunity for unconstitutional withholding of evidence would encourage such disclosure."²⁵⁰ The reasoning behind Justice White's statement is simple: If prosecutors are liable for unconstitutional withholding, the specter of civil suits should provide them with an incentive to disclose in the first instance. Similarly, by denying prosecutors a reward for their failure to disclose to defendants favorable evidence prior to trial, the incentive scheme described here hopes to encourage disclosure.

5. Case Disposition by Plea

One final possible objection to this scheme that cannot be overlooked is the fact that in a great majority of criminal cases review is unattainable, as eighty to ninety percent of criminal cases are resolved by pleas.²⁵¹ Most misconduct leading to pleas never comes to the ap-

245. *Imbler v. Pachtman*, 424 U.S. 409, 441-42 (1976) (White, J., concurring).

246. *Id.* at 433 (White, J., concurring).

247. *Id.* (White, J., concurring).

248. *Id.* at 441-44 (White, J., concurring).

249. *Id.* at 442 (White, J., concurring).

250. *Id.* at 443 (White, J., concurring).

251. *See supra* note 43.

pellate court's attention.²⁵² Of course, that many cases are resolved by pleas would not undermine the benefits of the reward system designed to deter improper argument, for this type of error occurs only at trial. The issue with respect to disclosure, however, is somewhat more difficult to unpack.

The test for a *Brady* violation is an outcome-determinative test. According to the test set out in *Bagley*, a court reviewing a *Brady* claim must ask, after determining that the evidence in question is both suppressed and favorable, "Would this evidence have made a difference at the proceeding?"²⁵³ The rule in *Bagley* is framed around the term "proceeding," which does not automatically preclude the applications of *Brady*'s rule to proceedings other than the trial setting, such as pleas. *Brady* itself applied to the sentencing stage, although there was a jury trial in that case.²⁵⁴ Defendants electing to go to trial are allowed on appeal to challenge the substance of their convictions, provided objections are properly preserved.²⁵⁵ But if a defendant pleads guilty, the plea will withstand almost any challenge on appeal, so long as the plea is intelligent and voluntary.²⁵⁶ Even so, at least three federal courts of appeals have noted that the *Brady* doctrine applies to guilty pleas as well as to trials and sentencing,²⁵⁷ indicating that it is possible for a defendant who pleads guilty to obtain appellate review of his *Brady* claims and, as a consequence, provide the appellate court with an opportunity to generate the information necessary for the prosecutor's supervisor to make a decision regarding the prosecutor's reward as described here.

As a practical matter, it might be somewhat difficult to imagine many contexts in which such an appeal would be possible, despite opinions indicating that at least three federal circuits would accept *Brady* challenges to conviction obtained by pleas. The most likely

252. See *infra* note 256.

253. See *supra* note 226 and accompanying text.

254. *Brady v. Maryland*, 373 U.S. 83, 88-91 (1963).

255. See Fed. R. Crim. P. 52(b) (noting, however, that plain error review may be used even though objections were not brought to the court's attention).

256. The Supreme Court's *Brady* trilogy of cases, *Parker v. North Carolina*, 397 U.S. 790 (1970), *McMann v. Richardson*, 397 U.S. 759 (1970), and *Brady v. United States*, 397 U.S. 742 (1970), hold that if the defendant pleads guilty voluntarily and intelligently, direct inquiry into the merits of the claimed antecedent constitutional violations is foreclosed. It is worth noting that the Court's assessment of voluntariness of a plea is dependent on the presence of counsel for the defendant and also on the effectiveness of counsel. See *Hill v. Lockhart*, 474 U.S. 52, 56, 58-60 (1985).

257. See *White v. United States*, 858 F.2d 416, 421-22 (8th Cir. 1988) (discussing the applicability of *Brady* to an *Alford* plea (citing *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985)), *cert. denied*, 489 U.S. 1029 (1989); *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir.) ("[A] guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution."), *cert. denied*, 488 U.S. 890 (1988). The *Campbell* case ultimately is more equivocal than either *White* or *Miller* about *Brady*'s effect on the validity of a plea. See *Campbell*, 769 F.2d at 322.

context would be a case in which the defendant agreed to an *Alford*²⁵⁸ plea. Because the essence of an *Alford* plea is that a defendant pleads guilty on the basis of his assessment of the prosecution's evidence against him, while maintaining his innocence, the defendant theoretically should be able to argue on appeal that the plea was not voluntary if the prosecution withheld evidence that would have made him change his assessment. A court, moreover, may be convinced after the revelation of suppressed, favorable evidence that there no longer is a factual basis for the defendant's *Alford* plea.²⁵⁹ Typically, however, *Alford* pleas are rare, and many defendants admit in open court to committing the charged offense. Under current rules it would be exceedingly difficult in the usual case for a defendant to argue that his plea was rendered unintelligent and involuntary on the basis of the prosecutor's suppression of favorable evidence. Even excluding the applicability of the reward system keyed to appellate review for numerous cases, the typical defendant is not without protection in the world with rewards that I describe here. The reward system described in part I is designed to influence the prosecutor's charging discretion as well as deter misconduct at trial, so the typical defendant who pleads guilty should enjoy the benefits of the rewards system produced at the beginning of the process though he may elect to waive his right to trial.

I have offered the previous explication of possible objections to highlight potential weaknesses of the plan I propose. However, I do not think any of the weaknesses are great enough to undermine the entire system. Rather, the weaknesses should be evaluated in relationship to the weaknesses of existing methods for combating prosecutorial misconduct. It is extremely difficult to argue that any of the weaknesses I have pointed out makes the scheme I propose any less effective than existing methods of enforcement. Furthermore, I believe that I have shown that rewards could be a useful addition to the limited arsenal of tools available to combat prosecutorial misconduct.

CONCLUSION

I have explained how rewards, specifically financial rewards, could be used to shape a public prosecutor's behavior in desired ways. The innovation I propose is that financial rewards could be used to achieve nuanced outcomes pertaining to prosecutorial charging decisions and the prosecutor's trial conduct. Rather than being motivated to accumulate convictions because they are paid to accumulate them, I argue that rewards could be used to motivate prosecutors to limit their

258. In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court upheld the constitutionality of a guilty plea by a defendant who maintains his innocence so long as there is a factual basis for the plea.

259. See Fed. R. Crim. P. 11(f).

charging discretion in ways that benefit criminal defendants. In turn, these defendants will be able to make decisions about relinquishing their constitutional rights in a more meaningfully voluntary and intelligent manner. Moreover, I argue that shaping a prosecutor's discretion with rewards also will benefit the public by encouraging the prosecutor to make a charging decision at the outset of the case that reflects the evidence and that will stick, because the prosecutor will be reluctant to bargain down.

In a similar vein I propose that financial incentives can be used to motivate public prosecutors to adhere to ethical rules, specifically rules prohibiting prosecutors from making improper arguments at trial and from failing to disclose to the defense evidence favorable to it. The primary benefit of rewarding prosecutors to adhere to ethical rules is that the current system of sanctions for misconduct rarely is enforced, leaving only standards which protect the defendant's constitutional rights. These standards guarantee the defendant only a fair trial, not a perfect one. They are not designed to regulate prosecutors, yet the Constitution in practice seems to be the primary reference of regulation of prosecutorial conduct. Clearly, using the Constitution as the yardstick to measure proper prosecutorial behavior is inadequate. Financial rewards could provide prosecutors with an incentive to achieve higher standards of conduct, embodied in ethical rules, with the constitutional standards providing, as they should, a floor. Even if the reward system outlined here is not efficacious, the analysis in this Article clearly indicates that the current enforcement system is broken and needs to be changed.

The most important feature of this proposal is the fact that it recognizes a primary characteristic of existing prosecutorial culture (the desire to win) and works with that characteristic to motivate prosecutors to internalize additional values. The foundation for this proposal does not rest on the assumption that prosecutors will respond to the reward system because they desire more money. Instead, the proposal rests on the notion that a prosecutor's desire to achieve status and compete with her colleagues will motivate her to alter charging practices and adhere to ethical rules because these behaviors will result in greater recognition and rewards. It is no easy task to strike a balance between the amount of reward necessary to achieve a good signaling effect of proper values to prosecutors and the amount of reward that will simply overcome the signaling function and replace it with an inducement to seek pure financial gains. Such a balancing act requires a careful and thoughtful assessment of the proper goals of the public prosecutor and the prosecutor's role in the criminal justice system. This Article is a start.

It is no doubt true that the devil is in the details. I have not tried to articulate the microscopic details of a system of rewards. I have instead tried as a first step to outline more generally how financial re-

wards could be used for agents of the public sector. Prosecutors have a unique culture that contributes to the problems we perceive in their exercise of discretion and in their trial conduct. Rewards can be used to influence this culture by capitalizing on the values such as winning and competition that prosecutors already think are important and harnessing these values to motivate prosecutors to achieve good behavior.

