2020

Should Criminal Justice Reformers Care About Prosecutorial Ethics Rules?

Bruce A. Green
Fordham University School of Law, bgreen@law.fordham.edu

Ellen C. Yaroshefsky
Hofstra University, Ellen.C.Yaroshefsky@hofstra.edu

Should Criminal Justice Reformers Care About Prosecutorial Ethics Rules?

Bruce A. Green[*] *& Ellen Yaroshefsky*[**]

I. INTRODUCTION

Criminal justice reformers have plenty to try to fix—bail,[1] sentencing,[2] and prison conditions,[3] to name a few.[4] Among reformers' targets are prosecutors' conduct—both prosecutors' discretionary

* Bruce A. Green is the Louis Stein Chair of Law and Director of the Stein Center at Fordham University School of Law.

** Ellen Yaroshefsky is the Associate Dean for Research and Faculty Development, Howard Lichtenstein Distinguished Professor of Legal Ethics, and Executive Director of the Monroe H. Freedman Institute for the Study of Legal Ethics at Hofstra University School of Law.

1. *See, e.g.*, Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 507 (2019) (discussing the need for bail reform); Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L.J. 845, 851-52 (2019) (same).

2. *See, e.g.*, Mirko Bagaric et al., *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1, 6 (2018) (offering proposals for sentencing reform); Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 795-96 (2019) (discussing successful sentencing reform efforts).

3. *See, e.g.*, Hopwood, *supra* note 2, at 795-96 (discussing successful prison reform efforts); Michael Jacobson et al., *Beyond the Island: Changing the Culture of New York City Jails*, 45 FORDHAM URB. L.J. 373, 379 (2018) (discussing the need for jail reform in New York City).

4. *See generally* Barry Scheck, *The Integrity of Our Convictions: Holding Stakeholders Accountable in an Era of Criminal Justice Reform*, 48 GEO. L.J. ANN. REV. CRIM. PROC. iii, iv (2019). On strategies for criminal justice reform, *see* Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 33 (2018). For an argument that reform proposals are superficial and deceptive in that they will leave structural deficiencies intact, *see* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J.F. 848, 851 (2019).

decision making (for example, punitive charging and plea bargaining policies that contribute to over-incarceration)[5] and prosecutors' obligations in their advocacy role (for example, the scope of prosecutors' disclosure obligations and how they are enforced).[6] Proponents of criminal justice reform call both for more demanding laws governing prosecutors' conduct and more effective oversight and enforcement of prosecutors' compliance with their legal obligations.

In the context of a national awakening to the deficiencies of the criminal justice process, institutions with an influence over the legal profession such as the American Bar Association (ABA), state bar associations, courts, and disciplinary authorities have examined the role of professional regulation in influencing prosecutors' conduct. In some states, following the ABA's lead, the judiciary has expanded prosecutorial ethics rules.[7] Some bar associations, and especially the ABA, have issued advisory opinions interpreting these rules and calling lawyers' attention to their significance.[8] And some disciplinary authorities appear to have stepped up the rules' enforcement.[9] These efforts have been buoyed by burgeoning academic literature exploring the potential significance of the professional regulation of prosecutors.[10]

---

5. *See generally* Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 750 (2018) (describing efforts to elect "progressive prosecutors" who will exercise prosecutorial discretion less harshly than conventional prosecutors).

6. *See generally* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 75-78 (2016) (discussing efforts to reform prosecutors' disclosure obligations).

7. *See generally* Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 468-73 (2017) (describing the development of ABA Model Rule 3.8, governing prosecutors' distinctive professional obligations); Laurie L. Levenson, *The Politics of Ethics*, 69 MERCER L. REV. 753 (2018); Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009); 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).

8. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 486 (2019) (discussing prosecutors' obligations under ABA Model Rule 3.8 in dealing with unrepresented defendants); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 (2009) (discussing prosecutors' disclosure obligation under ABA Model Rule 3.8(d)); N.Y. City Bar Comm. on Prof'l Ethics, Formal Op. 2 (2018) (discussing prosecutors' post-conviction obligations); N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 3 (2016) (discussing prosecutors' disclosure obligation).

9. *See* 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, 157-63 (2016) (identifying "signs that . . . disciplinary authorities may be taking prosecutorial misconduct more seriously").

10. *See, e.g.*, Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963 (2009); H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability and a Modest Proposal*, 63 CATH. U. L. REV. 51, 56 (2013); Green, *supra* note 7, at 462-63; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WISC.

And yet, when it comes to influencing prosecutors' work, prosecutorial ethics rules do not rank high on criminal justice reformers' wish list. For example, the National Association of Criminal Defense Lawyers (NACDL), which has spent years working to expand prosecutors' pretrial disclosure obligations, has focused on legislative reform.[11] Notwithstanding legislative victories in New York, Virginia, California, Texas, Louisiana, Ohio, and North Carolina,[12] prosecutors' disclosure obligations in federal proceedings and in many other states remain too limited from the defense bar's perspective. The NACDL knows that when legislative reform efforts falter, prosecutorial disclosure might be expanded through the interpretation and enforcement of professional conduct rules that are already in place in every jurisdiction: The NACDL has taken note of decisions interpreting state counterparts to Rule 3.8(d) of the ABA Model Rules of Professional Conduct (Model Rules)[13] to be more demanding than prosecutors' constitutional obligations under constitutional case law,[14] and has published articles encouraging defense lawyers to try to obtain court orders based on these decisions.[15] But it was not until 2019 that the NACDL added Rule

---

L. REV. 399, 400-01 (2006); *Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 HOFSTRA L. REV. 87, 89 (2017); Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 FORDHAM L. REV. 537, 539 (2011); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 579 (2017); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1591 (2010); Bradley T. Tennis, Note, Uniform Ethical Regulation of Federal Prosecutors, 120 YALE L.J. 144, 148 (2010).

11. *See Discovery Reform Proposals*, NAT'L ASS'N CRIM. DEF. LAW. (Mar. 9, 2020), https://www.nacdl.org/criminaldefense.aspx?id=31327&libID=31296.

12. *See Discovery Reform Legislative Victories*, NAT'L ASS'N CRIM. DEF. LAW. (Apr. 25, 2019), https://www.nacdl.org/criminaldefense.aspx?id=31324&libID=31293.

13. MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020) provides:

> 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.

14. *See, e.g.*, N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 3 (2016); *In re* Disciplinary Action Against Feland, 820 N.W.2d 672, 681 (N.D. 2012). *But see In re* Riek, 834 N.W.2d 384, 392-93 (Wis. 2013); Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 131 (Ohio 2010).

15. *See* Barry Scheck & Nancy Gertner, *Combatting Brady Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, THE CHAMPION, May 2013, at 40; Irwin H. Schwartz, *Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information*, THE CHAMPION, Mar. 2010, at 34; *Legislation, Model Laws, Ethics Rules & Commentary*, NAT'L ASS'N CRIM. DEF. LAW. (Apr. 25, 2019), https://www.nacdl.org/criminaldefense.aspx?id=19571; *see also* Theresa Newman & James E. Coleman Jr., *The Prosecutors Duty of Disclosure Under ABA Model Rule 3.8(d)*, THE CHAMPION, Mar. 2010, at 20.

3.8(d) to its own reform agenda by filing an amicus brief encouraging a state court to adopt a broad interpretation of that rule.[16]

Similarly, the national Innocence Project, while focusing significant attention on prosecutors' obligation to correct wrongful convictions, has not made a priority of Model Rules 3.8(g) and (h), which address prosecutors' post-conviction obligations by calling on prosecutors to disclose and investigate significant new exculpatory evidence and to attempt to rectify wrongful convictions.[17] The organization takes justifiable pride in its efforts to promote law reform directed at procedural deficiencies that contribute to wrongful convictions, including erroneous eyewitness identifications, unreliable forensic evidence, false confessions, perjurious informant testimony, police and prosecutorial misconduct, and incompetent defense representation.[18] It also pursues law reform to make it easier to detect and correct wrongful convictions, including laws to enhance access to post-conviction DNA testing.[19] In publicizing its reform efforts, the Innocence Project does not credit whatever efforts it undertakes to encourage state courts to adopt ethics rules, based on Model Rule 3.8(g) and (h).[20] Moreover, the organization's efforts to hold prosecutors accountable for misconduct only recently expanded to include promoting more rigorous disciplinary enforcement.[21]

---

16. *See* Brief of Amici Curiae in Support of the Board of Professional Responsibility, *In re*: Petition to Stay the Effectiveness of Formal Ethics Op. 2017-F-163 and Petition to Vacate Formal Ethics Op. 2017-F-163, 582 S.W.3d 200 (Tenn. 2019) (No. M2018-01932-SC-BAR-BP), https://www.nacdl.org/getattachment/6f9ae87c-9805-428f-8cf0-dc541a9a4783/in-re-petition-to-stay-effectiveness-of-formal-ethics-opinion-2017-f-163-and-petition-to-vacate-formal-ethics-opinion-2017-f-163.pdf.

17. MODEL RULES OF PROF'L CONDUCT r. 3.8(g) provides:

> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court or authority, and
>
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
>
> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

MODEL RULES OF PROF'L CONDUCT r. 3.8(h) provides:

> When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

18. *See Policy Reform*, INNOCENCE PROJECT, https://www.innocenceproject.org/policy/ (last visited Feb. 17, 2020).

19. *Id.*

20. *See id.*

21. Deborah Becker, *Innocence Project Calls for Probe into 2 Former State Prosecutors in Amherst Drug Lab Scandal*, WBUR NEWS (July 21, 2017), https://www.wbur.org/news/2017/

Criminal justice reform groups typically explore multiple avenues for improving the law and legal processes. Therefore, even if legislative reform might seem preferable from any number of perspectives, one might expect organizations such as the NACDL and the Innocence Project to also explore possibilities for influencing prosecutors' work through the disciplinary process—that is, by encouraging courts and disciplinary bodies to adopt, interpret, and enforce professional conduct rules so as to demand more of prosecutors. But there are a host of reasons, including the following, why advocates of criminal justice reform might instinctively overlook or disfavor prosecutorial ethics rules and their enforcement as a potential instrument of change.

First, there is a well-founded skepticism among defense lawyers about the utility of prosecutorial ethics rules. Many in the defense bar perceive that disciplinary authorities have historically been disinclined to initiate proceedings against prosecutors, and commentators have substantiated this perception.[22] While some disciplinary bodies may now be taking prosecutorial misconduct more seriously,[23] the change has not been significant enough to alter defense lawyers' perception.

Second, and perhaps in part because of how rarely prosecutors are sanctioned, many in the defense bar do not even perceive professional conduct rules to be a meaningful source of legal obligation for prosecutors. Instead, they assume that professional conduct rules establish "ethical" responsibilities, not legal responsibilities, and therefore do not legally bind prosecutors. This is, however, at least a partial misunderstanding.

It is true that the Model Rules themselves are not enforceable law but are simply the ABA's proposal for rules to be adopted by

---

07/21/innocence-project-foster-kaczamarek-drug-lab; Innocence Staff, *Innocence Project Files Lawsuit to Open Former ADA's Disciplinary Records*, INNOCENCE PROJECT (May 22, 2019), https://www.innocenceproject.org/innocence-project-files-lawsuit-to-open-former-adas-disciplinary-records; *see also* Mensah M. Dean, *Complaint: Prosecutor Knew Witnesses Were Lying During Retrial of Innocent Man*, PHILA. INQUIRER (Aug. 23, 2018), https://www.inquirer.com/philly/news/crime/prosecutor-misconduct-michael-wright-dna-evidence-innocence-project-20180823.html; Nina Morrison, *What Happens When Prosecutors Break the Law?*, N.Y. TIMES (June 18, 2018), https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html; Katie Mulvaney, *Journal Exclusive–Free After Quarter-Century in Prison, Raymond 'Beaver' Tempest Wants Prosecutor Disciplined*, PROVIDENCE J. (July 27, 2019, 10:18 AM), https://www.providencejournal.com/news/20190727/journal-exclusive---free-after-quarter-century-in-prison-raymond-beaver-tempest-wants-prosecutor-disciplined.

22. *See, e.g.*, Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007); Rudin, *supra* note 10, at 541-42, 547-48, 560-63, 572; Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC L. REV. 275, 277-78 (2004).

23. *See* Green & Levine, *supra* note 9, at 157-63 (discussing cases signaling that disciplinary agencies are regulating prosecutors more rigorously than in the past).

state courts. Likewise, "ethics opinions" published by the ABA and state and local bar associations have no legal authority but merely reflect the view of bar associations' ethics committees regarding the meaning and application of professional conduct rules. But states' professional conduct codes most assuredly are "law."[24] For example, New York prosecutors have a legal obligation to comply with applicable provisions of the New York Rules of Professional Conduct, just as they must comply with constitutional law, statutes, procedural rules, and other court rules. Adopted by courts in their rule-making capacity, the states' professional conduct codes are part of the "law of lawyering." They are enforceable against lawyers by the state courts through their disciplinary processes. In interpreting and applying their professional conduct rules, courts often give weight to bar associations' ethics opinions.[25]

Third, even if defense lawyers understand that professional conduct rules are "law" that may be enforced against prosecutors, at least in disciplinary proceedings, they may not regard these rules as law that is of utility to their clients, who have no stake in the professional discipline of prosecutors. This is largely—but not entirely—a correct understanding.

The stated purpose of professional conduct codes is not to establish parties' rights—for example, whether a client has a malpractice claim against a lawyer or whether a lawyer's wrongdoing in litigation entitles an opposing party to a remedy—but simply to establish standards of professional conduct to be used in lawyer discipline proceedings.[26] One might therefore assume that courts in criminal

---

24. *See* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 90-98 (2009) (explaining why it is a mistake to regard ethics rules "as weak or inconsequential law").

25. For differing views on the utility of ethics opinions, *see generally* Jorge L. Carro, *The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?*, 26 IND. L. REV. 1 (1992); Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67 (1981); Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731 (2002); David G. Trager, *Do Bar Association Ethics Committees Serve the Public or the Profession? An Argument for Process Change*, 34 HOFSTRA L. REV. 1129 (2006).

26. *See* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2020) (quoting the Preface of the MRPC):

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a law-

cases will leave the enforcement of prosecutorial ethics rules to disciplinary authorities, whose lax enforcement of these rules leaves prosecutors free to ignore them. As a general matter, there is legitimacy to this concern. Although courts sometimes enforce or give weight to the professional conduct rules in the course of adjudication, including criminal adjudication,[27] they rarely do so.[28] In pretrial or trial practice, courts generally look to case law rather than ethics rules to determine prosecutorial disclosure obligations and rarely do courts refer prosecutors who have violated ethics rules to disciplinary authorities.[29] Particularly in post-conviction proceedings, courts are unlikely to provide remedies for prosecutorial misconduct that violates disciplinary rules but that does not violate constitutional or statutory provisions.[30] Indeed, even constitutional and statutory violations are not necessarily remediable, but may be subject to harmless error analysis and other doctrines that limit the availability of remedies in order to promote finality and judicial economy.[31] The utility of professional conduct rules, from any individual criminal defendant's perspective, may depend on persuading trial judges in criminal cases to enforce them, and that may be a heavy lift.

Further, if disciplinary authorities and courts were to enforce prosecutorial ethics rules more rigorously in the disciplinary process, where they are meant to be enforced, criminal defendants might be harmed more than helped. Punishing a prosecutor provides no direct benefit to a defendant harmed by the prosecutor's

---

yer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

27. *See, e.g.*, State v. Miller, 600 N.W.2d 457, 468 (Minn. 1999) (suppressing evidence as remedy for prosecutor's violation of MINN. RULES OF PROF'L CONDUCT r. 4.2 (MINN. BAR ASS'N 1993)).

28. *See, e.g.*, United States v. Hammad, 858 F.2d 834, 842 (2d Cir. 1988) (finding that suppression was not a permissible remedy for prosecutor's violation of the rule forbidding communications with represented parties); United States v. Guerrerio, 675 F. Supp. 1430, 1433 (S.D.N.Y. 1987) ("Although suppression necessarily results from a constitutional violation, the same result is not a foregone conclusion in the case of an ethical violation by a prosecutor.").

29. *See, e.g.*, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1972–77, 2005–06, 2011–13, 2018–22, 2033 (2010) [hereinafter *New Perspectives on Brady: Report of Working Groups*].

30. *See, e.g.*, House v. State, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997).

31. *See, e.g.*, John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1155 (2004) (discussing ineffective assistance of counsel claims and *Brady* violations that do not lead to reversal because of the harmless error doctrine); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WISC. L. REV. 35, 56 (2005) (discussing violations of substantive constitutional rights resulting in wrongful convictions are often not remediable due to the harmless error doctrine).

misconduct and it may not provide an indirect benefit either, because disciplinary cases against prosecutors are often brought years after the prosecutorial conduct in question, and then only after the impropriety of the prosecutor's conduct has already been adjudicated in court proceedings. An increased risk of discipline for professional misconduct may encourage future prosecutors to comply more carefully with their legal and ethical obligations, if the possibility of discipline comes to seem less remote. But then, there may be unintended harms that make other enforcement mechanisms preferable to disciplinary enforcement. Relations between opposing lawyers in criminal cases can be fraught,[32] and discipline ups the ante.[33] It is hard to think of anything more provocative than an accusation of professional misconduct, and the bad feeling it produces may disadvantage not only the current client but future clients with cases against the accused prosecutor or others in the prosecutor's office.[34] Further, an accusation of professional misconduct may encourage retaliation, putting the defense lawyer on the defensive.

Fourth, even if professional conduct rules were enforced, their reach might be too limited to make much of a difference. By their very nature, the normative standards set by professional conduct rules are meant to be a "floor."[35] That is, the rules define the least that lawyers can get away with to avoid being subject to a disciplinary sanction—for example, the least that a lawyer must do to be

---

32. *See* Bruce A. Green, *The Right to Two Criminal Defense Lawyers*, 69 MERCER L. REV. 675, 687 (2018) ("In some jurisdictions, individual or institutional relationships between defense lawyers and prosecutors are mistrustful or even hostile.").

33. Levenson, *supra* note 7, at 768 ("[D]efense lawyers must resist the temptation to turn every prosecutorial mistake into an ethical violation. While defense lawyers have a duty to act zealously on behalf of their clients, prosecutors who feel attacked are less likely to act in a collaborative manner, especially when such collaboration might benefit a defendant.").

34. The New York Association of Criminal Defense Lawyers established the Prosecutorial and Judicial Complaint Center (PJCC) as an investigative and reporting center for such misconduct. The PJCC's was created because criminal defense lawyers historically were loath to file complaints against prosecutors, fearing potential repercussions against future clients and themselves. The PJCC, despite public pronouncements of its work and repeated informal complaints made by defense lawyers and judges, has received few formal complaints from defense lawyers about prosecutorial misconduct. The perception is that disciplinary authorities will not act to sanction prosecutors. *Prosecutorial and Judicial Complaint Committee*, N.Y. ST. ASS'N CRIM. DEF. LAW., https://nysacdl.site-ym.com/page/PJCC (last visited Feb. 17, 2020).

35. *See, e.g.*, N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 2 (2018) ("[T]he Rules governing conduct of prosecutors were adopted solely for purposes of professional discipline. Like other rules, they 'state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.' These Rules are not meant to state the limit of what prosecutors and their offices can or should do to rectify wrongful convictions." (quoting N.Y. RULES OF PROF'L CONDUCT ¶ 6 (N.Y. BAR ASS'N 2018))).

regarded as competent,[36] to avoid assisting a client's criminal act,[37] or to avoid using perjury at trial.[38] Reformers do not want to establish *minimal* requirements for prosecutors but to establish rigorous requirements for prosecutors to prevent and correct wrongful convictions. A legislative reform effort invariably holds out promise to achieve more demanding normative requirements. Moreover, once norms governing prosecutors' conduct are codified in criminal procedure rules or statutes, they are often enforceable through the disciplinary process: a prosecutor's deliberate violation of a procedural obligation is likely to be subject to sanction under the professional conduct rules;[39] indeed, even a prosecutor's negligent failure to fulfill a procedural obligation may be sanctionable, at least in theory.[40] Consequently, if one were confident of success, a defense effort aimed at reforming prosecutorial conduct would always favor legislative over disciplinary reform. Disciplinary reform may seem to be worth pursuing only if legislative reform is likely to be unavailing.

Further, professional conduct rules typically address lawyers' professional conduct at a level of generality and focus on areas of conduct that might be thought to implicate lawyers' ethics; they do not address social or criminal-justice policy per se. This, too, inherently limits their reach and scope. The more detailed, technical, and restrictive the rules become—that is, the more they look like legislation—the less legitimacy they have as professional conduct or "ethics" rules, and the more difficult it becomes to persuade courts to adopt them and uphold them in the face of legal challenges.[41] On the other hand, rules that are sufficiently vague to

---

36. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

37. *See id.* r. 1.2(d).

38. *See id.* r. 3.3.

39. *See, e.g.*, *id.* r. 3.4(a).

40. *See id.* r. 1.1; *see also* 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, 13-28 (2009) (discussing the potential role of the competence rule in regulating prosecutors).

41. Model Rule 3.8(e), which some state courts have declined to adopt, is a case in point. Its premise is straightforward—namely, that prosecutors should not chill defense lawyers' relationship with counsel and defendants' willingness to confide in their lawyers by needlessly subpoenaing defense lawyers to testify about their clients. The underlying idea that lawyers should not intrude on the opposing party's confidential relationship with counsel finds expression in various rules, including Rule 4.2, which restricts communications with represented persons, and Rule 4.4(b), which requires the disclosure of another party's inadvertently disclosed information. But Rule 3.8(e) is drafted at a level of detail that makes it seem, at least to some, more legislative than ethical. *See, e.g.*, Stern v. U.S. Dist. Court, 214 F.3d 4, 20 (1st Cir. 2000) ("Local Rule 3.8(f) [the counterpart to current ABA Model Rule 3.8(e)], though doubtless motivated by ethical concerns, has outgrown those humble beginnings. . . . As written, Local Rule 3.8(f) is more than an ethical standard. It adds a novel procedural step—the opportunity for a pre-service adversarial hearing—and to compound the matter, ordains that the hearing be conducted with new substantive standards in mind.").

gain judicial acceptance as ethics rules are likely to leave room for prosecutors to interpret and apply them liberally in ways that weaken their significance.

Fifth, from a historical perspective, efforts to employ the professional conduct rules as a means of reining in prosecutorial excess have not been hugely successful. For example, ABA Model Rule 3.8(e), designed to curb prosecutors' practice of subpoenaing lawyers for evidence about their clients, has not been rigorously enforced in states that have adopted it.[42] Likewise, efforts to persuade courts to interpret and apply the no-contact rule to restrict police investigations made only a marginal impact.[43]

For these reasons and perhaps others, criminal justice reformers might intuitively favor legislative reform—and, perhaps, even the reform of judicial decisional law—over the amendment and enforcement of professional conduct rules. And they would be right, in general, to see legislative reform as more promising and significant. By way of example, many years of reform efforts in New York recently culminated in the adoption of a new criminal procedure law which, among other things, expanded defendants' discovery rights in criminal cases.[44] The law details what prosecutors must provide to the defense and establishes timing requirements as well as procedural consequences for prosecutors' failure to comply.[45] By their nature, professional conduct rules could never be as demanding or effective.

Does this mean, however, that reformers should not expend any energy encouraging state courts to adopt and enforce prosecutorial ethics rules? This article examines that question, focusing on the rules noted above—those governing prosecutors' pretrial disclosure obligations and their post-conviction obligations. It examines the case for expanding reform efforts to take advantage of the professional conduct rules. As Part II discusses, prosecutors throughout the country are already subject to a version of Model Rule 3.8(d),

---

42. *See supra* note 41; *see also* Green, *supra* note 7, at 471 ("Although many states have Rule 3.8(e) on the books, it is questionable whether the provision has an impact in the federal grand jury investigations at which it was principally directed."). For a recent and rare exception, *see* Office of Disciplinary Counsel v. Fina, No. 2624, 2020 Pa. LEXIS 1056 (Pa. Feb. 19, 2020).

43. *See* Green, *supra* note 7, at 475-76.

44. N.Y. CRIM. PROC. LAW § 245 (eff. 1/01/2020); *see* Barry Kamins, *Bail, Discovery and Speedy Trial: The New Legislation*, N.Y.L.J. (May 31, 2019, 12:30 PM), https://www.law.com/newyorklawjournal/2019/05/31/bail-discovery-and-speedy-trial-the-new-legislation/ (analyzing new discovery statute, which replaced "one of the most regressive in the nation").

45. *See* Kamins, *supra* note 44.

which requires prosecutors to disclose evidence that "tends to negate the guilt of the accused;" reformers might attempt to persuade courts to interpret the rule to demand broader and/or earlier disclosure than does the *Brady* case law. Additionally, as Part III discusses, prosecutors in only 19 states are subject to a version of Rules 3.8(g) and/or 3.8(h); reformers might try to persuade other state judiciaries to adopt one or both provisions. In both cases, one might wonder whether the effort is worthwhile given the prospects for success and the potential payout. While the likelihood of success presumably varies from jurisdiction to jurisdiction, success in some jurisdictions is demonstrably achievable, and, we argue, successful efforts will be meaningfully rewarded.

II. PROSECUTORS' PRETRIAL DUTY OF DISCLOSURE

Among the most contentious issues in criminal practice is the extent of prosecutors' disclosure obligations. Although the term "Brady obligations" is sometimes used as a shorthand, prosecutors' obligations to disclose evidence and information to the defense derive from various sources including federal and state constitutional provisions (as interpreted by courts), federal and state statutes, court rules and orders, and professional conduct rules. Prosecutorial disclosure serves an essential role, enabling defense lawyers to counsel their clients about the decisions they must make, to negotiate effectively, to defend their clients competently in court, and to make effective sentencing arguments. Prosecutors' obligations vary from jurisdiction to jurisdiction and are often uncertain in scope, but, in general, defense lawyers perceive both that prosecutors' disclosure obligations are too narrow and that prosecutors often fail to fully comply with them. Consequently, prosecutorial disclosure is a significant target of criminal justice reform efforts.

The starting point for discussions of prosecutors' pretrial disclosure, and a focus of the defense bar's dissatisfaction, is the constitutional obligation established in *Brady v. Maryland*[46] and subsequent decisions. The judicial decisions generally address the question of whether a conviction must be overturned because of the prosecution's failure to disclose favorable evidence to the accused for use in defending the case at trial. *Brady*, the leading United States Supreme Court decision, held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due

46. 373 U.S. 83 (1963).

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[47] A later decision, *United States v. Bagley*,[48] defined "material to guilt or punishment" as a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[49] The materiality standard is the source of significant and ongoing controversy because, in most jurisdictions, this standard for reversal on appeal is also utilized as the standard for defining prosecutors' initial constitutional duty to provide pretrial disclosure of information.[50] In these jurisdictions, the prosecution does not have to produce favorable evidence to the defense if the evidence is deemed unlikely to contribute to an acquittal.[51] One might argue that prosecutors are constitutionally obligated to disclose all favorable evidence before trial because the materiality standard, like a harmless error standard, applies only post-trial and is designed to avoid the unnecessary expenditure of resources when it is a foregone conclusion that a retrial will result in another conviction. But only a few courts agree.[52] The Department of Justice (DOJ) endorses the pretrial "materiality" standard while urging prosecutors to err on the side of disclosure.[53] The ABA,

47. *Id.* at 87.

48. 473 U.S. 667 (1985).

49. *Id.* at 682.

50. *See* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1334-35 (2011).

51. *See, e.g.*, United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001); *see also* United States v. Causey, 356 F. Supp. 2d 681, 696 (S.D. Tex. 2005) (adopting materiality as the standard).

52. *See* United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) ("[T]he government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial."); United States v. Acosta, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2004) ("Simply because 'material' failures to disclose exculpatory evidence violate due process does not mean only 'material' disclosures are required."); United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) (same); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) ("Because the definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context, the Court relies on the plain meaning of 'evidence favorable to an accused' as discussed in *Brady*.").

53. U.S. DEP'T JUSTICE, JUSTICE MANUAL § 9-5.001(B)(1) (2010) ("Exculpatory and impeachment evidence is material to a finding of guilt—and thus the Constitution requires disclosure—when there is a reasonable probability that effective use of the evidence will result in an acquittal. Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question." (citations omitted)).

in contrast, takes the view that prosecutors should disclose favorable evidence regardless of whether it appears to be material.[54] The practice among state prosecutors varies.[55] Defense lawyers lack confidence that prosecutors correctly assess whether favorable evidence is material and believe that prosecutors, based on erroneous assessments, often withhold favorable evidence that is in fact material.[56]

Another source of defense lawyers' dissatisfaction is prosecutors' delay in disclosing evidence and information. Although most federal and state discovery laws and rules require prosecutors to make "timely disclosure," some courts regard disclosure to be sufficiently timely if it is made on the eve of trial, in time for the defense to offer it into evidence.[57] Some courts permit even longer delay if favorable evidence is useful only to impeach prosecution witnesses.[58] Another sore point is whether favorable evidence must be disclosed at all if a case ends in a guilty plea, not a trial. Defense lawyers perceive that favorable evidence is needed not only to prepare for trial but to advise the accused whether to plead guilty, but many courts disagree.[59]

Reformers' efforts over the past two decades to expand prosecutors' disclosure obligations have taken place against the background of cases in which prosecutors failed even to meet *Brady*'s minimal constitutional requirement. Perhaps most significant was the 2009 trial of Senator Ted Stevens in which federal prosecutors withheld exculpatory material, which, when discovered after the trial, resulted in the government's agreement to set aside the jury's

---

54. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION Standard 3.5-4 (AM. BAR ASS'N 2017) ("Before trial of a criminal case, . . . regardless of whether the prosecutor believes it is likely to change the result of the proceeding, . . . [a prosecutor should disclose] all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted.").

55. *See* Schwartz, *supra* note 15, at 34-35.

56. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590-91 (2006) (discussing irrationality in human decision making as it affects prosecutors); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases,* 2006 WISC. L. REV. 291 (2006) (discussing tunnel vision that leads to failure to disclose information and other issues); Bennett L. Gershman, *Litigating* Brady v. Maryland*; Games Prosecutors Play*, 57 CASE W. L. REV. 531, 538 (2007) (discussing various ways in which prosecutors fail to comply with disclosure obligations).

57. *See* Yaroshefsky, *supra* note 50, at 1337.

58. *See, e.g.*, United States *ex rel.* Lucas v. Regan, 503 F.2d 1, 3 n.1 (2d Cir. 1974) ("Neither *Brady* nor any other case we know of requires that disclosure under *Brady* must be made before trial.").

59. *See* Peter A. Joy & Kevin C. McMunigal, *Prosecutorial Disclosure of Exculpatory Information in the Guilty Plea Context: Current Law*, CRIM. JUST., Fall 2007, at 50, 50.

guilty verdict and end the prosecution.[60] The trial judge, District Judge Emmett Sullivan, later observed that he had "never seen mishandling and misconduct like what I have seen" committed by DOJ's trial prosecutors,[61] and he initiated the practice of issuing a "standing *Brady* order" in every criminal case so that future prosecutors who deliberately violated their *Brady* obligations could be held in contempt of court.[62] Elsewhere around the country, a federal judge in Boston excoriated federal prosecutors for discovery failures and issued an order to show cause why they should not be sanctioned,[63] and federal judges in Florida and Montana chastised other federal prosecutors who withheld key evidence.[64] Cases such as these spurred proposed federal legislation to expand federal prosecutors' disclosure obligations,[65] but the proposal stalled in the face of DOJ opposition.

Some state legislatures were more responsive to high profile cases of prosecutors' discovery misconduct. Most significantly, the wrongful prosecution of members of the Duke University lacrosse team on sexual assault charges in 2006 ultimately led to the disbarment of District Attorney Michael Nifong for withholding exculpatory evidence, among other wrongdoing,[66] and then to North Carolina legislation liberalizing the state's disclosure rules.[67] In Texas,

60. *See* Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 315-17 (2019) (discussing prosecutorial misconduct in the Ted Stevens prosecution and its significance to discovery reform efforts); *see also* Bennett L. Gershman, *Subverting* Brady v. Maryland *and Denying a Fair Trial: Studying the Schuelke Report*, 64 MERCER L. REV. 683, 683-86 (2013) (describing a report of prosecutorial misconduct in the Ted Stevens case).

61. Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES (Apr. 7, 2009), http://www.nytimes.com/2009/04/08/us/politics/08stevens.html.

62. Emmett G. Sullivan, *Enforcing Compliance with Constitutionally Required Disclosures: A Proposed Rule,* CARDOZO L. REV. DE NOVO 138, attachment 3 (2016) (Order).

63. *See* United States v. Jones, 620 F. Supp. 2d 163, 185 (D. Mass. 2009); *see also* United States v. Jones, 686 F. Supp. 2d 147, 149 (D. Mass. 2010).

64. United States v. Shaygan, 661 F. Supp. 2d 1289, 1322, 1324 (S.D. Fla. 2009); United States v. W.R. Grace, 455 F. Supp. 2d 1122 (D. Mont. 2006).

65. *See* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 641 (2013) (discussing the proposed Fairness in Disclosure of Evidence Act of 2012).

66. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 306 (2008); Duff Wilson, *Prosecutor in Duke Case Is Disbarred for Ethics Breaches*, N.Y. TIMES (June 16, 2007), http://www.nytimes.com/2007/06/16/us/16cnd-nifong.html.

67. *See* N.C. GEN. STAT. § 15A (2019).

similar reforms followed the highly publicized exoneration of Michael Morton,[68] who was convicted of murdering his wife and imprisoned for a quarter century before his conviction was overturned based on the prosecution's suppression of exculpatory evidence.[69]

Where courts cannot be persuaded to interpret the constitution more demandingly and legislatures cannot be persuaded to adopt more demanding statutory requirements, reformers might turn their attention to professional conduct rules as a basis for broader prosecutorial disclosure obligations. Model Rule 3.8(d) calls for prosecutors to disclose evidence and information "that tends to negate the guilt of the accused,"[70] as did an earlier provision of the ABA Code of Professional Responsibility,[71] and every state ethics code now includes a corresponding provision.[72] For decades, commentators have pointed out that the professional conduct rule is more demanding than the constitutional case law,[73] and the United States Supreme Court itself acknowledged as much, observing that "the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical . . . obligations" than under Brady[74] and that Brady" requires less of the prosecution than" does Model Rule 3.8(d).[75]

The ABA drew attention to the potential significance of the rule in 2009, when its Standing Committee on Ethics and Professional Responsibility issued Opinion 09-454,[76] which discussed how Model Rule 3.8(d) differs from, and is in some respects more demanding

---

68. Michael Morton Act, 2013 Tex. Gen. Laws 106 (codified as amendment to TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2019)).

69. Molly Hennessy-Fiske, *Inquiry Sought for Texas Prosecutor over Wrongful Conviction*, L.A. TIMES (Dec. 20, 2011, 12:00 AM), http://articles.latimes.com/2011/dec/20/nation/la-na-texas-prosecutor-20111220.

70. Model Rules of Professional Conduct r. 3.8(d) (Am. Bar Ass'n 2020), requires a prosecutor to "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."

71. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (AM. BAR ASS'N 2020).

72. The last state to adopt a version of Rule 3.8(d) was California, which adopted the provision in 2018 over significant opposition by the California District Attorneys' Association, *see* Letter from Patrick McGrath, President, Cal. Dist. Attorneys' Ass'n, to Chairpersons of the Commission for the Revision of the Rules of Professional Conduct (Oct. 1, 2015) (on file with the author). *See* Don J. DeBenedictis, *State Could Soon Impose Ethics Rules on Prosecutors*, the Daily Journal, April 30, 2015 (quoting Chief Justice: "It is time to have a uniform standard with uniform pressure on prosecutors to disclose information in a timely fashion.")

73. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454 (2009).

74. Cone v. Bell, 556 U.S. 449, 470 n.15 (2009).

75. *Kyles v. Whitley, 514 U.S. 419, 437 (1995).*

76. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 454.

than, the *Brady* line of decisions.[77] Most importantly, the opinion concluded that Rule 3.8(d) "does not implicitly include the materiality limitation recognized in the constitutional case law," stemming from *Brady v. Maryland*, but instead "requires prosecutors to disclose favorable evidence so that the defense can decide on its utility."[78] Additionally, the opinion explained that the rule's requirement of "timely disclosure" required prosecutors to disclose favorable evidence "as soon as reasonably practical."[79] This means that disclosure must be made in time for the defense to take account of favorable evidence in conducting pretrial investigation, developing strategy, and advising the accused whether to plead guilty. In these respects, prosecutors' disclosure obligation under the rule is more demanding than under the constitutional case law in most jurisdictions. On the other hand, the opinion recognized an important respect in which the rule is less demanding—namely, it requires disclosure only of evidence and information "known" to the prosecutor and does not obligate the prosecutor to seek out favorable information in the hands of investigators or other government agents.[80]

The ABA's interpretation of its model rule, although potentially influential, is not authoritative. Although states' rules of professional conduct corresponding to Model Rule 3.8(d) are identically or similarly worded, state courts are free to interpret their rules differently. Prosecutors can be expected to urge their state courts to do so. For example, the DOJ has consistently argued that interpreting Rule 3.8(d) more broadly than other law will create a "confusing double standard" and would let defendants "engage in blind fishing expeditions through the government's files."[81] Unless their state judiciary has issued a decision or other authoritative writing adopting the ABA's interpretation, many or most prosecutors freely ignore the ABA opinion.

The question of whether a state's version of Rule 3.8(d) imposes requirements independent of those set forth in state and federal statutes and case law may arise in any of a number of ways. A state

---

77. The ABA opinion rejected the argument, which some courts have adopted, that the professional obligation under Rule 3.8(d) is coextensive with prosecutors' disclosure obligations under *Brady*. *Id.* at 3. After reviewing the history and wording of the Model Rule, the opinion concluded that the drafters of Model Rule 3.8(d) "made no attempt to codify the evolving constitutional case law." *Id.*

78. *Id.* at 2.

79. *Id.* at 6.

80. *Id.* at 5-6.

81. Eli Hager & The Marshall Project, *DOJ is Challenging Tennessee Ethics Opinion on Prosecutors Obligation to Disclose Evidence*, ABA J. (Aug. 16, 2018, 2:00 PM), http://www.abajournal.com/news/article/doj_is_challenging_tennessee_ethics_opinion_on_prosecutors_obligations_to_d.

or local bar association might issue an advisory opinion interpreting its state's rule broadly; in some states, these opinions would be reviewable by the state's high court.[82] Alternatively, a state disciplinary authority relying on a broad interpretation of the state's rule might proceed against a prosecutor who withheld favorable evidence from the accused.[83] Or a defense lawyer in a criminal trial might ask the trial judge to order the prosecutor to make disclosure in compliance not only with relevant case law, statutes, and procedural rules but also with the state's version of Rule 3.8(d), as broadly construed.[84]

So far, authorities in only around a quarter of United States jurisdictions have considered whether its jurisdiction's counterpart to Model Rule 3.8(d) is more demanding than the constitutional case law or is merely coextensive with prosecutors' other legal duties. Those authorities have reached different conclusions. State courts and ethics committees in New York, California, Texas, North Dakota, Utah, and Washington, D.C. have agreed with the ABA's Opinion 09-454 that prosecutors' ethical duty under the rule is independent of, and in some ways more extensive than, prosecutors' other legal obligations.[85] For example, rejecting the DOJ's position, a court in Washington, D.C. disciplined a federal prosecutor under that jurisdiction's Rule 3.8(d), concluding that the rule did not include a materiality limitation.[86] Likewise, the Supreme Court of Massachusetts added a comment to its amended version of Rule 3.8 to clarify that "[t]he obligations imposed on a prosecutor by the

82. *See, e.g.*, *In re:* Petition to Stay the Effectiveness of Ethics Op. 2017-F-163, 582 S.W.3d 200, 211 (Tenn. 2019) (vacating ethics opinion issued by the state's Board of Professional Responsibility and holding that, in general, "the ethical obligations under Rule 3.8(d) of Tennessee's Rules of Professional Conduct are coextensive in scope with the obligations of a prosecutor as provided by applicable statute, rules of criminal procedure, our state and federal constitutions, and case law").

83. *See, e.g.*, *In re* Kline, 113 A.3d 202, 213 (D.C. Cir. 2015).

84. *See supra* note 15 (citing articles discussing this strategy).

85. *See* N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 3 (2016); *In re* Larsen, 379 P.3d 1209, 1216 (Utah 2016); Kline, 113 A.3d at 213 (concluding that the Washington, D.C. version of the rule does not include a "materiality" limitation); Schultz v. Comm'n for the Lawyer Discipline of the State Bar of Tex., No. 55649, 2015 WL 9855916, at *1 (Tex. Bd. Disciplinary App. Dec. 17, 2015) (concluding that Texas Rule 3.09(d) is "broader than *Brady*"); *In re* Disciplinary Action Against Feland, 820 N.W.2d 672 (N.D. 2012) (rejecting the argument that the North Dakota equivalent to New York Rule 3.8(b) is coextensive with Brady); People v. Gonzalez, 800 P.2d 1159, 1206-07 (Cal. 1990) (finding ethical violation based on, in part, the prosecutor's failure to timely comply with discovery obligations regardless of whether the belated failure violated the constitutional duty to disclose evidence under *Brady*).

86. *Kline*, 113 A.3d at 213. For other notable examples of discipline for failure to comply with prosecutorial disclosure obligations, *see* Green & Yaroshefsky, *supra* note 6, at 82.

rules of professional conduct are not coextensive with the obligations imposed by substantive law."[87]

However, other courts, including in Colorado, Ohio, Oklahoma, Wisconsin, Louisiana, and most recently, Tennessee, have held that, despite its wording, the rule implicitly codifies other law and demands nothing more.[88] In general, these courts reason that prosecutors would find it too difficult to have to comply with yet one more source of discovery law. For example, the Louisiana Supreme Court expressed concern about the imposition of inconsistent disclosure requirements upon prosecutors.[89] The Tennessee Supreme Court, in turn, cited this opinion and explained, "[t]o say that our ethical rules require prosecutors to consider different standards than their constitutional and legal requirements has the potential to bring about a myriad of conflicts."[90]

The question for reform groups such as the NACDL is whether to expend energy promoting the ABA's interpretation in the many states where there is no authoritative decision regarding the scope and application of Rule 3.8(d). Individual defense lawyers might also present the interpretive question, but they would obviously benefit from organizational support. Reform groups might ask the state bar's ethics committee or the state bar itself to interpret Rule 3.8(d) to require prosecutors to disclose favorable evidence known to them regardless of whether it is material in the constitutional sense, and to do so as soon as reasonably practical. But, in the end, only the judiciary can authoritatively interpret the rule.[91] While a

---

87. MASS. RULES OF PROF'L CONDUCT r. 3.8 cmt. 3A.

88. *See State ex rel. Okla. Bar Ass'n v. Ward, 353 P.3d 509, 521 (Okla. 2015)* (declining to adopt the ABA Committee's interpretation of Model Rule 3.8(d) and construing the Oklahoma version of rule as "consistent with the scope of disclosure required by applicable law"); *In re* Riek, 834 N.W.2d 384, 390 (Wis. 2013) (declining to construe Wisconsin version of rule "to impose ethical obligations on prosecutors that transcend the requirements of Brady"); Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010) (declining to adopt an ethical duty that would "threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does *not* require disclosure"); *see also In re* Petition to Stay the Effectiveness of Ethics Op. 2017-F-163, 582 S.W.3d 200 (Tenn. 2019). *See generally* David L. Hudson Jr., *Split Intensifies over Prosecutors' Ethical Disclosure Duties,* ABA J. (Oct. 2, 2019, 8:30 AM), http://www.abajournal.com/web/article/split-over-prosecutors-ethical-disclosure-duties-intensifies.

89. *In re* Seastrunk, 236 So. 3d 509, 519 (La. 2017); *see also Ethics Op. 2017-F-163*, 582 S.W.3d at 200.

90. *Ethics Op. 2017-F-163*, 582 S.W.3d at 209.

91. For example, in the process leading up to California's adoption of a provision based on Rule 3.8(d), proponents urged an interpretation consistent with Opinion 454. *See, e.g.*, Letter from Laurie Levinson, Professor of Law, Loyola Law Sch., and Barry C. Scheck, Professor of Law, Cardozo Sch. of Law, to the Cal. Comm'n for Revision of the Rules of Prof'l Conduct (April 10, 2015) (on file with author) ("Rule 3.8(d) is designed to be broader and independent of Brady, requiring 'timely' and prophylactic disclosure of all information that could be Brady or impeachment evidence [anything that 'tends to negate guilt or mitigate

state trial judge might be asked in a criminal prosecution to order the prosecutor to comply with Rule 3.8(d), as interpreted by the ABA, the judge may be reluctant to do so. Likewise, while disciplinary authorities might be asked to proceed against a prosecutor who withheld evidence that was favorable but not material in order to achieve an authoritative interpretation, disciplinary authorities may be similarly reluctant. These are not the only options, however. In states where the court adopts interpretive Comments to the professional conduct rules, a reform group might petition the judiciary to add a Comment codifying the ABA's interpretation of Rule 3.8(d). Alternatively, an organization might urge the judiciary to codify this interpretation in a court rule or order. For example, in response to lobbying by the Innocence Project and other organizations, the New York judiciary has adopted a standing order regarding prosecutors' disclosure obligations that is more demanding than existing case law and that tracks the language of Rule 3.8(d).[92] A willful violation of the order may be sanctioned as a contempt of court.[93]

---

punishment'] in order to make sure Brady violations do not occur. . . . Additionally, the rule promotes judicial efficiency by eliminating subjective 'materiality' evaluations prior to trial.").

92. The court directive and order (1) spells out three broad categories of information that should be disclosed to the defense—exculpatory, impeaching, and those relevant to suppression—precisely tailored to existing state and federal case law requiring disclosure as well as New York ethical rules; (2) makes specific reference to types of evidence that are required to be disclosed, including any benefits or promises made to witnesses for their cooperation, prior inconsistent statements and uncharged criminal conduct or convictions, and information regarding a witness's mental or physical illness or substance abuse; (3) encourages early disclosure by reminding prosecutors to produce information as soon as "reasonably possible," and presumptively no later than 30 days before the start of a felony trial and 15 days before the start of a misdemeanor trial; and (4) allows for personal sanctions against prosecutors who engage in "willful and deliberate" violations of the order. Press Release, N.Y. State Unified Court Sys., Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases (Nov. 8, 2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR17_17.pdf. The order was adopted by more than 80% of New York's lower state courts. The statewide debate about the Order contributed to the significant law reform efforts that resulted in legislation that imposes sweeping changes to disclosure practices in New York as of January 2020. The new law requires prosecutors to produce categories of information and evidence that are encompassed by Rule 3.8 (d). *See also infra* text accompanying note 93.

93. *See* Scheck & Gertner, *supra* note 15, at 41; *see also* Nancy Gertner & Barry Scheck, *How to Rein in Rogue Prosecutors*, WALL ST. J., https://www.wsj.com/articles/SB10001424052702304692804577281852966541834 (last updated Mar. 15, 2012, 7:31 PM) ("A direct order by a judge to follow the ethics rule and disclose all evidence that 'tends to negate guilt' will act as a deterrent to the overzealous prosecutor. Disobedience of a direct court order is contempt, which is an ongoing offense. So contempt prosecutions of unscrupulous prosecutors whose suppression of exculpatory evidence is discovered many years after the act won't be derailed by statute-of-limitations problems (which have been a significant obstacle to prosecuting prosecutors).").

It seems obvious that criminal defendants will benefit if the court determines that the prosecutorial obligation under Rule 3.8(d) is more demanding than the constitutional and statutory disclosure obligations. The benefit is that defendants will receive more, and prompter, disclosure. Prosecutors who do not currently comply with the admonition to resolve doubts about materiality in favor of disclosure might be expected to comply with a judicial decision that says that all favorable evidence must be disclosed under Rule 3.8(d), even if it is not material, and that this information must be disclosed as soon as reasonably practicable. This is true even though a violation of the rule in itself will probably not be remedied by the reversal of a criminal conviction. Most prosecutors presumably want to comply with professional obligations for their own sake,[94] and some of those remaining will be motivated by the risk of a disciplinary prosecution. Wholly apart from prosecutors' personal responsibility to keep current regarding their disclosure obligations,[95] prosecutors' offices can be expected to train prosecutors regarding obligations imposed by Rule 3.8(d), as interpreted by the court. Further, prosecutors can be reminded of the professional obligation in defense lawyers' pretrial requests for disclosure and discovery motions, and trial courts can be expected to issue reminders and orders referring to the distinct obligation under Rule 3.8(d) once it is established in the jurisdiction.

Even if reformers ultimately favor expanding prosecutors' disclosure obligations through legislation and constitutional decision making, their reform efforts can be enhanced by persuading state courts to adopt the ABA's interpretation of Rule 3.8(d), which accords with the plain language of the rule. The position adopted by the ABA—that prosecutors should disclose favorable evidence even if it is not material, and that this evidence should be disclosed promptly and before a guilty plea—is consistent with the positions taken by organizations pursuing discovery reform in criminal

94. For a more skeptical view, *see* United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, J., dissenting):

> Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place. This creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice. In the rare event that the suppressed evidence does surface, the consequences usually leave the prosecution no worse than had it complied with *Brady* from the outset. . . . If the violation is found to be material (a standard that will almost never be met under the panel's construction), the prosecution gets a do-over, making it no worse off than if it had disclosed the evidence in the first place.

95. *See* Connick v. Thompson, 563 U.S. 51, 65-67 (2011).

cases.[96] When constitutional arguments are advanced and legislation is proposed that would embody the ABA's position, prosecutors push back, contending that broader disclosure will undermine the public interest by leading to obstruction of justice, excessive administrative burdens, or other harms. But prosecutors' argument becomes less credible every time a state court adopts the ABA's interpretation of Rule 3.8(d) and that state's prosecutors then start making broader disclosure without suffering demonstrably harmful consequences. Therefore, even if a state court opinion interpreting Rule 3.8(d) broadly is unlikely to be any reform group's ultimate objective, such an opinion may be an intermediate step toward a more impactful constitutional decision or statute.[97]

III. PROSECUTORS' POST-CONVICTION OBLIGATIONS

In 2008, in the wake of the innocence movement, the ABA amended the Model Rules to address prosecutors' post-conviction obligations.[98] Rule 3.8(g) established new obligations for a prosecutor who "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."[99] At minimum, the prosecutor must "promptly disclose that evidence to an appropriate court or authority."[100] Additionally, "if the conviction was obtained in the prosecutor's jurisdiction," the prosecutor has two further obligations[101]—the prosecutor must "promptly disclose that evidence to the defendant unless a court authorizes delay"[102] and must "undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit."[103] Finally, if the

96. *See* text accompanying note 16, *supra*.

97. For example, West Virginia's Supreme Court issued a landmark decision recognizing prosecutors' constitutional obligation to disclose exculpatory evidence during plea bargaining—a stage when prosecutorial power is relatively unchecked. Buffey v. Ballard, 782 S.E.2d 204, 221 (W. Va. 2015) (overturning conviction predicated on guilty plea where prosecutors suppressed favorable DNA test results). A constitutional decision such as this one is preferable to a comparable interpretation of Rule 3.8(d) because a constitutional violation can result not only in professional discipline but in the reversal of a criminal conviction.

98. *See generally* Stephen A. Saltzburg, *Changes to Model Rules Impact Prosecutors*, CRIM. JUST., Spring 2008, at 1.

99. Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012); *see also* Wayne D. Garris, Jr., *Model Rule of Professional Conduct 3.8: The ABA Takes a Stand against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829 (2009).

100. MODEL RULES OF PROF'L CONDUCT r. 3.8(g)(1) (AM. BAR ASS'N 2020).

101. *Id.* r. 3.8(g)(2).

102. *Id.* r. 3.8(g)(2)(i).

103. *Id.* r. 3.8(g)(2)(ii).

investigation establishes clear and convincing evidence that the defendant was convicted of a crime of which the defendant is innocent, Rule 3.8(h) requires the prosecutor to attempt to rectify the wrongful conviction.[104]

As of this writing, nineteen state courts have incorporated a version of either Rule 3.8(g) or Rule 3.8(h), or both, into their professional conduct rules.[105] In late 2018, Michigan became the most recent adopter.[106] Michigan's rule was promoted by the Michigan Innocence Clinic[107] and supported by a letter from the national Innocence Project[108] as well as one from former Michigan prosecutors.[109] But in Michigan, as in some (but not all) other states, state and federal prosecutors opposed the provisions.[110] Presumably, as more state courts have adopted the rule, and time has passed without incident, prosecutors' opposition to the rule becomes increasingly less persuasive. Should reformers in the remaining states undertake comparable efforts, which may consume resources and ultimately may fail, or should they focus their efforts exclusively in other directions that they may consider to be more promising? In this instance, the payoff of a successful effort is less clear: as Section A acknowledges, there are multiple reasons to doubt the value of Rules 3.8(g) and (h). We argue in section B, however, that these provisions, and efforts to adopt them, have virtues that reformers may be overlooking.

---

104. *Id.* r. 3.8(h).

105. Those states are: Alaska, Arizona, California, Colorado, Delaware, Hawaii, Idaho, Illinois, Massachusetts, Michigan, New Mexico, New York, North Carolina, North Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. *See* Letter from Bruce A. Green, Louis Stein Chair of Law, Fordham Univ. Sch. of Law, to the Justices of the Mich. Supreme Court (Sept. 11, 2018) (on file with author) (addressing the proposed amendment of Rule 3.8 of the Michigan Rules of Professional Conduct).

106. *See* MICH. PROF'L CONDUCT R. 3.8(f), (g).

107. *See* Letter from Mich. Innocence Clinic, Mich. Law, to the Justices of the Mich. Supreme Court (Aug. 27, 2018) (on file with author) (addressing comments on proposed revisions to MCR 6.502(G) and MRPC 3.8).

108. *See* Letter from Innocence Project, Cardozo Sch. of Law, to the Clerk of the Mich. Supreme Court (Aug. 30, 2018) (on file with author) (addressing the proposed amendment of MCR 6.502 and MRPC 3.8).

109. *See* Letter from James S. Brady, Peter D. Houk & John Smietanka, Former Mich. Prosecutors, to the Justices of the Supreme Court of Mich. (on file with author) (addressing the prosecutors' support of the proposed amendments to MRPC 3.8).

110. *See* Letter from Prosecuting Attorneys Ass'n of Mich., to the Justices of the Supreme Court (Aug. 31, 2018) (on file with author) (addressing the amendment to MRPC 3.8); Letter from the U.S. Attorneys' Offices, E. and W. Dists. of Mich., to the Justices of the Mich. Supreme Court (Aug. 30, 2018) (on file with author) (addressing proposed revisions to MRPC 3.8). *See generally* Green, *supra* note 99, at 889-93.

A. Reasons for Skepticism

There are at least five reasons why reformers might hesitate to put their weight behind the post-conviction provisions.

First, as far as one can tell, no prosecutor has yet been disciplined for violating Rules 3.8(g) or (h). Indeed, the drafters and proponents considered it a selling point that, unlike Rule 3.8(d), these provisions were not intended, or expected, to become the basis of discipline.[111] In large part, the assumption was that prosecutors would simply comply with the rules, which seems like the ideal outcome. But the fact that prosecutors are not expected to be punished for violating these provisions might seem to be a deficiency from the perspective of those who doubt that prosecutors will universally adhere to the rules and who believe that punishing prosecutors is important to promote prosecutors' compliance with the law. For example, reformers regard the contempt conviction of former Texas prosecutor Ken Anderson, who withheld exculpatory evidence in an arson case, as a victory for their cause.[112] If the prosecutorial ethics rules governing prosecutors' post-conviction obligations are not meant to be employed against prosecutors in disciplinary proceedings, and they do not establish rights in the adjudicative process, then one might wonder what they are for.

Second, so far, courts have only infrequently referred to these provisions in their published decisions regarding defendants' post-conviction rights and remedies.[113] Published decisions suggest that courts are unreceptive to arguments that they should enforce the rules as a new source of defendants' discovery rights.[114] And there

---

111. Green, *supra* note 7, at 473 ("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.") (quoting Saltzburg, *supra* note 98, at 14).

112. *Former Williamson County Prosecutor Ken Anderson Enters Plea to Contempt for Misconduct in Michael Morton's Wrongful Murder Conviction*, INNOCENCE PROJECT (Nov. 8, 2013), https://www.innocenceproject.org/former-williamson-county-prosecutor-ken-anderson-enters-plea-to-contempt-for-misconduct-in-michael-mortonaes-wrongful-murder-conviction/ ("Today's historic precedent demonstrates that when a judge orders a prosecutor to look in his file and disclose exculpatory evidence, deliberate failure to do so is punishable by contempt." (quoting Professor Barry C. Scheck, Professor of Law at Cardozo School of Law)).

113. *See, e.g.*, Warney v. Monroe Cty., 587 F.3d 113, 125, 125 n.15 (2d Cir. 2009) ("The advocacy function of a prosecutor includes seeking exoneration and confessing error to correct an erroneous conviction. Thus, prosecutors are under a continuing ethical obligation to disclose exculpatory information discovered post-conviction." (citing and quoting MODEL RULES OF PROF'L CONDUCT r. 3.8(g), (h) (AM. BAR ASS'N 2020)).

114. *See* Simpson v. United States, No. 1:16-cv-01354-JES, 2017 U.S. Dist. LEXIS 74091, at *7 (C.D. Ill. May 16, 2017) ("[A]lthough Simpson argues that the U.S. Attorney for the Central District of Illinois owed him a duty to investigate and follow the rules of professional conduct and ethical standards, the Court does not need to determine whether the duties of the U.S. Attorney are discretionary or ministerial, because here there is 'an adequate remedy

is no evidence that criminal defense lawyers see the rules as a significant potential source of rights, or even as rhetorically valuable.

Third, the rules fall far short of what reformers want prosecutors to do in the post-conviction setting. Reformers urge prosecutors to establish conviction integrity units that investigate wrongful convictions but have a broader role, instigate investigations when doubts are raised about a convicted person's guilt based on a standard that is less exacting than that of Rule 3.8(g), and incorporate procedural reforms that are not incorporated into the rules.[115] Reformers would not be satisfied with the minimal response captured by Rules 3.8(g) and (h).

Fourth, there may be little need to influence prosecutors to make post-conviction disclosures, conduct post-conviction investigations, and remedy wrongful convictions. Prosecutors' internal commitment to correcting wrongful convictions may suffice in many or most cases, making a rule unnecessary. Prosecutors who are not sufficiently self-motivated may be motivated by professional and societal expectations that are not necessarily codified by political considerations or by concerns about their reputations.

Fifth, even assuming prosecutors need a boost, it may be more effective and/or more easily achievable to accomplish legislative reform that enhances prosecutors' post-conviction obligations and their enforcement.

B. The Utility of Ethics Rules to Reform Efforts

In the face of reasons for criminal justice reformers generally to be indifferent to prosecutorial ethics reform, and reasons for them to be indifferent to Rules 3.8(g) and (h) in particular, why should

---

other than mandamus.'") (citation omitted); Eden v. Ryan, No. CV-15-08020-PCT-DGC, 2016 U.S. Dist. LEXIS 32415, at *20 (D. Ariz. Mar. 14, 2016) ("[T]he question of whether the prosecutor complied with ER 3.8(g) and (h) of the Arizona Rules of Professional Conduct is not an appropriate issue for habeas review") (citations omitted); State v. Harris, 893 N.W.2d 440, 456-57 (Neb. 2017) ("After a case is closed, there may be ethical duties that require prosecutors to take action upon learning of evidence that creates a reasonable likelihood the defendant did not commit the crime. But Nebraska's post-conviction statutes provide relief only for constitutional violations that render a conviction void or voidable.") (citations omitted); *see also* State v. Harris, 893 N.W.2d 317, 340 n.56 (Neb. 2017) ("After a case is closed, there may be ethical duties that require prosecutors to take action upon learning of evidence that creates a reasonable likelihood the defendant did not commit the crime. But Nebraska's post-conviction statutes provide relief only for constitutional violations that render a conviction void or voidable.").

115. *See, e.g.*, Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010); INNOCENCE PROJECT, CONVICTION INTEGRITY UNIT BEST PRACTICES (2015), https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf.

these provisions interest reformers? We would suggest a half dozen reasons.

First, expressions of professional norms matter to individual lawyers, including prosecutors. Certainly, courts and bar associations assume these expressions matter, regardless of whether the norms are enforceable, which is why they develop and promote civility codes, professionalism codes, and other writings memorializing professional norms that are not necessarily backed by enforceable law.[116] In the criminal justice context, the ABA has expended substantial resources over the course of a half century developing volumes of ABA Criminal Justice Standards that codify aspirational standards for the work of prosecutors, defense lawyers, judges, and others in the criminal justice process.[117] One of the objectives of law is expressive.[118] Even if a professional conduct rule is never enforced, it is law—not just an aspirational standard—that has expressive force in establishing judicial and professional expectations. For prosecutors who aspire to do "the right thing"[119]—presumably, the vast majority of prosecutors—a normative statement in the law should have some influence. Like most other lawyers, most prosecutors want to be considered law-abiding. Regardless of whether discipline is a realistic possibility, they will comply with professional ethics rules because they are law and because they express a professional consensus regarding how lawyers should behave.

Second, prosecutorial conduct rules may influence the culture of prosecutors' offices and the broader judicial and professional cultures within which prosecutors function. Different prosecutors and prosecutors' offices take different approaches to many of the problems they encounter.[120] Among these are post-conviction claims of

116. *See, e.g.*, Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093, 1095-1100 (2011) (discussing the importance of ABA standards on the prosecution and defense functions); Melissa S. Hung, Comment, *A Non-Trivial Pursuit: The California Attorney Guidelines of Civility and Professionalism*, 48 SANTA CLARA L. REV. 1127, 1142 (2008) ("Although the Guidelines do not directly confront the roots of incivility, they still have the potential to positively affect the profession despite their optional character.").

117. *See generally* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, at 10 (discussing significance of the ABA's Criminal Justice Standards).

118. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021 (1996). *But see* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1364 (2000).

119. *See* DIST. ATTORNEYS ASS'N OF THE STATE OF N.Y., "THE RIGHT THING": ETHICAL GUIDELINES FOR PROSECUTORS (2016), http://www.daasny.com/wp-content/uploads/2016/02/2016-Ethics-Handbook.pdf.

120. *See, e.g.*, Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1668, 1672-73 (2018) ("[T]he wide range of motivations among working prosecutors complicates the reform plans of newly elected prosecutors.").

innocence: some prosecutors are more open than others to the importance of reviewing new evidence of innocence and conceding when an innocent person was convicted.[121] We have previously argued that the greatest influence on prosecutors' professional conduct—for example, whether they take a liberal or conservative approach to disclosing exculpatory evidence—is the culture of their offices.[122] Model Rules 3.8(g) and (h) may already influence the professional culture because they are included in the set of rules on which most law students are tested in law school classes on professional responsibility and on the national bar examination on professional responsibility. Comparably, once Model Rules 3.8 (g) and (h) are incorporated into state professional conduct codes, the rules are likely to have a more significant impact because they may be included in Continuing Legal Education programs for prosecutors in the state and in writings prepared for the state's prosecutors regarding their professional practices.

What is important about the provisions, from a cultural perspective, is that they give expression to the paramount importance of avoiding and correcting wrongful convictions. Much has been written about prosecutors' overly aggressive attitudes toward their work—for example, their desire just to secure convictions.[123] To the extent that prosecutors' offices can encourage a stronger commitment to a different ethos—one that puts avoiding wrongful convictions above securing convictions—prosecutorial practices will generally improve.

Third, Rules 3.8(g) and (h) impose minimal disciplinary standards that can be useful, particularly if they are understood to be intended as a legal and professional floor, because they provide the base on which advocates can seek to build. Lawyers do not ordinarily want to be minimally competent or minimally ethical—to be doing the bare minimum that they can get away with and still hold onto their licenses. Certainly, prosecutors do not want to regard

121. *See, e.g.*, Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 458 (2018) ("A small but select group of prosecutors are innocence deniers, irrationally refusing to admit that a wrongful conviction has occurred in the face of overwhelming evidence that it has occurred.").

122. Ellen Yaroshefsky & Bruce Green, *Prosecutors' Ethics in Context*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 269 (Leslie C. Levin & Lynn Mather eds., 2012); *see also* Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 326-27, 327 n.172 (2017) ("In a variety of contexts, it has been argued that the best way to achieve change in the criminal justice process is to change internal office culture, rather than imposing external legal requirements.") (citing authority).

123. *See, e.g.*, Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388 (2001) ("In view of the institutional culture of prosecutor's offices and the culture of the adversary system generally, it is perhaps inevitable that the overriding interest of prosecutors would be winning.").

themselves, or be regarded by others in the profession, as aiming low. In advocating for prosecutors to re-open individual criminal cases based on new evidence, there may be a value to being able to press the prosecutor to rise above the disciplinary minimum.

Likewise, in promoting the development of other law, it may be useful to have Rules 3.8(g) and (h) in place as a foundation. The underlying premises of these rules are that convictions of innocent persons should not stand and that institutions of the state (in this case, prosecutors' offices) have a responsibility to uproot and remedy wrongful convictions. Rules 3.8(g) and (h) incorporate these normative understandings into the law. One can now argue that these principles, which are legally established, should be extended to other contexts in which they are relevant: their significance is not limited to the professional conduct of prosecutors.

For example, the principles codified in Rules 3.8(g) and (h) supported a claim that a convicted defendant should have access to the state's evidence in order to subject it to newly available forensic testing. Indeed, Justice Stevens referred to Rules 3.8(g) and (h) for just this purpose in a dissenting opinion, joined by three other justices, in *District Attorney's Office v. Osborne.*[124] His argument was that the defendant's claimed right of access to DNA testing gains strength not only from legislative developments but also from "recent trends in legal ethics recognizing that prosecutors are obliged to disclose all forms of exculpatory evidence that come into their possession following conviction."[125] The rules may bolster arguments for assertions of other post-conviction rights and remedies as well.[126]

Fourth, law that codifies professional expectations may influence prosecutors who might otherwise not accept those expectations. Prosecutors have sometimes opposed these rules on the ground that they are unnecessary because prosecutors accept the underlying normative premises of these provisions.[127] But that may not uni-

---

124. 557 U.S. 52, 94-95 (2009) (Stevens, J., dissenting).

125. *Id.*

126. Brief of Legal Ethics Scholars as Amici Curiae at 29, State v. Johnson, No. 22941-03706A-01 (Mo. Cir. Ct. Aug. 23, 2019), *appeal docketed*, Nos. ED108193, ED108223 (Mo. Ct. App. Sept. 4, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3475542 (discussing prosecutors' ethical, professional, and legal obligations as a minister of justice in taking steps to remedy a wrongful conviction).

127. *See, e.g.*, Memorandum from the U.S. Attorney of the W. Dist. of Tenn. to the Clerk of Tenn. Appellate Courts on Objections to Adoption of Proposed Tennessee Rules 3.8(g) and (h) (Dec. 14, 2009) (on file with author) ("The Department would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's

formly be true. The recent history of efforts to expand pretrial discovery obligations and post-conviction efforts to exonerate convicted defendants based on new evidence and information has sometimes shown seemingly unfathomable resistance by prosecutors.[128] As has been amply demonstrated, prosecutors certainly resist additional pretrial disclosure obligations.[129] In the post-conviction setting, those who embrace the idea of reopening cases and rectifying wrongful convictions may believe that all other prosecutors do too, but criminal justice reformers believe otherwise. Some of those who might otherwise resist the idea may be influenced by disciplinary rules spelling out their post-conviction obligations, however undemanding the rules may be.

Fifth, it may be valuable in the context of a judicial rule-making process to provoke a public discussion and debate about prosecutors' obligations. To the extent that prosecutors oppose the rules based on a debatable conception of their role and responsibilities, their views can be challenged. If the judiciary adopts Rules 3.8(g) and (h) over prosecutors' objection, that may be viewed as an affirmation of prosecutors' duties and a rejection of prosecutors' contrary assertions.

With respect to Rules 3.8(g) and (h), in Michigan, the United States Attorneys' written objections to the proposed rules reflected debatable understandings of law and practice that federal prosecutors probably do not ordinarily express publicly. For example, federal prosecutors asserted that when they know of new, credible and material evidence creating a reasonable likelihood that an innocent person was wrongly convicted, federal law often precludes them from disclosing the evidence promptly, if at all,[130] and likewise precludes them from investigating to determine whether the person is in fact innocent.[131] They also asserted that federal prosecutors were

---

innocence, therefore, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained—pre-trial, during trial, or after conviction.").

128. *See generally* Bazelon, *supra* note 121.

129. *See supra* notes 60-69.

130. *See* Letter from the U.S. Attorneys' Offices to the Justices of the Mich. Supreme Court, *supra* note 110, at 2 ("Some disclosures are outright prohibited, some must wait for an investigation to run its course, some are permissible only with judicial or agency authorization.").

131. *See id.* at 2-3:

> Proposed Rule 3.8(f)(2)'s investigative requirements raise similar incompatibilities with federal law. Although existing investigative tools and resources will sometimes permit prosecutors to conduct or bring about the investigation contemplated by proposed Rule 3.8(f) (2), many times they will not. Federal law enforcement agencies have no statutory authority to conduct those types of investigations, and many investigative tools and resources are only permitted for specific violations of federal law. It may well

not free to take remedial measures when they ascertained conclusively that they had convicted an innocent person.[132] The Department of Justice and individual federal prosecutors may rethink the views expressed by Michigan's two United States Attorneys now that the Michigan Supreme Court has found them to be unconvincing.

Sixth, although serving as a potential basis for professional discipline may be one of the less important contributions of Rules 3.8 (g) and (h), the disciplinary consequences should not be overlooked. There may be prosecutors, however aberrational, who will ignore or bury significant new exculpatory evidence in order to avoid jeopardizing a conviction. Although such prosecutors may be subject to sanction under open-ended professional conduct rules, such as the prohibition on "conduct that is prejudicial to the administration of justice,"[133] courts may be reluctant to impose discipline without the more explicit mandate afforded by Rules 3.8(g) and (h).[134]

IV. CONCLUSION

Many legal academics think that professional regulation should play a bigger role in criminal justice reform, but reform groups appear to be unpersuaded that prosecutors' practices can be meaningfully improved through new professional conduct rules, broader interpretations of existing rules, and enhanced disciplinary and judicial enforcement of these rules. Efforts to reform prosecutorial practices have focused instead on legislation and judicial decision making. Reform groups' skepticism of professional regulation is understandable for reasons we have identified. But, on balance, we think professional regulation should not be overlooked as one among various approaches.

As we have shown, prosecutors' pretrial disclosure obligations can be expanded via professional regulation: in some jurisdictions, courts can be persuaded to adopt and enforce an interpretation of Rule 3.8(d), the prosecutorial disclosure rule, that is more demanding than constitutional case law. Likewise, courts can be persuaded to codify prosecutors' post-conviction obligations, which are now

---

be that Congress will appropriate funds and legislatively enable agencies to investigate otherwise closed cases. But it has not yet done so.

132. *Id.* at 4.

133. MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2020).

134. *See* Comm'n for Lawyer Discipline v. Hanna, 513 S.W.3d 175, 184 (Tex. App. 2016) (finding that although prosecutors owed a post-conviction duty to disclose evidence of innocence, they could not be sanctioned in the disciplinary process for violating that duty, because Texas had not adopted Rules 3.8(g) & (h)).

largely discretionary in most jurisdictions, by adopting a version of Rules 3.8(g) and (h). These two examples, on which we have focused, are certainly not the only ones. Courts might be persuaded to adopt a more robust approach to prosecutorial regulation in other respects as well. Of course, prosecutorial regulation is no panacea for the limitations and deficiencies of the criminal justice process; it is not even a panacea for the perceived problems of prosecutorial conduct. But, as we have shown, there are benefits to be gained from pursuing more robust prosecutorial regulation that can justify taking reform efforts into this additional direction.