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Prosecutorial Ethics in Retrospect

BRUCE A. GREEN*

ABSTRACT

This Essay examines the ethical regulation of prosecutors over the past three decades. The topic is important from the perspective of criminal justice, no less than legal ethics, because prosecutors are centrally responsible for administering the criminal law. Courts assume that the principal role in regulating prosecutors should be played by the states' formal attorney disciplinary processes rather than by civil liability or judicial oversight in criminal cases. However, there has been a well-justified academic and professional consensus that the disciplinary processes fail to fulfill their expected role because, when it comes to prosecutors, ethics rules are neither sufficiently restrictive nor adequately enforced. Consequently, proponents of criminal justice reform seek to hold prosecutors more accountable for conduct that undermines the fairness and reliability of the criminal justice process, in part, by advocating for stricter ethics rules governing prosecutors' work and stricter enforcement of existing rules applicable to prosecutors. Those seeking prosecutorial ethics reform face an uphill battle, however, given the significant political influence of prosecutors, who are armed with a checklist of justifications for opposing efforts to regulate their conduct more strictly through the disciplinary process. Consequently, holding prosecutors more accountable may require either developing and strengthening alternatives to formal discipline or restructuring the process by which ethics rules for prosecutors are fashioned and enforced.

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INTRODUCTION

Recently, proponents of criminal justice reform have sought to hold prosecutors more accountable for conduct that undermines the fairness and reliability of the criminal justice process.[1] Their efforts are fueled in part by the innocence movement, which has shown how prosecutorial misconduct leads to wrongful convictions,[2] and by a general public disillusionment with criminal justice.[3] Although prosecutors might be held accountable in various ways, including through civil liability, ad hoc judicial oversight, and internal self-regulation,[4] courts assume that professional regulation should play the principal role.[5] Building on this understanding, advocates of greater prosecutorial accountability seek, among other things, stricter ethics rules governing prosecutors' work and stricter enforcement of existing rules applicable to prosecutors.[6] But prosecutorial ethics reform faces challenges from prosecutors themselves, who have considerable political clout and can offer abundant arguments against stricter ethics regulation.[7]

In honor of this Journal's impressive thirty-year contribution to the legal ethics scholarship, this Essay examines the ethical regulation of prosecutors since the mid-1980s.[8] This retrospective shows that ethics rules and disciplinary proceedings have not lived up to their promise in overseeing prosecutors. Part I uses a case of a wrongful conviction to illustrate the deficiency of both ethics rules and

1. *See* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016) [hereinafter Green & Yaroshefsky, *Prosecutorial Accountability 2.0*].

2. *See id.* at 93–95; *see also* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399; Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187 (2010).

3. Green & Yaroshefsky, *Prosecutorial Accountability 2.0*, *supra* note 1, at 87–93.

4. *Id.* at 61–66; *see also* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995) [hereinafter Green, *Policing Federal Prosecutors*].

5. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 66 (2011); Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

6. *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 180–83 (2007); Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 ILLINOIS L. REV. 1573 [hereinafter Green, *Prosecutorial Ethics as Usual*].

7. *See infra* Part V.

8. This Essay has also turned into a retrospective of my own scholarship on prosecutors' ethics, written over the same thirty-year period.

their enforcement. Parts II, III, and IV describe how professional conduct rules have been developed, interpreted, and enforced over the past three decades. Finally, Part V discusses the roadblock that prosecutors present to efforts to develop more demanding ethics rules to govern their conduct or to enforce existing rules more strictly. The Essay concludes that more robust regulation of prosecutors' conduct will require strengthening alternative regulatory mechanisms or restructuring the process by which ethics rules for prosecutors are fashioned.

I. THE UNDERLYING STATE OF PROSECUTORIAL ETHICS

Wilton Dedge spent twenty-two years in prison, much of it in solitary confinement, after he was wrongly convicted of brutally raping and assaulting a twenty-year-old Florida woman in her home.[9] He is one of hundreds of innocent people who have been exonerated years after being found guilty.[10] After Dedge's exoneration, Armen Merjian, a civil rights lawyer, published an article exploring in-depth what went wrong in the case in order to illustrate flaws in the criminal justice system in general.[11] One might also ask more specifically in exoneration cases such as this one, "Where were the prosecutors?"[12] In Dedge's case, the inquiry yields insights into the deficiencies of prosecutorial regulation in particular.

As Merjian highlighted, Dedge's case illustrates several recurring evidentiary problems in criminal cases.[13] One, long understood, is the unreliability of eyewitness identifications offered by prosecutors in criminal cases.[14] In the hospital after she was attacked, while her recollection was most recent, the victim said her assailant was at least six feet tall with hazel eyes, but much later she identified Dedge, who was five feet five inches tall with blue eyes, as her assailant.[15] Another problem is the untrustworthiness of much of prosecutors' forensic evidence.[16] At Dedge's trial, a police dog handler was allowed to testify that more than a month after the rape, he conducted a so-called "scent lineup" and

9. Armen H. Merjian, *Anatomy of a Wrongful Conviction:* State v. Dedge *and What It Tells Us About Our Flawed Criminal Justice System*, 13 U. PA. J.L. & SOC. 137 (2009).

10. *See* NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/3A9U-BULX] (last visited Mar. 26, 2017).

11. Merjian, *supra* note 9.

12. *See* Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors?*, 3 TEX. A&M L. REV. 515 (2016); *see also* Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn From Their Lawyers' Mistakes*, 31 CARDOZO L. REV. 2161 (2010).

13. The summary of Dedge's case in Part I of this Essay is based on Armen Merjian's account and critique. *See* Merjian, *supra* note 9.

14. *See, e.g.*, ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979); Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395 (1987).

15. Merjian, *supra* note 9, at 141–43.

16. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 7–9 (2011); NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH

concluded (without advancing any legitimate scientific foundation) that his German Shepherd found a match between Dedge's scent and the scent on the victim's bed sheets.[17] A third problem is the use of perjurious "jailhouse snitch testimony."[18] After Dedge's first conviction was overturned on procedural grounds, the police secured false testimony from a jailhouse informant who, seeking to reduce his sentence, had a prior history of fabricating other inmates' confessions.[19]

In retrospect, while one might blame the witnesses, the police, the trial judge, or the evidence law, the prosecutors deserve blame for convicting and punishing Dedge for a crime he did not commit while letting the actual rapist go unpunished. Prosecutors have a gatekeeping obligation to refrain from prosecuting doubtful cases constructed on unreliable evidence.[20] As Merjian noted, the prosecutors "never should have brought the case in the first place."[21] Nor should they have offered unreliable eyewitness evidence, the dog handler's opinion that lacked a legitimate scientific foundation, or the jailhouse informant's lies—all of which, from a reasonable prosecutor's perspective at the time, should have fostered skepticism. The prosecutors also deserve blame for mischaracterizing forensic evidence regarding a hair found at the crime scene. The prosecutors suggested to the jury that there was a match with Dedge's hair, when the contrary was true: The prosecution's expert found differences between Dedge's hair and the hair found at the crime scene, although the differences were not enough to "entirely eliminate Dedge as a possible source" of the hair.[22]

The prosecutors' conduct over the years following Dedge's trial was no less culpable. Prosecutors' post-trial obligations to rectify injustices are as compelling as their pretrial obligation to avoid injustices.[23] In Dedge's case, however, the

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FORWARD (2009); PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., FORENSIC SCIENCE IN THE CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016).

17. Merjian, *supra* note 9, at 142–43.

18. THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW (2007); *see also* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737 (2016).

19. Merjian, *supra* note 9, at 145–47.

20. *See, e.g.*, Jane Campbell Moriarty, *"Misconvictions," Science, and the Ministers of Justice*, 86 NEB. L. REV. 1 (2007).

21. Merjian, *supra* note 9, at 166.

22. *Id.* at 142–43.

23. *See generally* Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389 (2002); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009) [hereinafter Green & Yaroshefsky, *Post-Conviction Evidence of Innocence*]; Laurie L. Levenson, *The Problem With Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015); David Luban, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1, 15 (2010); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 47–58 (2009); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005).

prosecutors frustrated his lawyers' efforts to show that he was wronged.[24] When the jailhouse informant recanted, prosecutors refused to reconsider the evidence and opposed Dedge's new trial motion.[25] After the advent of DNA analysis, prosecutors denied a request from Innocence Project lawyers to test the hair from the crime scene and vigorously opposed Dedge's attempts in court to secure DNA testing.[26] When the defense finally won this right, and DNA experts concluded that the hair was not Dedge's, prosecutors still fought his release, arguing that it was inconsequential whether the hair belonged to Dedge and that, anyway, even his innocence would not warrant a judicial remedy.[27] After having adamantly resisted DNA testing earlier, the prosecutors prolonged Dedge's incarceration by insisting that new DNA testing techniques be used to test semen from the crime scene. Only after further testing confirmed Dedge's innocence did the prosecutors stop fighting to keep him locked up.[28]

After Dedge won his freedom, his father commented that the state attorneys "should be disbarred, and they should spend time in jail."[29] This was not unreasonable. The public might expect there to be repercussions, and perhaps even criminal liability, for prosecutors who acted with others to put an innocent man behind bars and keep him there. One might wonder, at the very least, why there was no professional discipline—not even a public admonition. Were there no relevant ethics rules? Were disciplinary authorities indifferent?

Dedge's case illustrates how ethics rules fall short. Even if the prosecutors were personally convinced that Dedge was innocent, the ethics rules allowed them to prosecute Dedge, argue that he was guilty, and leave it to the jury to decide his fate, as long as there was "probable cause."[30] Moreover, even if the prosecutors disbelieved the victim's identification of Dedge, the dog handler's dog-sniff identification, and the jailhouse informant's account, and even if any reasonable prosecutor would have found all of this evidence incredible, the rules permitted prosecutors to put any or all of it before the jury.[31] Trial lawyers

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24. This is not an unusual reaction by prosecutors in exoneration cases. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

25. Merjian, *supra* note 9, at 146–48.

26. *Id.* at 150–56.

27. *Id.* at 155–59.

28. *Id.* at 159–60.

29. *Id.* at 161.

30. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2016) [hereinafter MODEL RULES] (requiring prosecutors to refrain from prosecuting charges they know are not supported by probable cause). *See generally* Green & Yaroshefsky, *Post-Conviction Evidence of Innocence*, *supra* note 23, at 497–502 (comparing "probable cause" standard with more demanding standards that some prosecutors voluntarily employ in their gatekeeping role).

31. With respect to informants in particular, the ethics rules allow prosecutors to engage in conduct that tends to foster false testimony while concealing having done so. While generally restraining advocates from offering inducements to fact witnesses that may influence their testimony, prosecutors may expressly or tacitly promise their informants leniency in exchange for testifying. *See, e.g.*, R. Michael Cassidy, *"Soft Words of Hope":* Giglio, *Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. L. REV. 1129 (2004). As long as

generally may offer testimony and other evidence as long as they do not *know* it to be false, and shockingly, the rules impose no higher standard on prosecutors to ensure that their evidence is truthful and reliable.[32] And years later, the prosecutors could oppose Dedge's post-conviction applications even if the prosecutors were, or reasonably should have been, entirely convinced of his innocence, as Florida had not adopted a proposed rule, ABA Model Rule 3.8(h), which would have required prosecutors to remedy wrongful convictions when there was clear and convincing evidence that the defendant was innocent.[33]

Dedge's case also illustrates the failure of ethics enforcement. Prosecutors are professionally blameworthy in many of the cases where innocent defendants have been convicted and punished.[34] At the very least, the prosecutors might be sanctioned for their incompetence in putting an innocent man in prison and then fighting to keep him there, insofar as they acted unreasonably.[35] Alternatively, the prosecutors might be sanctioned for engaging in "conduct prejudicial to the administration of justice," for undertaking a course of conduct resulting in punishing an innocent man for more than two decades. But disciplinary authorities rarely if ever seek to punish prosecutors for unreasonable conduct in cases like Dedge's.

A prosecutor's job is to seek justice, which means, among other things, avoiding the punishment of innocent people and rectifying wrongful convictions.[36] Professional regulation is supposed to ensure that lawyers—prosecutors among them—do their jobs. But prosecutorial regulation has never adequately ensured that prosecutors protect innocent people from wrongful punishment and

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prosecutors do not intentionally or knowingly elicit perjury, prosecutors may exploit their power and leverage to obtain testimony that supports their theory of the case and use other interviewing techniques that are as likely to elicit false testimony as truthful testimony. *See generally* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999). Prosecutors have no obligation to record their meetings with informants or to provide the recordings to the defense to enable it to expose how the informant may have been induced to lie. *See generally* Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257 (2005).

32. *See* MODEL RULES R. 3.3(3); *cf.* STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-6.6(a) (Am. Bar Ass'n 4th ed. 2015) [hereinafter ABA PROSECUTION STANDARDS] ("The prosecutor should not offer evidence that the prosecutor does not reasonably believe to be true, whether by documents, tangible evidence, or the testimony of witnesses. When a prosecutor has reason to doubt the truth or accuracy of particular evidence, the prosecutor should take reasonable steps to determine that the evidence is reliable, or not present it."). *See generally* Green & Yaroshefsky, *Prosecutorial Accountability 2.0*, *supra* note 1, at 59 & n.42.

33. *See* MODEL RULES R. 3.8(g), 3.8(h) (addressing prosecutors' post-conviction obligations upon learning new exculpatory information); *infra* notes 74–79 and accompanying text (discussing Rule 3.8(g), 3.8(h)).

34. *See generally* BRYAN STEVENSON, JUST MERCY (2014).

35. *See* MODEL RULES R. 1.1 (duty of competence); R. 3.8, cmt. 1 ("Competent representation of the sovereignty may require the prosecutor to undertake some procedural and remedial measures as a matter of obligation."). *See generally* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009) [hereinafter Zacharias & Green, *Duty to Avoid Wrongful Convictions*].

36. MODEL RULES R. 3.8 cmt. 1; *see infra* notes 39–46 and accompanying text.

otherwise seek justice. Professional conduct rules overlook a range of prosecutorial conduct that undermines the fairness and reliability of criminal proceedings.[37] And disciplinary authorities often overlook prosecutorial misconduct even when it could be punished under existing rules.[38]

In theory, the ethical regulation of prosecutors can be strengthened in any of three ways: (1) Courts can adopt additional rules governing prosecutors' professional conduct or amend current rules to make them more demanding; (2) courts can interpret the existing rules to demand more from prosecutors; and (3) state-court disciplinary authorities, which seek to discipline lawyers who violate the state's professional conduct rules, can enforce existing rules more rigorously in cases of prosecutorial misconduct. But over the past three decades, as the next three Parts describe, advances have been minor and sporadic.

II. RULES REGULATING PROSECUTORS

The organized bar is generally skeptical of the idea that standards of conduct should differ depending on what type of law lawyers practice.[39] The bar makes an exception for prosecutors, however. Prosecutors have long been thought to have a distinctive responsibility "to see that justice is done."[40] Among other things, this means that, in some respects, prosecutors have more demanding professional obligations than other advocates—for example, a more demanding duty of candor,[41] and a heightened obligation to promote fair processes and reliable outcomes.[42] Further, prosecutors necessarily have some additional professional obligations simply because their job is different—for example, prosecutors have professional obligations relating to their unique decisions about bringing charges and plea bargaining.[43] Of course, the idea of "seeking justice" is vague and, in itself, does not tell prosecutors how to answer tough questions in these and other

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37. *See infra* Part II.

38. *See infra* Part IV.

39. *See generally* Bruce A. Green, *Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?*, 29 GEO. J. LEGAL ETHICS 527 (2016) [hereinafter Green, *Specialized Ethics Code*].

40. CANONS OF PROF'L ETHICS Canon 5 (1908) [hereinafter 1908 CANONS]. *See generally* Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301 (1996); Bennett L. Gershman, *The Zealous Prosecutor As Minister of Justice*, 48 SAN DIEGO L. REV. 151 (2011); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999) [hereinafter Green, *"Seek Justice"?*]; Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337 (2004).

41. ABA PROSECUTION STANDARDS, Standard 3-1.4(a) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations."). *See generally* Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105 (2016) [hereinafter Green, *Candor*].

42. *See* MODEL RULES R. 3.8 cmt. 1.

43. *See* Green & Levine, *supra* note 6, at 152–55 (discussing application of ethics rules to prosecutors' charging decisions).

contexts.[44]

There is an expanding academic literature exploring how prosecutors should conduct their work in light of their heightened and special obligations. Many of the writings address how prosecutors should resolve particular ethics issues that may arise in individual criminal cases.[45] Academic writings have also begun to focus on how prosecutors, as public officials, should address systemic problems such as underfunding of criminal defense, excessive sentencing and prison overcrowding, and how prosecutors should otherwise seek public-interested law reform.[46]

One might expect rule drafters to make a comparable effort to give specific, concrete meaning to prosecutors' distinctive professional obligations. After all, leaving it to prosecutors to decide for themselves what it means to "seek justice" in any given situation is a doomed regulatory strategy if one wants prosecutors to get the right answer and act accordingly.[47] History shows that in the absence of disciplinary regulation, many prosecutors will be indifferent to the idea of "seeking justice," even when courts and legal ethicists espouse the concept.[48] For instance, it is not always easy to convince prosecutors that, as a matter of self-restraint, they should forego doing what the laws and rules permit to convict people they think are guilty.[49] And even prosecutors committed to self-regulation may lack sufficient time and objectivity to intuit what "seeking justice" entails in the rough and tumble of a fast-moving criminal prosecution.

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44. *See* Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of Charging Discretion*, 20 FORDHAM URB. L.J. 513, 519 (1993); Green, *"Seek Justice"?*, *supra* note 40, at 622; Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1030 (2012).

45. *See generally, e.g.*, R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635 (2006) [hereinafter Cassidy, *Character and Context*]; Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67 (2008); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

46. *See* R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 983 (2014). *See generally, e.g.*, Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063 (2016); Bruce A. Green, *Criminal Neglect: Indigent Defense from an Ethics Perspective*, 52 EMORY L.J. 1169 (2003); Bruce A. Green, Gideon*'s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336 (2013).

47. Some critics of the *Model Rules* have suggested that lawyers should generally have more leeway to resolve their ethical problems on their own, but there is nothing to suggest that lawyers were more ethical in the days when there was less professional regulation. In general, arguments for more professional guidance seem more compelling. *See generally* Green, *Specialized Ethics Code*, *supra* note 39.

48. *See generally* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309 (2002).

49. *See, e.g.*, Bruce A. Green & Ellen Yaroshefsky, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 269, 274 (Leslie C. Levin & Lynn Mather eds., 2012) (noting disparity on prosecutors' discovery policies which, in some offices, are limited to what the law requires).

For the most part, prosecutors are governed by precisely the same rules as other advocates.[50] The generally applicable provisions do not address aspects of prosecutorial conduct, such as charging and plea bargaining, that are unique to criminal prosecution. Further, the one-size-fits-all rules often fit prosecutors badly. As Dedge's case illustrates, it is wrong to treat prosecutors like ordinary advocates when it comes to offering evidence and testimony of questionable reliability and veracity; prosecutors should not have license to offer unreliable, incredible evidence simply because they do not *know* it is false.[51] The threshold is also too low for prosecutors when it comes to filing motions and making legal arguments: anything goes as long as prosecutors' legal and factual assertions are not frivolous.[52] Even if other advocates can do so, it is wrong for prosecutors to make baseless (albeit not "frivolous") arguments for strategic benefit—for example, unfounded disqualification and sanctions motions that needlessly consume defense lawyers' time and resources and potentially undermine defendants' trust in their lawyers. Compounding the problem of prosecutors' unmeritorious (though not necessarily frivolous) arguments is that courts, understanding prosecutors to be "ministers of justice," often give prosecutors the benefit of the doubt.[53]

The ABA *Model Rules of Professional Conduct* include one rule specifically targeted at prosecutors, Rule 3.8, titled "Special Responsibilities of a Prosecutor." It is where one would hope to find more rigorous obligations than the ones set forth in the generally applicable rules, as well as find standards of conduct for aspects of prosecutors' work that are unique. But Rule 3.8 barely scratches the surface.[54] This is unsurprising because rule drafters have developed Rule 3.8 piecemeal over time rather than systematically studying prosecutors' conduct to determine what obligations and restrictions are warranted.

As of 1986, Rule 3.8 had five provisions, two of which, sections (a) and (d), were carried over from the ABA *Model Code of Professional Responsibility*.[55] Model Rule 3.8(a), forbidding the prosecution of a charge that the prosecutor knows is not supported by probable cause, codifies one constitutional restriction

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50. *See, e.g.*, MODEL RULES R. 3.1–3.7, 4.1–4.4, 8.2–8.4. The significant exceptions are Rule 1.11, which governs government lawyers' conflicts of interest, and Rule 3.8, titled "Special Responsibilities of a Prosecutor."

51. MODEL RULES R. 3.3; *see supra* note 32 and accompanying text; *see also* Green, *Prosecutorial Ethics as Usual*, *supra* note 6, at 1596; Green & Yaroshefsky, *Prosecutorial Accountability 2.0*, *supra* note 1, at 59 n.42.

52. MODEL RULES R. 3.1.

53. *Cf.* Rice v. Collins, 546 U.S. 333, 337 (2006) (trial judge gave prosecutor the benefit of the doubt regarding the reasons for exercising a peremptory challenge).

54. *See generally* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Samuel C. Damren, *The Special Responsibilities of the Prosecutor with Respect to Crime Labs, Plea Agreements, Trial Evidence, Impaired Defense Counsel and* Brady, CRIM. L. BRIEF, Spring 2013, at 2; Green, *Prosecutorial Ethics as Usual*, *supra* note 6; Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009).

55. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(A), (B) (1980).

on prosecutors' exercise of the power to bring criminal charges.[56] Otherwise, Model Rule 3.8 leaves charging and plea bargaining to prosecutors' discretion.[57] Model Rule 3.8(d) requires the disclosure of "evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" or the sentence. On its face, this provision demands more than the due process decisions beginning with *Brady v. Maryland*[58] that require prosecutors to disclose "material" exculpatory and impeachment evidence.[59] But, as of the mid-1980s, courts and disciplinary agencies essentially ignored the provision, and so prosecutors did too.

The other three provisions, originating in the *Model Rules*, were similarly inconsequential. To the extent that states adopted them—and not all states did—they have rarely been taken seriously by courts or enforced in disciplinary proceedings. One provision requires prosecutors to give defendants an opportunity to obtain counsel.[60] Another forbids prosecutors from seeking waivers of certain pretrial rights from unrepresented defendants,[61] while not addressing the more common and consequential practice of seeking waivers of trial and post-conviction rights.[62] The third provision calls on prosecutors to attempt to restrain their investigators and employees from violating the rule regulating prosecutors' out-of-court statements in the media.[63] This adds little to existing rules requiring all lawyers to take reasonable steps to prevent subordinates from engaging in ethical misconduct.[64]

Some commentators have envisioned the possibility that Rule 3.8 be reviewed and comprehensively amended, or that the existing rules be supplemented by a specialized ethics code for prosecutors, to more fully codify the unique and more demanding normative expectations for prosecutors' conduct.[65] But the ABA has added to the rule only modestly over the past three decades.

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56. Green, *Prosecutorial Ethics as Usual*, *supra* note 6, at 1587–91.

57. *See generally* Brandon K. Crase, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475 (2007). Several states have added additional restrictions on prosecutors' exercise of charging power. *See* Green & Levine, *supra* note 6, at 152.

58. 373 U.S. 83 (1963).

59. *See, e.g.*, Cone v. Bell, 556 U.S. 449, 470 n.15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations.").

60. MODEL RULES R. 3.8(b); *see* MODEL RULES OF PROF'L CONDUCT (1983) [hereinafter 1983 MODEL RULES].

61. MODEL RULES R. 3.8(c); *see* 1983 MODEL RULES.

62. *See infra* notes 110–16 and accompanying text.

63. MODEL RULES R. 3.8(f); *see* 1983 MODEL RULES. This provision was originally Rule 3.8(e) but later combined with a later-added restriction on out-of-court speech.

64. MODEL RULES R. 5.2; *see also* MODEL RULES R. 8.4(a).

65. *See, e.g.*, Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 963 (1996) (advocating the adoption of clear standards for prosecutors to reflect their distinctive role); Kuckes, *supra* note 54, at 462 ("Meaningful reform in the prosecutorial ethics rule may finally be within reach, if ethics regulators can learn the lessons from

Most controversially, the ABA added a new provision in 1990 to address prosecutors' practice of issuing grand jury subpoenas to lawyers for testimony concerning their current or past clients.[66] Federal prosecutors had increasingly begun employing this investigative measure, principally in conspiracy cases. For example, in narcotics and organized crime cases, when criminal defendants without a legitimate source of income came to court with private lawyers, prosecutors sometimes questioned the lawyers about how their legal fees were paid and by whom. The lawyers' grand jury testimony was of potential investigative or evidentiary value—for example, it might establish whether the client was paying legal fees with ill-gotten gain, or whether he had a benefactor who was engaged in conspiratorial wrongdoing.[67] Although the fee information sought by prosecutors was not necessarily protected by the attorney-client privilege, defense lawyers complained that prosecutors were improperly intruding into the attorney-client relationship and undermining clients' trust in their lawyers. The *Model Rules* provision, based on a Massachusetts counterpart, required prosecutors to obtain court approval and to exhaust other options before subpoenaing a lawyer to testify before the grand jury about a client. Federal prosecutors aggressively opposed states' adoption of the provision, and in various jurisdictions where it was adopted, they initiated lawsuits to bar its enforcement, arguing that the provision unduly interferes with the prerogatives of the federal grand jury. In 1994, after the Third Circuit struck down a state attorney-subpoena restriction based on the ABA model, the ABA attempted to deflect further legal challenges by amending its version of the attorney-subpoena restriction to remove the requirement of judicial approval. However, the rule has still been successfully challenged for unduly interfering with the federal grand jury's independence.[68] Although many states have Rule 3.8(e) on the books,[69] it is questionable whether the provision has an impact in the federal grand jury investigations at which it was principally directed.

While achieving little from a regulatory perspective, the battle over the attorney-subpoena restriction fueled prosecutors' antagonism toward the ABA.[70] Prosecutors point to the provision as one among several items of evidence to support their impression that the ABA has been captured by the criminal

Ethics 2000—that there is the political will among many leaders within the criminal justice community to tackle the rules governing prosecutorial ethics, but a patient, persistent, and inclusive process is critical."); *supra* note 6 and accompanying text.

66. *See generally* Max D. Stern & David A. Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783 (1988); Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917 (1992).

67. *See* Stern v. U.S. Dist. Court, 214 F.3d 4, 18 (1st Cir. 2000).

68. *See generally* United States v. Supreme Court of N.M., 839 F.3d 888 (10th Cir. 2016); *Stern*, 214 F.3d at 4.

69. *See* Kuckes, *supra* note 54, at 445–50.

70. *See generally* Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. PITT. L. REV. 515 (1992).

defense bar.[71]

In 1994, the earlier restrictions on extra-judicial communications were supplemented by a provision restricting prosecutors from making public statements that would heighten condemnation of the accused.[72] The provision has rarely been noted and even more rarely enforced through discipline, even though transgressions are publicly conspicuous. For example, no public discipline followed when U.S. Attorney Patrick Fitzgerald announced that Illinois Governor Rod Blagojevich's alleged conduct "would make Lincoln roll over in his grave,"[73] or when U.S. Attorney Preet Bharara made extensive public comments about government corruption while his office was pursuing a high-profile corruption case.[74] Given the spectacle of highly regarded prosecutors publicly ignoring the ethics rule with impunity, one cannot avoid deducing that ethical restraints on prosecutors' extrajudicial statements are precatory, toothless, or in the internet era, obsolete.[75]

When the ABA's Ethics 2000 Commission set to work from 1997 to 2002 to comprehensively review and amend the *Model Rules*, it essentially left Rule 3.8 untouched. The ABA received proposals for new rules to codify conventional understandings about how prosecutors should conduct their work. However, prior battles with prosecutors had made the ABA gun-shy. It made a deliberate decision to stay away from prosecutorial ethics reform in order to avoid further debate and controversy and to try to restore prosecutors' confidence.[76]

The ABA rule drafters did not return to Rule 3.8 until 2008, when, in the wake of the innocence movement, they added the current Rules 3.8(g) and (h), which address prosecutors' post-conviction duties.[77] Rule 3.8(g) requires prosecutors to reexamine a conviction when they receive substantial new evidence of innocence and to disclose the evidence to the defense, while Rule 3.8(h) requires them to seek a remedy when it becomes clear from their review that their office convicted an innocent person.

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71. *See* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 875 (2012) [hereinafter Green, *Prosecutors and Professional Regulation*]; Green, *Prosecutorial Ethics as Usual*, *supra* note 6, at 1585. Prosecutors also took issue with a comment to Rule 3.8 that indicated that prosecutors had a duty to present exculpatory evidence to the grand jury. *Id.* at 1581 (citing 1983 MODEL RULES R. 3.8 cmt. 1).

72. This was initially Rule 3.8(g). The two earlier provisions are now combined into the current Model Rule 3.8(f).

73. Victoria Toensing, *Fitzgerald Should Keep His Opinions to Himself*, WALL ST. J., Dec. 13, 2008.

74. *See* United States v. Silver, 103 F. Supp. 3d 370, 373 (2015) (denying former public official's motion to dismiss indictment, but observing: "the Court does not condone the Government's brinksmanship relative to the Defendant's fair trial rights or the media blitz orchestrated by the U.S. Attorney's Office in the days following Mr. Silver's arrest").

75. *See generally* Emily Anne Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367 (2015).

76. *See* Green, *Prosecutorial Ethics as Usual*, *supra* note 6, at 1585–87.

77. *See generally* Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309 (2010).

The ABA rule drafters did not expect these provisions to meet resistance and, indeed, when they were circulated for comment, prosecutors had no substantial normative objections, only suggestions for re-wording. The provisions basically accord with professional and judicial expectations that prosecutors will not ignore evidence of a wrongful conviction.[78] No prosecutor seriously argued that the public interest in finality outweighed the need to look at significant new evidence that raises serious doubts about an inmate's guilt. Over the course of the lengthy ABA revision and adoption process, the drafters (myself among them) sought to accommodate prosecutors' concerns about wording while reminding them that the provisions were only models and could be modified by states in light of their distinctive laws, processes, and traditions. The drafters also emphasized that the provisions were not meant to target "well-intentioned prosecutors who make considered judgments" about whether to reopen investigations or support motions to overturn convictions.[79] In a further attempt to win over prosecutors, the drafters added an unusual comment stating that prosecutors do not violate these provisions when they conclude erroneously, but in good faith, that new exculpatory evidence does not trigger their duty to act.[80]

Even so, some (though not all) federal and state prosecutors subsequently opposed states' adoption of these provisions, typically interposing theoretical arguments against judicial oversight or predicting that the floodgates would open to frivolous disciplinary complaints.[81] Lawmakers, including courts, traditionally give significant deference to prosecutors' views about how new laws will affect their work. Nonetheless, by mid-2017, seventeen jurisdictions had adopted Rules 3.8(g) and (h) or a modified version.[82] None subsequently reported that prosecutors' earlier fears were substantiated. This has not quelled prosecutors' opposition, however. The Department of Justice (DOJ) still refuses to endorse the ABA model provisions or to offer its own alternatives to give concrete ethical expression to prosecutors' inarguable duty "to rectify the conviction of innocent persons."[83] Many state prosecutors follow the DOJ's lead.[84]

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78. *See, e.g.*, Warney v. Monroe Cty., 587 F.3d 113, 125 n.15 (2d Cir. 2009).

79. Stephen A. Saltzburg, *Changes to Model Rules Impact Prosecutors*, CRIM. JUST., Spring 2008, at 14.

80. MODEL RULES R. 3.8 cmt. 9.

81. *See* Green, *Prosecutors and Professional Regulation*, *supra* note 71, at 891–93.

82. *See* AM. BAR. ASS'N, CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 3.8(G) AND (H) (Mar. 29, 2017), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.authcheckdam.pdf [https://perma.cc/DH3D-A6SH] (Arkansas, Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Massachusetts, New Mexico, New York, North Carolina, North Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming). As of the end of 2016, authorities in five other jurisdictions—California, the District of Columbia, Nebraska, Pennsylvania, and Vermont—were considering whether to adopt these or comparable provisions. *Id.*

83. MODEL RULES R. 3.8 cmt. 1.

84. For example, in 2012, comments opposing the amendment of the Arizona rules to add provisions based on Model Rules 3.8(g) and (h) were filed in the Arizona Supreme Court not only by the U.S. Attorney's Office for the District of Arizona, but also by the Arizona Prosecuting Attorneys' Advisory Council, the Maricopa

To some extent, the ABA seeks to compensate for the deficiency of the rules by adopting legally-unenforceable "standards"—the ABA *Prosecution Function Standards*[85]—that reflect the organization's view of how good prosecutors should generally behave.[86] But these "aspirational" bar association guidelines do not ensure that prosecutors will "seek justice" throughout their work. There is nothing to suggest that prosecutors are generally aware of them and accept them as expressions of how prosecutors should generally behave. Although courts occasionally cite them, there is no evidence that many courts actively encourage prosecutors to abide by them. Moreover, one might question whether the *Standards* are sufficiently demanding even as a collection of purely aspirational guidelines.[87]

III. INTERPRETATIONS OF RULES REGULATING PROSECUTORS

In theory, courts could demand more of prosecutors under generally applicable rules, given prosecutors' unique duty to seek justice. This is true, in part, because some rules are extremely open-textured. For example, a rule forbidding "conduct

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County Attorney, and the Pima County Attorney. *See R-11-0033 Petition to Amend ER 3.8, Rule 42, Arizona Rules of the Supreme Court*, ARIZ. COURT RULES FORUM, https://www.azcourts.gov/Rules-Forum/aft/322 [https://perma.cc/RFC6-9NQ7] (last updated Oct. 28, 2013). In 2016, similar proposed provisions were opposed by the North Carolina Conference of District Attorneys on behalf of forty-four District Attorneys of that state. Letter from Andrew Murray, N.C. Conference of Dist. Attorneys, to Alice Mine, N.C. State Bar (June 24, 2016) (on file with author).

85. ABA PROSECUTION STANDARDS. *See generally* Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093 (2011); Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111 (2011).

86. *See, e.g.*, ABA PROSECUTION STANDARDS, Standard 3-4.3(a) ("A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that . . . admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."); ABA PROSECUTION STANDARDS, Standard 3-5.4(g) ("A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused."); ABA PROSECUTION STANDARDS, Standard 3-6.6(a) ("The prosecutor should not offer evidence that the prosecutor does not reasonably believe to be true, whether by documents, tangible evidence, or the testimony of witnesses. When a prosecutor has reason to doubt the truth or accuracy of particular evidence, the prosecutor should take reasonable steps to determine that the evidence is reliable, or not present it.").

87. For example, Standard 3-6.8(a) provides: "The prosecutor may argue all reasonable inferences from the evidence in the record, unless the prosecutor knows an inference to be false." ABA PROSECUTION STANDARDS, Standard 3-6.8(a). One might question whether, accepting their role as gatekeepers, prosecutors should argue inferences that they reasonably believe, but do not personally know, to be false. Standard 3-4.3(d) provides: "A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence." ABA PROSECUTION STANDARDS, Standard 3-4.3(d). This standard also seems to give inadequate weight to prosecutors' role in ensuring the reliability of the criminal process. *Cf.* RUSSELL G. PEARCE ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 668 (2d ed. 2014) ("[F]or generations, before determining whether a case should proceed to trial, felony prosecutors in New York County have insisted that they be personally convinced beyond a reasonable doubt of the defendant's guilt, and believe themselves able to prove that guilt to a jury.") (quoting prosecution's motion to dismiss indictment in *People v. Strauss-Kahn* (2011)).

that is prejudicial to the administration of justice"[88] gives courts wide latitude to proscribe conduct that undermines the fairness or reliability of the adversarial process. But even when interpreting less vague rules, courts have considerable discretion because courts themselves adopt the ethics rules and are therefore not required by separation-of-powers principles to honor the drafters' intent as courts are when interpreting legislation.[89]

But courts are often inclined to go in the opposite direction—to interpret rules less restrictively for prosecutors—out of deference to prosecutors' judgment about the exigencies of their work.[90] For example, lawyers are generally forbidden from providing inducements to witnesses in exchange for their testimony.[91] But prosecutors are substantially exempted from this restriction.[92] Courts defer to prosecutors' customary practice of securing accomplice witnesses' testimony by giving them immunity from prosecution, reducing criminal charges, or limiting their punishment. Because prosecutors can void cooperation agreements if they disbelieve cooperating witnesses, these witnesses have powerful incentives to tell prosecutors what they want or expect to hear.[93]

The professional conduct rules forbidding false statements and dishonest and deceitful conduct offer another example of prosecutorial exceptionalism.[94] In general, the ethics rules foreclose lawyers and their agents from lying or engaging in deceit,[95] and in some respects prosecutors are expected to be more candid than other lawyers.[96] But courts do not apply these restrictions to prosecutors who authorize their agents to engage in trickery to obtain confessions and other inculpatory evidence.[97]

Most controversially, courts interpret state counterparts to Model Rule 4.2, the no-contact rule, more liberally with regard to prosecutors.[98] In general, lawyers and their investigators may not question someone who is represented by counsel in the matter.[99] But courts generally hold that, at least prior to the formal commencement of criminal proceedings, prosecutors may send investigators to speak with witnesses and suspects who are represented in connection with the

88. MODEL RULES R. 8.4(d).

89. *See generally* Green & Levine, *supra* note 6, at 150 nn.42–43.

90. *See generally* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000) [hereinafter Zacharias & Green, *Uniqueness of Federal Prosecutors*].

91. *See* MODEL RULES R. 3.4(b) (forbidding inducements to witnesses that are forbidden by law). *See generally* Bruce A. Green, *There but for Fortune: Real-Life vs. Fictional "Case Studies" in Legal Ethics*, 69 FORDHAM L. REV. 977 (2000).

92. *See* Zacharias & Green, *Uniqueness of Federal Prosecutors*, *supra* note 90, at 221.

93. *See* Yaroshefsky, *supra* note 31, at 952–53.

94. *See* MODEL RULES R. 4.1, 8.4(c).

95. *See* MODEL RULES R. 8.4(a), (c).

96. *See generally* Green, *Candor*, *supra* note 41, at 1115–19.

97. *See* Zacharias & Green, *Uniqueness of Federal Prosecutors*, *supra* note 90, at 221–22; *cf.* Joel Cohen, *When a Detective Deceives—And the Lawyer Knows It*, N.Y. L.J., Dec. 12, 2016.

98. *See* Zacharias & Green, *Uniqueness of Federal Prosecutors*, *supra* note 90, at 219–20.

99. MODEL RULES R. 4.2.

investigation.[100]

The question of whether the no-contact rule restrains prosecutors' investigative activities sparked controversy in the 1980s and '90s. Concerned that courts were beginning to apply the rule more seriously to prosecutors, the Department of Justice took the position in the so-called Thornburgh Memo that its prosecutors were not subject to the no-contact rule and then issued a regulation early in Attorney General Janet Reno's tenure that was meant to substitute for the rule.[101] At least momentarily, congressional and judicial confidence in the DOJ diminished as a result. While litigation ensued over the legal effectiveness of the DOJ regulation, Congress mooted the question by adopting legislation, known as the McDade Amendment, providing that federal prosecutors were subject to the ethics rules of the states in which they worked.[102] While confirming that federal prosecutors, as lawyers, were subject to courts' supervisory authority over the bar,[103] the federal law changed little as far as the no-contact rule was concerned, because courts generally did not read the rule more strictly, as the DOJ feared they might.[104] Further, in a fence-mending effort, the ABA adopted a comment to Model Rule 4.2 acknowledging judicial decisions that authorize prosecutors and their agents to question represented suspects during investigations.[105]

That said, in the past three decades courts have occasionally applied ethics rules to prosecutors to impose meaningful obligations and restrictions beyond those established by constitutional or statutory law or criminal procedure rules. Most importantly, while courts, disciplinary authorities, and prosecutors have sometimes tended to ignore the plain meaning of Rule 3.8(d), as discussed above, several courts have interpreted Rule 3.8(d) in accordance with its plain language, which requires prosecutors to disclose favorable evidence in their possession without regard to its materiality and to do so with reasonable promptness before trial.[106] This contrasts with the constitutional case law under the *Brady v.*

100. *See, e.g.*, United States v. Sabean, No. 2:15-CR-175-GZS, 2016 WL 5721135, at *4 (D. Me. Oct. 3, 2016).

101. For a discussion of this history, see generally Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460 (1996).

102. *See generally* Zacharias & Green, *Uniqueness of Federal Prosecutors*, *supra* note 90; Rima Sirota, *Reassessing the Citizens Protection Act: A Good Thing It Passed, and a Good Thing It Failed*, 43 SW. L. REV. 51 (2013).

103. For discussion of courts' supervisory authority to regulate federal prosecutors, see generally Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002).

104. *See, e.g.*, United States v. Balter, 91 F.3d 427, 435 (3d Cir. 1996); United States v. Grass, 239 F. Supp. 2d 535, 549 (M.D. Pa. 2003); United States v. Ward, 895 F. Supp. 1000, 1003–06 (N.D. Ill. 1995). *But see* United States v. Koerber, 966 F. Supp. 2d 1207, 1225–34 (D. Utah 2013).

105. MODEL RULES R. 4.2 cmt. 5.

106. *See generally, e.g.*, *In re* Kline, 113 A.3d 202 (D.C. App. 2015); *In re* Disciplinary Action Against Feland, 820 N.W.2d 672 (2012); *In re* Larsen, 379 P.3d 1209 (2016). The court opinions follow the lead of bar association ethics opinions. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009); NYS Bar Ass'n Comm. on Prof'l Ethics, Op. 2016-3 (2016). *See generally* Green & Levine, *supra* note 6, at

Maryland line of constitutional decisions, which hold that a conviction will not be set aside for a prosecutor's failure to disclose exculpatory and impeachment evidence unless it was "material" in the sense that its disclosure might have led to an acquittal.[107] That several courts seemed to strike an important blow simply by reading Rule 3.8(d) to mean what it says suggests how deferential courts have usually been to prosecutors. And the battle is still joined, because a relatively equal number of courts have neutered Rule 3.8(d) by interpreting it to add nothing to the constitutional case law, despite plain language to the contrary.[108] Notably, in disciplinary cases against federal prosecutors in Massachusetts and the District of Columbia, the DOJ has endorsed this approach.[109]

Also of note, several decisions have held prosecutorial conduct to be "prejudicial to the administration of justice"[110] or otherwise punishable when it appears to be grossly unfair even if not contrary to a specific rule.[111] Most significantly, following the lead of various bar association ethics committees, the Kentucky Supreme Court ruled it to be improper for federal prosecutors to negotiate, as a condition of a favorable plea bargain, for the defendant to waive a future ineffective assistance of counsel claim.[112] The court reasoned that making this waiver a condition of a plea agreement poses a conflict of interest for the defense lawyer, who will have a self-interest in encouraging the defendant to waive an ineffectiveness claim, especially if such a claim were viable.[113] The Kentucky decision led the DOJ to change its plea bargaining policy to cease the waiver practice nationally.[114]

But at the same time, courts have allowed prosecutors to use their leverage in plea bargaining to obtain waivers of procedural rights that are equally consequential—in particular, waivers of appellate and post-conviction challenges to illegal sentences or to prosecutorial misconduct (such as discovery violations) that only later come to light.[115] Courts have not been troubled by the argument "that these

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162–63; Bruce A. Green, *Prosecutors' Ethical Duty of Disclosure In Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 57 (2011); Kirsten M. Schimpff, *Rule 3.8, The Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729 (2012).

107. *See generally* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 645–47 (2013).

108. *See generally, e.g.*, Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125 (Ohio 2010); Okla. Bar Ass'n v. Ward, 353 P.3d 509 (2015).

109. *See* Green & Levine, *supra* note 6, at 162 n.116 (citing DOJ amicus).

110. *See* MODEL RULES R. 8.4(d).

111. *See* Green & Levine, *supra* note 6, at 176–80.

112. United States v. Ky. Bar Ass'n, 439 S.W.3d 136, 157–58 (Ky. 2014).

113. *Id.*

114. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, Department Policy on Waivers of Claims of Ineffective Assistance of Counsel (Oct. 14, 2014), http://pdfserver.amlaw.com/nlj/DOJ_Ineffective_Assistance_Counsel.pdf [https://perma.cc/SK57-NUJL].

115. Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After* Cooper *and* Frye*: Is the Supreme Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable . . . in Pursuit of Perfect Justice"?*, 51 DUQUESNE L. REV. 735, 742–44 (2013).

waivers reflect an abuse of prosecutorial power, given the public interest in ensuring that criminal proceedings are fair and that significant procedural errors are corrected."[116]

In sum, courts have done relatively little over the past thirty years to compensate for the limited reach of the ethics rules by interpreting them to give fuller expression to the "duty to seek justice." With rare exception, courts remain deferential to prosecutors, even interpreting the rules to be less demanding in some respects with regard to prosecutors' work.

IV. ENFORCEMENT OF ETHICS RULES

In the academic literature on the regulation of prosecutors, it is virtually a truism that disciplinary authorities do not take prosecutorial misconduct seriously enough.[117] The debate is mostly over just how bad disciplinary enforcement has been. This is hard to answer because of the opacity of most disciplinary systems. One can only speculate about how often prosecutorial misconduct comes to disciplinary authorities' attention but goes unpunished. Some have suggested that critics overestimate the amount of prosecutorial misconduct, as in the case of Judge Alex Kozinski's recent reference to an "epidemic" of prosecutorial discovery violations,[118] or overstate the rarity of disciplinary actions against prosecutors.[119] But virtually none of the literature asserts that disciplinary enforcement plays an adequate role in regulating prosecutors.

Critics have illustrated the problem by pointing to disciplinary authorities' failure to sanction prosecutors who make improper jury arguments and who engage in other courtroom misconduct.[120] Improper arguments in particular are proscribed by generally applicable ethics rules,[121] occur right under a trial judge's nose, and are recorded. Trial judges can send transcripts of improper arguments to the disciplinary authorities, and disciplinary authorities can also learn of some improper arguments from appellate decisions. Appellate judges have themselves complained when prosecutors make improper arguments in the face of prior judicial opinions setting boundaries and issuing stern warnings.[122]

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116. *Id.* at 742.

117. *See generally, e.g.*, Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275 (2007); Bennett L. Gershman, *"Hard Strikes and Foul Blows":* Berger v. United States *75 Years After*, 42 LOY. U. CHI. L.J. 177 (2010); Walter W. Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1985).

118. *See* Green & Yaroshefsky, *supra* note 1, at 67–70 (discussing Judge Kozinski's observation).

119. *See generally, e.g.*, Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

120. *See generally, e.g.*, Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972).

121. *See, e.g.*, MODEL RULES R. 3.4(e).

122. *See generally, e.g.*, United States v. Modica, 663 F.2d 1103 (2d Cir. 1981); Bell v. State, 723 So. 2d 896 (Fla. App. 1988); State v. Salitros, 499 N.W.2d 815 (Minn. 1993); Green & Yaroshefsky, *supra* note 1, at 63.

But for all this, disciplinary authorities rarely take prosecutors to task for this misconduct, at least as far as one can tell from published disciplinary decisions.[123] Likewise, despite reported cases where prosecutors made discriminatory peremptory challenges and then offered insincere reasons for doing so, disciplinary authorities virtually never punish this misconduct.[124]

Critics have also long complained of the lack of disciplinary enforcement when prosecutors improperly withhold evidence.[125] While most discovery violations are probably never revealed, some later become the subject of motion and appellate practice. Prosecutors have been chastised in court decisions or otherwise shamed for withholding evidence that should have been produced.[126] But professional discipline under the ethics rules rarely follows.[127]

To some extent, rule drafters appear to share disciplinary agencies' ambivalence toward disciplining prosecutors. As noted, a comment to Rule 3.8 cautions that prosecutors cannot be tagged with misconduct when they make a "good faith" but erroneous judgment that new exculpatory evidence need not be disclosed or investigated.[128] Overlooking lawyers' good faith errors might be a good principle for disciplinary enforcement in general.[129] But prosecutors are virtually the only lawyers who benefit from a good faith exception in the ethics rules.[130]

One can understand disciplinary agencies' reluctance to battle with prosecutors.[131] Even so, in recent years, there seems to be a slight upsurge in discipline cases against prosecutors,[132] which may be a response to increasing public pressure to hold prosecutors accountable for misconduct.[133] Perhaps the tide is turning. But as long as the applicable ethics rules remain incomplete and unduly permissive, there are limits to how effective professional discipline can be in regulating prosecutors' conduct.

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123. *See* Green & Levine, *supra* note 6, at 156.

124. *See* Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 282 (2003).

125. *See, e.g.*, Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987). The ethics rules squarely address this conduct. *See, e.g.*, MODEL RULES R. 3.4(a), 3.8(d).

126. On courts' use of "shaming" to influence prosecutors' conduct, see Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305 (2016).

127. For a brief description of how the disciplinary rules have recently been enforced against prosecutors, see Green & Levine, *supra* note 6, at 155–63. The article describes several recent cases in which discipline was imposed against prominent prosecutors, including the Attorneys General of Kansas and Pennsylvania.

128. MODEL RULES R. 3.8 cmt. 9.

129. *See* Green, *Specialized Ethics Code*, *supra* note 39, at 557.

130. The other context where this concept arises is when a subordinate lawyer reasonably relies on a superior's reasonable but erroneous resolution of an ethics question. MODEL RULES R. 5.2(b).

131. *See, e.g.*, Zacharias & Green, *Duty to Avoid Wrongful Convictions*, *supra* note 35, at 52–56 (identifying institutional reasons why disciplinary agencies would not enforce the competence rule against prosecutors).

132. *See* Green & Levine, *supra* note 6, at 157–63; Green & Yaroshefsky, *supra* note 1, at 82–83.

133. *Cf.* Green & Yaroshefsky, *supra* note 1, at 82–83.

V. IMPEDIMENTS TO ETHICS REGULATION

Reviewing thirty years of prosecutorial ethics regulation, one might initially form the impression that the ABA has fallen down on the job. State courts rely on the ABA to draft rules of professional conduct rather than doing this work themselves.[134] Those who write about prosecutorial ethics have called attention to the inadequacy of the *Model Rules*.[135] But the ABA has never tried to fully develop the rules for prosecutors. Instead, it has devoted its effort to unenforceable, aspirational standards. The current *Standards* serve an important function in the absence of fully developed rules. They assist well-intentioned prosecutors who are willing to regulate themselves, as seekers of justice, beyond the enforceable rules. But mere standards are not enough. Prosecutors who do only what the law and rules require, ignoring the *Standards*, cannot be held accountable for abusive conduct.

It would be unfair to blame the ABA, however. It would be virtually futile for the ABA to propose special rules of prosecutorial ethics over the opposition of prosecutors, especially federal prosecutors. And opposition would be almost inevitable. The thirty-year review of prosecutorial ethics is largely a story about federal prosecutors' obstruction of ethics regulation at every turn: the DOJ opposed the application of the no-contact rule, going so far as to promulgate a federal regulation establishing its own standard;[136] federal prosecutors opposed states' adoption of the attorney subpoena rule and then challenged its constitutionality in federal courts;[137] the DOJ to this day rejects the plain wording of the disclosure rule;[138] and it also still opposes states' adoption of rules establishing prosecutors' post-conviction obligations.[139]

While the ABA might not worry about other lawyers' uncooperativeness, prosecutors are not just any lawyers. They are politically powerful public officials who have the ear and sympathy of the judiciary. It is unlikely that state judiciaries will adopt comprehensive rules for prosecutors if prosecutors do not actively participate in the drafting process and endorse the rules. Moreover, the ABA works closely with prosecutors on other aspects of criminal justice reform and cannot afford to antagonize them by proposing wholesale reform of prosecutors' ethics over their objection. It's just not worth it.

For their part, prosecutors can tick off more than a dozen reasons why the ABA should not be trusted to propose rules of prosecutors' ethics, and why virtually

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134. *See* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 94–95 (2009).

135. *See, e.g.*, DAVIS, *supra* note 6, at 150–51; MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 295–96, 309 (4th ed. 2010). *See generally* Kuckes, *supra* note 54.

136. *See supra* notes 101–02.

137. *See supra* notes 66–69.

138. *See supra* note 109.

139. *See supra* notes 77–84.

any proposed rule is inadequate, sight unseen, even if one accepts the underlying normative premise, as in the case of Rules 3.8(g) and (h). The checklist of arguments includes the following:

- Courts, bar associations, and disciplinary authorities should not be making and enforcing rules for prosecutors because they don't know how prosecutors should behave in any given situation. Prosecutors know best.[140]
- Courts, bar associations, and disciplinary authorities should not be making rules for prosecutors because doing so usurps the legislative function. Legislatures know best.[141]
- The ABA in particular cannot be trusted because it has been captured by the defense bar.[142]
- Prosecutors' conduct is too complicated to be dictated by enforceable rules. Determining how best to behave requires weighing complex facts in light of multiple considerations. Prosecutors should be left to decide what is best as a matter of independent professional judgment informed by their experience.[143]
- New ethics rules will lead to frivolous and oppressive disciplinary complaints by inmates and defense lawyers, wasting prosecutors' time and intruding into the confidentiality of their investigations and prosecutions.[144]
- The heightened risk of discipline created by additional rules will make prosecutors overly cautious, impeding their effectiveness.[145]
- Defendants will use the new rules as the basis for motions in criminal cases, taking up time and resources and potentially creating new, unintended legal rights.
- The norms governing prosecutors are uncertain and contested. Prosecutors who are elected or appointed, as public officials in a democratic process, should have authority to resolve questions about

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140. *See* Zacharias & Green, *Duty to Avoid Wrongful Convictions*, *supra* note 35, at 49–52 (discussing arguments directed at disciplinary authorities' institutional competence).

141. *See* Green, *Prosecutors and Professional Regulation*, *supra* note 71, at 892–93; *see also* Zacharias & Green, *Duty to Avoid Wrongful Convictions*, *supra* note 35, at 47–48 (discussing concerns about aligning disciplinary decisions with legislative and constitutional standards governing prosecutors).

142. *See* Green, *Prosecutors and Professional Regulation*, *supra* note 71, at 886–87 (discussing suggestion by National District Attorneys Association (NDAA) that Rule 3.8(d) was a product of ABA partisanship).

143. *See* Cassidy, *Character and Context*, *supra* note 45, at 640 (arguing that prosecutors should rely on virtue ethics where conduct standards cannot be codified).

144. *See* Green, *Prosecutors and Professional Regulation*, *supra* note 71, at 888 (discussing NDAA claim that prosecutors will be chilled by the fear of disciplinary allegations under Rule 3.8(d)); *id.* at 892 (discussing state prosecutors' concern about disciplinary actions under Rules 3.8(g) and (h)); Zacharias & Green, *Duty to Avoid Wrongful Convictions*, *supra* note 35, at 43–46.

145. *See* Zacharias & Green, *Duty to Avoid Wrongful Convictions*, *supra* note 35, at 39–41 (discussing risk that disciplinary rules will lead to over-deterrence of prosecutors).

proper prosecutorial conduct based on their own informed judgments, subject to political accountability, not judicial oversight.[146]

- Ethics rules are almost invariably over-inclusive; one can imagine scenarios where the rule might be interpreted to forbid conduct that does not deserve to be punished.
- Ethics rules are invariably uncertain in meaning, resulting in the possibility that prosecutors will be confused, and that courts will interpret the rules in ways that are unanticipated, unintended, inappropriate, and oppressive.[147]
- Ethics rules are invariably drafted imperfectly, and prosecutors can point out imperfections (without necessarily suggesting improvements).
- New ethics rules for prosecutors are unnecessary. There is no problem of widespread prosecutorial misconduct. Whatever problems may exist are best addressed by self-regulation. Singling out prosecutors for new rules is unfair to them and demoralizing.[148]

Some arguments will be convincing some of the time. Courts should not adopt every conceivable ethics rule for prosecutors. But at other times, prosecutors' arguments against ethics regulation will be disingenuous and makeweight. It cannot be that prosecutors should be exempt from all ethics rules. Certainly, state judiciaries, the ultimate arbiters, do not doubt their own authority to adopt and enforce ethics rules regulating prosecutors.[149] Nor can it be that the existing rules are the best of all possible rules and that no others would be useful.[150]

The problem is that prosecutors will not necessarily distinguish good ethics regulation from bad but will reflexively oppose any proposed new rules governing prosecutors' conduct. Prosecutors are supposed to act in the public interest not their own self-interest, but in this context, their self-interest is hard to resist.[151] No lawyers want to increase their own risk of disciplinary oversight and sanctions. Sometimes, lawyers will see a compensating benefit, because their opposing counsel are equally bound, but not when it comes to rules for prosecutors alone. It is to the credit of many state prosecutors that, in discussions regarding whether to adopt Rules 3.8(g) and (h) to regulate prosecutors' post-conviction conduct, they disinterestedly supported states' adoption of these provisions.[152]

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146. *See* Green, *Prosecutors and Professional Regulation*, *supra* note 71, at 894–95.

147. *See* Zacharias & Green, *Duty to Avoid Wrongful Convictions*, *supra* note 35, at 37–39 (discussing problems for prosecutors caused by vague rules).

148. *See id.* at 36–37 (discussing problem of singling out prosecutors).

149. *See* Green & Levine, *supra* note 6, at 175 nn.178–79.

150. *See* Green, *Prosecutorial Ethics as Usual*, *supra* note 6, at 1601–03.

151. *See generally* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463 (2017).

152. *See* Green, *Prosecutors and Professional Regulation*, *supra* note 71, at 890–91.

CONCLUSION

The lesson of the past three decades is that ethics rules and disciplinary proceedings cannot realistically be relied on to play the primary role in regulating prosecutors. If prosecutors are to be held more accountable, something must change.

One possibility is to enhance other regulatory mechanisms, such as by expanding civil liability or ad hoc judicial sanctions. At least on the federal level, courts have shown little inclination to encourage civil lawsuits against prosecutors by lowering the bars posed by doctrines of absolute and qualified immunity. On the contrary, Supreme Court decisions have largely protected prosecutors from civil lawsuits arising out of professional misconduct, in part based on the stated assumption that professional discipline will fill the void.[153] On the other hand, some judges in recent years have shown an increased willingness to inquire into prosecutors' conduct when it appears wrongful. Some have even threatened to impose contempt sanctions or other sanctions directly against individual prosecutors who are blameworthy, although, for the most part, judges have been more open to affording defendants remedies and to issuing informal admonishments than to formally punishing prosecutors.[154] Additionally, legislative efforts might be undertaken to impose additional disclosure obligations on prosecutors or to regulate other aspects of their conduct, as has already occurred in some states.[155]

Alternatively, if ethics regulation is to live up to its promise, there is a need to reform not just the ethics rules themselves but also the process by which ethics rules regulating prosecutors are adopted. In recent years, the ABA has increasingly examined how existing professional conduct rules apply to prosecutors' conduct.[156] But the ABA cannot fairly be expected to play a central and assertive rule-making role, given prosecutors' traditional opposition. State judiciaries collectively need to take the reins from the ABA and establish their own commission to develop a more comprehensive ethics code for prosecutors.

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153. *See* Green & Yaroshefsky, *supra* note 1, at 64–65.
154. *See id.* at 73–75.
155. *See id.* at 75–78.
156. *See id.* at 80–81.