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ARTICLES

THE DUTY TO AVOID WRONGFUL CONVICTIONS: A THOUGHT EXPERIMENT IN THE REGULATION OF PROSECUTORS

FRED C. ZACHARIAS* AND BRUCE A. GREEN**

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* Herzog Endowed Research Professor, University of San Diego Law School. The Authors thank Professors Michael Devitt and Robert Mosteller for their helpful comments and Alexander Chien, Alexander Guiha, and David Ziegler for their research assistance.

** Louis Stein Professor of Law and Director, Louis Stein Center for Law and Ethics, Fordham University School of Law.

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This Article explores the possible role of the attorney disciplinary process in discouraging prosecutorial conduct that contributes to false convictions. It asks what the impact would be, for better or worse, of disciplining prosecutors for incompetence when they fail to exercise reasonable care to prevent the conviction of the innocent. The inquiry provides a new vehicle for thinking about the nature of the disciplinary process, the work of prosecutors, the challenge of preventing erroneous convictions and, ultimately, the complexities of prosecutorial regulation.

The Article demonstrates that it would be plausible to interpret the attorney competence rule as encompassing prosecutorial negligence and identifies various potential benefits of doing so. But the Article also identifies and analyzes significant normative and institutional objections that might be raised. The Article concludes that there are serious problems with employing the competence rule as proposed and that these problems are inherent in the use of discipline to regulate prosecutors.

This analysis suggests that the historical under-utilization of discipline in regulating prosecutors may not result exclusively from insufficient resources or a lack of will on the part of disciplinary regulators, as some have argued. The Article's illustration of the inherent limitations of the disciplinary process highlights the need for renewed attention to alternative regulatory processes.

These include civil liability, which currently is foreclosed by prosecutorial immunity doctrines, and more robust internal regulation.

INTRODUCTION

A civil rights case recently decided by the U.S. Supreme Court commenced when Thomas Lee Goldstein sued the Los Angeles County District Attorney's Office for conduct that led to Goldstein's wrongful incarceration.¹ Goldstein was convicted of murder based on a jailhouse informant's testimony that Goldstein had confessed.² At trial, the informant concealed that he had previously served as a government witness in exchange for a series of reduced sentences, a fact which Goldstein learned only decades later.³ Upon his exoneration and release, Goldstein found himself unable to sue the trial prosecutor for failing to disclose the exculpatory information or correct the informant's false testimony, because prosecutors are immune from civil liability for actions taken in their "prosecutorial role."⁴ Goldstein's civil case therefore maintained that senior prosecutors were negligent in performing an administrative function – training trial prosecutors to share information about informants.⁵ The Supreme Court rejected Goldstein's attempt to avoid absolute prosecutorial immunity, and proving that the supervisors were negligent would have been difficult even if the Supreme Court had allowed the case to proceed on the theory that supervisory lapses are actionable.

The *Goldstein* case highlights the regulatory vacuum created when the Supreme Court implemented prosecutorial immunity thirty-three years ago.⁶ With the advent of DNA evidence and the realization that criminal defendants are erroneously convicted more frequently than previously believed,⁷ courts and commentators have been struggling to identify alternative mechanisms for holding prosecutors to their theoretical obligation to see "that justice shall be

¹ Van de Kamp v. Goldstein, No. 07-854 (U.S. Jan. 26, 2009).

² Goldstein v. City of Long Beach, 481 F.3d 1170, 1171-72 (9th Cir. 2007), *rev'd sub nom.* Van de Kamp v. Goldstein, No. 07-854 (U.S. Jan. 26, 2009).

³ *Id.*

⁴ See *id.* at 1173-75 (discussing the level of immunity afforded prosecutors in § 1983 actions).

⁵ The Court of Appeals found in Goldstein's favor, concluding that prosecutors have only qualified immunity for administrative acts. *Id.* at 1175; *cf.* Walker v. City of New York, 974 F.2d 293, 300 (2d Cir. 1992) (basing liability on the District Attorney office's failure to train and supervise individual prosecutors "to disclose exculpatory evidence and to avoid the use of perjured evidence").

⁶ See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (applying the absolute immunity prosecutors enjoyed from civil actions at common law to § 1983 actions).

⁷ See generally Innocence Project – Know the Cases, <http://www.innocenceproject.org/know> (last visited Nov. 24, 2008) ("There have been 225 post-conviction DNA exonerations in United States history. These stories are becoming more familiar as more innocent people gain their freedom through postconviction testing.").

done.”⁸ Even if Goldstein had prevailed in the Supreme Court, civil litigation would serve only a marginal role in regulating misconduct, because prosecutors exercising “prosecutorial” functions would remain invulnerable to suit.

This Article explores the feasibility of using the attorney disciplinary process to fill the vacuum.⁹ The disciplinary process is a natural place to look because, in justifying immunity, the Supreme Court relied on the existence of professional regulation as an alternative remedy for prosecutorial misconduct.¹⁰ Unfortunately, legal ethics codes expressly address only a narrow range of prosecutorial behavior, so discipline has not proven to be an effective deterrent.¹¹

The Article therefore conducts a thought experiment. Most legal ethics codes include provisions based on Rule 1.1 of the American Bar Association’s Model Rules of Professional Conduct (“Model Rules”), which requires all lawyers to “provide competent representation.”¹² The Article explores the

⁸ *Berger v. United States*, 295 U.S. 78, 88 (1935).

⁹ Numerous commentators have disapproved of prosecutorial immunity and have urged its reversal or substitute remedies for civil liability. *E.g.*, Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 59 (arguing “that absolute prosecutorial immunity should be abandoned and replaced in all circumstances by qualified immunity”); Douglas J. McNamara, Buckley, Imbler and *Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1138 (1996) (“Although prosecutors need some protection from suit, absolute immunity is too much.”); Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 *FORDHAM L. REV.* 3441, 3464-80 (1999) (discussing the problems with the current system of prosecutorial discipline, recommending enhanced enforcement of ethical obligations, and arguing for limiting prosecutorial immunity to qualified immunity).

¹⁰ *Imbler*, 424 U.S. at 429.

¹¹ *See, e.g.*, Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 19 *LOY. U. CHI. L.J.* 39, 47 (1987) (“Disciplinary sanctions are rarely imposed against prosecutors.”); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 *N.C. L. REV.* 693, 697 (1987) (“[D]isciplinary charges have been brought infrequently and meaningful sanctions [have been] rarely applied.”); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 *TEMP. L. REV.* 887, 889 (1998) (“[T]here is a notable absence of disciplinary sanctions against prosecutors, even in the most egregious cases.”); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 *D.C. L. REV.* 275, 277 (2004) [hereinafter Yaroshefsky, *Wrongful Convictions*] (“[T]he disciplinary consequence [of prosecutorial misconduct] is often nil.”); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. REV.* 721, 756-62, 774 (2001) [hereinafter Zacharias, *Professional Discipline*] (documenting the infrequency of discipline against prosecutors and identifying explanations).

¹² MODEL RULES OF PROF’L CONDUCT R. 1.1 (2008) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

possibility of enforcing the general competence standard against prosecutors who fail to exercise reasonable care to prevent false convictions.¹³ The inquiry provides a new vehicle for thinking about the nature of the disciplinary process, the work of prosecutors, the challenge of preventing faulty results, and ultimately, the complexities of prosecutorial regulation.

The Article begins in Part I by examining when prosecutors are to blame for false convictions. Part II illustrates that little of this conduct is regulated by specific professional rules. Existing ethics provisions, for the most part, simply reinforce or implement constitutional mandates governing the trial process.

Part III considers the option of employing the competence rule to discipline prosecutors who engage in behavior that risks faulty convictions. It sets forth the general contours of the proposed disciplinary remedy and identifies its potential benefits.

Parts IV, V, and VI explore objections that prosecutors or others might raise against the proposed enforcement of the competence rule. Part IV identifies and analyzes possible objections to interpreting rules like Model Rule 1.1 as encompassing prosecutorial behavior or as requiring defendant-protective behavior. Part V addresses normative objections to enforcing a competence rule vigorously, including the possibility that more harm than good would result. The analysis illustrates the complexity of regulating prosecutorial conduct through a general standard such as competence, but concludes that the proposed approach nevertheless is plausible. Finally, Part VI addresses institutional concerns – most notably, whether professional discipline is the best approach to enforcing prosecutorial competence.

The Article identifies reasons to be skeptical of the conventional confidence, expressed by the U.S. Supreme Court and others, in the efficacy of prosecutorial discipline. It suggests that the current failure of the disciplinary regime may not simply be a matter of favoritism toward prosecutors, laxity on the part of disciplinary authorities, or inadequate resources. Rather, disciplinary regulators' historic deference to prosecutors' offices may reflect legitimate policy and political considerations that militate against aggressive disciplinary oversight. The Article's insights, in turn, raise new questions about the legitimacy of prosecutorial immunity and highlight the need to enhance prosecutorial self-regulation.

I. PROSECUTORS' RESPONSIBILITY FOR WRONGFUL CONVICTIONS

American law seeks to prevent erroneous criminal convictions principally through procedures designed to ensure that the risk of trial error falls on the

¹³ The Article's analysis probably applies equally to prosecutors' role in preventing improper incarceration and other forms of punishment. To streamline the thought experiment, however, the Article confines itself to prosecutors' participation in convicting the innocent.

side of acquittals rather than guilty verdicts.¹⁴ Improvements in genetic testing and media reports of defendants exonerated through its use, however, have heightened public awareness that false convictions nonetheless result.¹⁵ This has led to renewed attention to the causes of faulty outcomes, including prosecutors' acts and omissions.¹⁶

Prosecutors rarely deserve exclusive or primary blame for the conviction of innocent defendants.¹⁷ Inaccurate testimony accounts for many of the cases in which innocent individuals are found guilty: witnesses may falsify the facts;¹⁸

¹⁴ The procedural protections include the right to counsel, evidentiary safeguards, and the beyond a reasonable doubt standard of proof. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting) (“[W]rongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety . . .”); *cf.* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1123 (2005) (“[D]espite all the procedural protections built into the criminal system, juries and judges are sometimes convinced beyond a reasonable doubt of a fact that is false.”).

¹⁵ *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT, at xiii-xxi (2003) (discussing wrongful convictions and their causes); *see also* *United States v. Sczubelek*, 402 F.3d 175, 185 n.5 (3d Cir. 2005) (describing how DNA testing has changed the criminal justice system); Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 336 (2002) (observing that DNA testing has resulted in the exoneration of over one hundred defendants); Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 237-40 (observing that the irrefutable nature of DNA evidence has resulted in “[p]rint, electronic media, movies, and television shows all [vying] to portray the latest real or fictionalized saga of an innocent person locked up for years”); *cf.* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1359 (1997) (“[P]rocedural protections . . . have not succeeded in minimizing false convictions to the extent practicable.”).

¹⁶ *See generally* CTR. FOR PUB. INTEGRITY, HARMFUL ERRORS: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (2003) (tracking prosecutorial misconduct nationally); Fredric N. Tulsy, *Tainted Trial Series Part Two: Prosecutors over the Line*, SAN JOSE MERCURY NEWS, Jan. 23, 2006, at A1, available at http://www.mercurynews.com/taintedtrials/ci_5127908 (describing prosecutorial misconduct as part of a three-year study of wrongful convictions).

¹⁷ *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 122 (2008) (finding that the primary evidence supporting false convictions were “eyewitness identification evidence, forensic evidence, informant testimony, and confessions”); Jeff Peabody, *Prosecutorial Liability for Wrongful Convictions* 3-7 (May 8, 2008) (unpublished manuscript, available at <http://ssrn.com/abstract=1130250>) (discussing various causes of false convictions).

¹⁸ *See, e.g.*, *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1124 (9th Cir. 2001) (“[E]ach contract for testimony is fraught with the real peril that the proffered testimony will . . . [be] factually contrived . . . to induce concessions from the government.”); *Ruff v. Runyon*, 258 F.3d 498, 499 (6th Cir. 2001) (adjudicating a civil action resulting from false informant testimony presented to a grand jury); *cf.* Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L.

eye-witnesses misidentify defendants;¹⁹ and defendants sometimes cannot adequately explain prior false confessions.²⁰ In other cases, erroneous convictions result because police falsify evidence²¹ or fail to convey exculpatory evidence to the prosecutor,²² defense lawyers lapse,²³ judges act partially or apply law negligently,²⁴ or juries reach incorrect conclusions based on prejudice, false inferences, inadequacies in the evidence, or simply poor judgment.²⁵

REV. 917, 931 (1999) [hereinafter Yaroshefsky, *Cooperation with Federal Prosecutors*] (discussing whether prosecutors are able to confidently extract truthful testimony from cooperating witnesses).

¹⁹ The Supreme Court has “recognized the inherently suspect qualities of eyewitness identification evidence.” *Watkins v. Sowders*, 449 U.S. 341, 350 (1981) (Brennan, J., dissenting); *accord* *United States v. Wade*, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known . . .”).

²⁰ *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944-45, 970-71 (2004) (analyzing 125 cases of “interrogation-induced false confessions” and emphasizing the special vulnerability of children and the mentally retarded); Garrett, *supra* note 17, at 74 (finding that defendants had confessed in 9 of 200 cases in which false convictions were established); *see also* *False Accusations Scar Boys*, L.A. TIMES, Nov. 6, 2005, at A18 (describing the extraction of a false murder confession from two young boys). Defendants who regret their confessions may not dare take the stand to recant because of a fear being impeached with prior convictions or losing a benefit the confession has procured. *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record – Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 479 (2008) (“[D]emonstrably innocent defendants do not testify in their own defense at substantially [higher] rates than criminal defendants in general.”).

²¹ *E.g.*, *Limone v. Condon*, 372 F.3d 39, 43 (1st Cir. 2004) (describing a police cover-up that resulted in the conviction of three innocent men); *Pierce v. Gilchrist*, 359 F.3d 1279, 1283 (10th Cir. 2004) (discussing an investigation of a forensic chemist that found that five of eight investigations “involved contrived and erroneous statements . . . beyond the limits of forensic science”); *Castellano v. Fragozo*, 352 F.3d 939, 943 (5th Cir. 2003) (describing an arson conviction based on recordings altered to sound like a confession).

²² *E.g.*, *Newsome v. McCabe*, 256 F.3d 747, 749 (7th Cir. 2001) (describing an incident where the police officers did not tell prosecutors that the defendant’s fingerprints did not match those found at the crime scene).

²³ *See* CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON FUNDING OF DEFENSE SERVICES IN CALIFORNIA 4 (2008) (reporting a ten-year study which found that, of 121 cases in which California’s appellate courts identified ineffective assistance of counsel, 104 convictions were reversed).

²⁴ False convictions often result because judicial lapses are affirmed as “harmless error.” *E.g.*, *Fry v. Pliler*, 127 S. Ct. 2321, 2324, 2327-28 (2007) (affirming a conviction despite the trial judge’s erroneous exclusion of a defense witness); *United States v. Record*, 873 F.2d 1363, 1365-66, 1370-71 (10th Cir. 1989) (affirming a criminal conviction while finding that the trial court acted improperly); *United States v. White*, 589 F.2d 1283, 1289 (5th Cir. 1979) (excusing a trial judge’s conduct in falling asleep during defense counsel’s opening).

²⁵ *See, e.g.*, Hal R. Arkes & Barbara A. Mellors, *Do Juries Meet Our Expectations?*, 26 LAW & HUM. BEHAV. 625, 637 (2002) (concluding that juries’ “error rates are sizable”);

Other faulty convictions involve defendants who plead guilty.²⁶ Innocent criminal defendants voluntarily accept punishment for the same sorts of reasons that civil litigants settle even when they deserve to prevail at trial.²⁷ Some counter-factual pleas simply hedge the risk of trial error – i.e., the possibility of conviction despite the defendant’s innocence.²⁸ Other false pleas result from pressures or inducements to plead guilty.²⁹ In cases involving potential sanctions that are relatively minor, defendants often have strong incentives to plead guilty though confident they would ultimately be acquitted.³⁰

Although prosecutors are not always the cause of wrongful convictions, they invariably play some role in producing them. Prosecutors make the initial

Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 326 (2007) (estimating that jury verdicts are inaccurate in at least thirteen percent of cases).

²⁶ See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932-34 (1983) (discussing flaws of the plea bargaining system); John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 96 (1977) (questioning whether guilty pleas are confined to guilty defendants); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1382-84 (2003) (“[O]ur system . . . perversely makes it too easy for [innocent defendants] to plead guilty by allowing *Alford* and *nolo contendere* pleas.”); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1395 (2000) (“Available data confirms the common sense proposition that not all guilty pleas are accurate . . .”).

²⁷ See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1130 (2008); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

²⁸ See *Ruff v. Runyon*, 258 F.3d 498, 499-500 (6th Cir. 2001) (resolving a civil suit by plaintiffs who, in a prior criminal proceeding, though believing themselves innocent, pleaded guilty to reduced charges after being confronted with fabricated informant testimony); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308-09 (1983) (modeling plea bargaining as an entirely market-based system in which each side responds to the risks); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2012 (1992) (“[I]f the trial process is flawed – if trials sometimes convict innocent defendants – bargaining will not fix the mistakes.”).

²⁹ Cf. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1995-98 (1992) (suggesting a need to minimize pleas involving innocent defendants).

³⁰ See, e.g., MALCOM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 185-89, 195-96 (1979) (analyzing the benefits that plea bargaining offers defendants and why the criminal justice system favors it); Bowers, *supra* note 27, at 1119 (“On balance, plea bargaining is a categorical good for many defendants, particularly in low-stakes cases.”). For example, a defendant is likely to accept probation when otherwise he would be detained while awaiting trial. Other defendants may accept pleas simply to avoid missing work in order to attend court.

decision to bring charges. Thereafter, prosecutors offer favorable plea bargains that can contribute to innocent defendants' decisions to plead guilty. Before trial, the prosecutor prepares the witnesses, some of whom may testify inaccurately. In court, a prosecutor may make a presentation based on admissible but misleading evidence or ask the jury to draw inferences that prove to be incorrect. It does not follow that the prosecutor's conduct in these scenarios is blameworthy; legitimate adversarial behavior can contribute to a wrongful conviction simply because it exploits defects for which others are primarily responsible.³¹

There is a range of conduct that prosecutors may undertake in good faith but nevertheless creates a serious danger of producing false convictions. For example, prosecutors often offer benefits, such as leniency or immunity from prosecution, to accomplices and informants. The inducements alone can cause a witness to testify falsely. Prosecutors' interviewing techniques may further encourage false testimony by signaling what a witness must say to obtain the offered benefits. Although both criminal statutes and professional codes forbid prosecutors to intentionally elicit false testimony,³² they are otherwise silent with respect to prosecutors' methods of preparing witnesses. One should not infer, however, that techniques which pose an unreasonable risk of eliciting perjury are legitimate. There simply is no accepted standard delineating prosecutors' obligations to evaluate the bona fides of unreliable evidence.

Similarly, the gate-keeping functions of prosecutors traditionally have been left almost entirely to prosecutorial discretion. With respect to screening, for instance, the professional codes typically forbid prosecutors to bring charges in the absence of probable cause but leave unresolved how prosecutors should act once that minimal threshold is satisfied.³³ Prosecutors have been known to file prosecutions when there is no better than a fifty percent likelihood that the defendant is guilty, as in the situation in which a prosecutor charges two individuals with the same act, knowing that both cannot be guilty.³⁴ How prosecutors should exercise discretion in such cases, however, remains a

³¹ A prosecutor may, for example, secure a faulty conviction based on testimony that he had no reason to believe was false.

³² *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3 (2008).

³³ *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(b)(i) (1993) (authorizing prosecutors to decline prosecution based on their "reasonable doubt the accused is . . . guilty"); *cf. infra* text accompanying note 182.

³⁴ *See* Michael Q. English, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525, 525-28 (1999) (analyzing prosecutors' use of inconsistent factual theories against multiple defendants for individual crimes); Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL L. REV. 1423, 1423 (2001) (arguing that prosecutors "should be prohibited from exploiting inconsistent positions in separate proceedings" because it would violate Due Process rights of defendants).

matter of debate; given the fallibility of the trial process, one might plausibly argue that it is unreasonable to proceed in cases in which the risk of a false conviction is significant.

The legal and professional standards also fail to address prosecutors' obligations to correct deficiencies in the trial process. Prosecutors sometimes have incentives to remedy errors in order to avoid appellate reversals, but this will not always be true. It is unclear whether and when prosecutors should be held accountable for contributing to wrongful convictions by allowing defense attorneys to serve ineffectively,³⁵ judges to act partially or incompetently,³⁶ or juries to operate in ways inconsistent with the adversary system's ideals.³⁷

II. THE STATUS QUO

Although the Supreme Court has recognized that “[i]t is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one,”³⁸ existing law does not effectively distinguish blameless conduct from unreasonable conduct likely to produce a faulty outcome. For the most part, constitutional and professional standards identify only intentional or obvious improprieties, such as violating discovery obligations,³⁹ intentional misconduct in presenting evidence⁴⁰ and arguments,⁴¹ and knowingly contributing to witness perjury or violating criminal statutes applicable to all attorneys.⁴²

³⁵ See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 70 (1991) [hereinafter Zacharias, *Can Prosecutors Do Justice?*] (arguing that a prosecutor’s duty to “serve justice” within an adversarial system requires a commitment to the adequate functioning of that system and sometimes may require the prosecutor to remedy inadequate defense representation).

³⁶ See *id.* at 85-88 (arguing that prosecutors have some duty to respond to judicial bias at the trial stage); *cf.* MODEL RULES OF PROF’L CONDUCT R. 8.3(b) (2008) (“A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct . . . shall inform the appropriate authority.”).

³⁷ See, *e.g.*, *Commonwealth v. Pierce*, 303 A.2d 209, 214 (Pa. 1973) (holding that prosecutors must avoid unduly prejudicial publicity in order to preserve citizens’ rights to fair trials by impartial juries); *Commonwealth v. Stewart*, 295 A.2d 303, 307 (Pa. 1972) (Roberts, J., concurring) (arguing that the prosecutor was required to disclose a juror’s relationship to the victim).

³⁸ *Berger v. United States*, 295 U.S. 78, 88 (1935).

³⁹ Prosecutors must produce exculpatory evidence and comply with other procedural, statutory, and constitutional disclosure requirements. See, *e.g.*, FED R. CRIM. P. 16(a)(1) (establishing government disclosure obligations); *Brady v. Maryland*, 373 U.S. 83, 85-86 (1963) (requiring the disclosure of exculpatory evidence).

⁴⁰ See, *e.g.*, *People v. Russ*, 589 N.E.2d 375, 378-79 (N.Y. 1992) (reversing a conviction because the prosecutor intentionally called a witness and revealed recanted testimony on the pretext of attacking the witness’s credibility).

⁴¹ See, *e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (reversing a death sentence because of the prosecutor’s misstatements to the jury); *Griffin v. California*, 380

As tort law has developed, prosecutors who fail to exercise reasonable care in performing their duties are immune from lawsuits brought by injured persons.⁴³ This immunity eliminates civil liability as a mechanism for regulating prosecutorial conduct. It also impedes the development of alternative means of regulating prosecutors, because it encourages wrongfully convicted defendants to shift blame *from* prosecutors to other state actors who are potentially subject to liability.⁴⁴ Prosecutors' participation in faulty convictions therefore is less likely to be exposed.⁴⁵

Prosecutorial immunity places an emphasis on self-regulation by prosecutors and their offices and, in theory, shifts the burden of external regulation to the disciplinary process. In the seminal decision establishing prosecutorial immunity, *Imbler v. Pachtman*, the U.S. Supreme Court assumed that attorney discipline would play a significant role in deterring prosecutorial misconduct.⁴⁶ The Court observed that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."⁴⁷

Despite the Supreme Court's expectations, professional discipline has had little practical effect in constraining prosecutorial behavior that risks faulty

U.S. 609, 613-15 (1965) (reversing a conviction because of a prosecutor's remark to the jury about the defendant's failure to testify); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 644-77 (1972) (analyzing the remedies for prosecutorial misconduct in summations).

⁴² See, e.g., 18 U.S.C. §§ 1501-1518 (2000) (prohibiting obstruction of justice); CAL. PENAL CODE § 141 (West 1999) (establishing that anyone who tampers with evidence is guilty of a misdemeanor).

⁴³ Prosecutors have absolute immunity for work performed in the trial setting and qualified immunity for investigative and administrative activities. See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993). Other state actors are potentially liable for procuring wrongful convictions. See, e.g., *Newsome v. McCabe*, 319 F.3d 301, 304 (7th Cir. 2003) (finding police liable under a federal civil rights law for procuring false testimony that resulted in an erroneous murder conviction).

⁴⁴ Because of prosecutorial immunity, where a prosecutor and police share responsibility for a wrongful conviction, the civil plaintiff might minimize the prosecutor's participation to avoid the defense that the prosecutor, not the police, was to blame. See, e.g., *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988) (affirming a civil judgment against the police and rejecting the defense that the plaintiff's injury arose from the prosecutors' wrongful decision to prosecute).

⁴⁵ James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2121-29 (2000) (discussing reasons why prosecutors, and sometimes police officers, avoid public opprobrium for misconduct in procuring death sentences); cf. Peabody, *supra* note 17, at 18 (providing an economic model suggesting that, in the absence of prosecutorial liability for wrongful convictions, "prosecutors will tend to over-prosecute generally, and are more likely than not to pursue a conviction in 'close cases,' where there is a sizeable chance that the prosecutor will fail to convict the proper individual")

⁴⁶ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

⁴⁷ *Id.*

convictions.⁴⁸ Durham, North Carolina District Attorney Mike Nifong's disbarment in June 2007 was an exceptional instance in which disciplinary regulators imposed meaningful sanctions, but it involved the unusual situation in which a prosecutor intentionally, and for self-serving reasons, violated explicit ethics requirements.⁴⁹ Nifong's disbarment contrasted sharply with the North Carolina authorities' failure to sanction two prosecutors for conduct resulting in the murder conviction of Alan Gell, who spent nine years in prison after the prosecutors withheld proof that Gell was incarcerated while the murder was committed.⁵⁰ The disciplinary committee merely reprimanded Gell's prosecutors, explaining that "there was 'no clear, cogent, and convincing evidence that [the prosecutors'] conduct was intentional.'"⁵¹ What distinguished Nifong from Gell's prosecutors was not the seriousness of the harm he caused; the Duke students Nifong targeted, unlike Gell, remained free throughout the proceedings. Rather, the difference was in Nifong's perceived culpability – his reasons for engaging in the conduct that risked a false conviction.

In general, only a few disciplinary rules addressing prosecutors' work go beyond established constitutional law.⁵² These are mainly procedural rules, including provisions regulating interference with defendants' constitutional rights, the subpoenaing of attorneys, and extrajudicial speech.⁵³ The notable exception is a 2008 addition to the Model Rules which implements post-conviction duties of disclosure, investigation, and rectification upon learning

⁴⁸ See sources cited *supra* note 11.

⁴⁹ Nifong's acts in the Duke lacrosse case included making false statements, withholding exculpatory evidence, and misusing the media in a way that might have led to the conviction of young men now universally regarded as innocent. Amended Findings of Facts, Conclusions of Law and Order of Discipline at 22-24, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 *FORDHAM L. REV.* 1337, 1346, 1348, 1358 (2007) [hereinafter Mosteller, *Duke Lacrosse Case*]. Other exceptional cases in which sanctions have been imposed on prosecutors for professional misconduct include *In re Zawada*, 92 P.3d 862, 862 (Ariz. 2004) (suspending a prosecutor for conducting an improper cross-examination), and *In re Peasley*, 90 P.3d 764, 764 (Ariz. 2004) (disbarring a prosecutor for intentionally introducing false testimony).

⁵⁰ 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, 264-69 (2008) [hereinafter Mosteller, *Disbarment of Nifong*].

⁵¹ *Id.* at 270 (quoting Order of Discipline at 3, N.C. State Bar v. Hoke, No. 04 DHC 15 (Disciplinary Hearing Comm'n of the N.C. State Bar Dec. 2, 2004) (on file with author)).

⁵² See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 *U. ILL. L. REV.* 1573, 1587 [hereinafter Green, *Prosecutorial Ethics as Usual*] (discussing the provisions of Model Rule of Professional Conduct 3.8).

⁵³ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8(c), (e), (f) (2008). *But see, e.g., id.* R. 3.8(d) (requiring disclosure of all evidence "that tends to negate the guilt of the accused").

new evidence that suggests an innocent person has been convicted.⁵⁴ The new provision has not been accompanied by parallel prohibitions focusing on prosecutorial conduct that may lead to a false conviction at the trial or pre-trial stages.

To the extent that general ethical principles have the potential to constrain a broad range of unreasonable prosecutorial behavior, disciplinary agencies have never tapped into that potential. Many ethics codes forbid “conduct that is prejudicial to the administration of justice,”⁵⁵ but no jurisdiction has interpreted this prohibition with an eye toward developing prosecutorial standards. Language in the codes exhorting prosecutors to serve justice has been similarly ignored, largely because of the codes’ failure to define the meaning of “justice.”⁵⁶ The codes typically do not reflect other possible sources of restraint identified in the professional responsibility literature, such as the concept of “prosecutorial neutrality.”⁵⁷

The bottom line is that disciplinary agencies have not interpreted the existing rules expansively. Prosecutorial discipline has been rare.⁵⁸ As a consequence, the disciplinary process does not currently play a significant role in influencing prosecutorial behavior.

III. THE POTENTIAL ROLE OF THE COMPETENCE RULE IN REGULATING PROSECUTORS’ CONTRIBUTION TO WRONGFUL CONVICTIONS

Some commentators are skeptical that disciplinary regulation can constrain prosecutorial behavior attributable to overzealousness or negligence. These commentators instead advocate for more demanding legal rules governing specific prosecutorial activity, including discovery, interrogating witnesses, and overseeing accomplice testimony and eyewitness identifications.⁵⁹ Other commentators, however, take the view that the disciplinary process should play a more robust role in constraining prosecutorial misconduct, arguing that existing ethics rules should be enforced more vigorously or their scope

⁵⁴ *Id.* R. 3.8(g)-(h). For a discussion of prosecutors’ post-conviction obligations, see generally Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005).

⁵⁵ *E.g.*, MODEL RULES OF PROF’L CONDUCT R. 8.4(d).

⁵⁶ See Zacharias, *Can Prosecutors Do Justice?*, *supra* note 35, at 46-53, 69-70 (discussing the possible meaning of “justice” in the codes).

⁵⁷ Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 838, 901 [hereinafter Green & Zacharias, *Prosecutorial Neutrality*] (discussing ethics codes’ failure to address prosecutorial neutrality and possible reasons why drafters have failed to do so).

⁵⁸ See sources cited *supra* note 11.

⁵⁹ *E.g.*, Mosteller, *Duke Lacrosse Case*, *supra* note 49, at 1408 (advocating “concrete, enforceable rules” on eyewitness identification); Mosteller, *Disbarment of Nifong*, *supra* note 50, at 318 (advocating open-file discovery).

expanded.⁶⁰ *Imbler*'s reliance on prosecutors' "amenability to professional discipline"⁶¹ suggests that it may be fair to impose on prosecutors at least some enforceable disciplinary obligation to take defendants' innocence seriously⁶² – an obligation the generalized concept of "seeking justice" assumes but does not spell out in a meaningful way.⁶³

The following Sections of this Article explore one way in which disciplinary agencies might enhance their oversight in this regard; namely, interpreting the professional competence rule as including the obligation to exercise reasonable care to avoid false convictions. As background, Section A contrasts disciplinary regulators' use of the competence requirement against private attorneys, including criminal defense lawyers, with the regulators' historical indifference to instances of prosecutorial incompetence. Section B then introduces the possibility of expanding the competence rule's enforcement. The remaining sections flesh out the thought experiment. Section C describes the potential benefits of enhanced enforcement of the rule. Section D illustrates why this approach might be preferable to other options for enhancing prosecutorial discipline.

A. *Disciplinary Authorities' Unresponsiveness to Prosecutorial Negligence*

Most states have adopted professional code provisions that, like Model Rule 1.1, require all lawyers to provide "competent representation to a client."⁶⁴ These provisions have been enforced selectively against private attorneys. Recognizing lawyers' human fallibility and seeking to conserve resources, disciplinary authorities typically reserve discipline for incompetence that is

⁶⁰ E.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 141, 161 (2007) (advocating stricter oversight of prosecutors by disciplinary authorities and "[a] separate code of prosecutorial conduct"); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 761 (1986) (commenting on a "lack of will on the part of disciplinary agencies"); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 901 (1995) ("Infusing the professional disciplinary bodies with more money and resources to identify and sanction prosecutorial misconduct is one way to remedy the inadequate scrutiny that prosecutors currently receive.").

⁶¹ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

⁶² See *United States v. Mullins*, 446 F.3d 750, 761 (8th Cir. 2006) (asserting that it is "part of [prosecutors'] professional responsibility to avoid inculcating the innocent").

⁶³ See, e.g., Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *FORDHAM URB. L.J.* 607, 634 (1999) [hereinafter Green, *Why "Seek Justice"?*] (maintaining that doing justice includes pursuing objectives implicit in the constitutional and statutory law including avoiding convicting the innocent, affording defendants a fair and lawful process, treating wrongdoers with proportionality, and treating similarly situated individuals roughly the same); Zacharias, *Can Prosecutors Do Justice?*, *supra* note 35, at 46 (discussing the ethics codes' failure to define the meaning of justice).

⁶⁴ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

egregious or places future clients at risk.⁶⁵ They rely on civil liability as an alternative mechanism for deterring ordinary lawyer negligence.⁶⁶ Nevertheless, by preserving the possibility of sanction for incompetence, occasional enforcement of the competence rule encourages care on the part of some private attorneys who might otherwise approach clients' matters cavalierly.⁶⁷

Disciplinary authorities have been especially hesitant to enforce the competence rule in cases involving criminal defense lawyers, for a variety of reasons.⁶⁸ Even so, criminal defenders face a realistic risk of discipline for incompetence, particularly when defense negligence potentially leads to an erroneous conviction. For example, in *In re Wolfram*, a criminal defense lawyer was sanctioned for inadequately investigating and preparing his client's case.⁶⁹ The reviewing court identified a host of specific tasks the lawyer had failed to perform: interviewing prosecution witnesses and other prospective witnesses, procuring independent expert witnesses, reading the grand jury transcript, examining physical evidence, consulting with the client on whether to submit lesser included offenses to the jury, challenging prospective jurors, and objecting to expert testimony offered on the ultimate issue of guilt.⁷⁰ Taken together, the omissions made the representation, in the words of successor counsel, "wretched beyond all belief" – an assessment the court quoted with evident agreement.⁷¹ Although there was no specific legal obligation to do any of the tasks the court identified, the competence rule allowed the disciplinary authorities to evaluate the quality of the lawyer's acts collectively.

⁶⁵ See WOLFRAM, *supra* note 60, at 191 ("[O]nly relatively blatant cases of incompetence are selected for disciplinary prosecution . . .").

⁶⁶ See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 803 (1992) (observing the expansion of civil malpractice liability).

⁶⁷ See *Statewide Grievance Comm. v. Witt*, No. CV010810765, 2002 WL 31124756, at *3 (Conn. Super. Ct. Aug. 13, 2002) (suspending a recidivist lawyer for three months for incompetence and lack of diligence).

⁶⁸ Court-appointed lawyers' lapses may be attributable to the pressures of inadequate office staffing or inadequate state funding rather than the lawyers' incompetence. The Sixth Amendment right to effective assistance of counsel already provides a supplemental remedy for criminal defendants harmed by their counsel's negligence. Constitutional decisions also provide an alternative vehicle through which courts can analyze and identify incompetent representation. See Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1185-90 (2003) (discussing constitutional case law's effect on defense counsel behavior).

⁶⁹ *In re Wolfram*, 847 P.2d 94, 103 (Ariz. 1993) (justifying a sanction based on the lawyer's "lack of competence and diligence, and his failure to properly communicate with his client").

⁷⁰ *Id.* at 96.

⁷¹ *Id.* at 96-97.

In theory, prosecutors are subject to the same obligation to “provide competent representation to a client.”⁷² Their “client” is the state (or another sovereign entity), not the victim, defendant, or any individual.⁷³ But representing the state may include functions that, when performed correctly, safeguard the interests of individuals. The Comment to Model Rule 3.8, which addresses the “Special Responsibilities of a Prosecutor,” specifically references the competence rule as a potential source of prosecutorial obligations.⁷⁴

As a practical matter, disciplinary regulators have not implemented rules like Model Rule 1.1 against prosecutors. Prosecutorial neglect has been regulated almost exclusively through internal administrative sanctions or informally by courts.⁷⁵ The following Sections develop the rationale for giving the competence rule a more significant role in prosecutorial discipline.

⁷² MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008). Although not all professional rules are germane to prosecutors' work, prosecutors are subject to ethics requirements, including rules governing the attorney-client relationship, relationships with the court and third parties, and rules addressing conduct in which the prosecutors do engage. See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 216-18 (2000) (discussing prosecutors' ethics obligations after the Ethical Standards for Federal Prosecutors Act of 1996, 28 U.S.C. § 530B (2000)).

⁷³ Cf. John Jackson, *The Ethical Implications of the Enhanced Role of the Public Prosecutor*, 9 LEGAL ETHICS 35, 48 (2006) (arguing that prosecutors' “task is similar to that of judges”).

⁷⁴ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2008) (“Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation.”).

⁷⁵ Non-performing prosecutors are subject to chastisement by judges and supervisors and may be denied promotions or, in extreme cases, discharged. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 71, 83-87 (1995) [hereinafter Green, *Policing Federal Prosecutors*] (discussing informal judicial disciplinary mechanisms and the disciplinary powers of district court disciplinary committees).

Federal prosecutors face the possibility of formal sanctions imposed by the Justice Department's Office of Professional Responsibility (“OPR”). The nature of OPR's oversight, however, is uncertain. The first report of a disciplinary investigation published by OPR found that a prosecutor had negligently, but not intentionally, withheld exculpatory material. *Id.* at 86-87 (discussing OFFICE OF PROF'L RESPONSIBILITY, PUBLIC REPORT ON INVESTIGATION OF MISCONDUCT ALLEGATIONS IN UNITED STATES V. ISGRO (1994)). From 1993 to 1999, OPR publicly disclosed some of its activities, issuing seventeen reports. See Williams, *supra* note 9, at 3475. Previous to that period and subsequently under the Bush Administration, OPR's investigative reports were not disclosed, and only summary information was provided in OPR's annual reports. This made it impossible to know the circumstances under which, and in what manner, the Justice Department sanctions federal prosecutors for incompetence.

B. *Initiating the Thought Experiment: Enforcing a Prosecutor's Duty to Avoid Wrongful Convictions*

Assuming prosecutors are responsible for representing their clients competently, what is the scope of that duty? At root, competent work requires the performance of basic job functions, including carefully investigating and presenting matters to the grand jury. It also entails carrying out legally required tasks, such as filing briefs or disclosing information in accordance with discovery rules. At a minimum, prosecutors must fulfill the state's core objectives and accomplish core tasks essential to successful prosecutions, including screening cases diligently, interviewing and preparing key witnesses, preparing for trial, and performing adequately in court. This Article has posited that the competence requirement can also be interpreted to include the exercise of reasonable care to avoid convicting the innocent, an obligation that has both negative and affirmative components: *avoiding* unreasonable conduct that tends to produce wrongful convictions and *undertaking* conduct reasonably necessary to prevent wrongful convictions.

Under this conception, prosecutorial acts and omissions, cumulatively, can create an unreasonable likelihood of false convictions even when (as in *Wolfram*) no single act or omission itself would violate the competence rule.⁷⁶ Suppose, for example, that a prosecutor in a corporate fraud case comes to believe that an unindicted employee was a co-conspirator. In pursuing the employee, the prosecutor might engage in the following acts, none of which alone would be grounds for discipline: (1) securing an accomplice's cooperation by offering immunity; (2) falsely informing the accomplice that the evidence overwhelmingly suggests the employee attended a meeting where the fraud was discussed; (3) reminding the accomplice that the immunity agreement requires him to cooperate fully; (4) obtaining the accomplice's testimony that the employee attended the meeting, even though the accomplice's lawyer expresses doubts about the accomplice's credibility on this point; (5) failing to seek evidence that would contradict the account; (6) ignoring the absence of evidence corroborating the accomplice's account; (7) failing to disclose the expression of doubt by the accomplice's attorney, on the theory that it was not evidence and was made in the course of plea negotiations; and (8) presenting the accomplice's testimony in evidence at the employee's trial. In context, the prosecutor's overall conduct arguably creates an unreasonable risk of obtaining a wrongful conviction.

For purposes of this Article's thought experiment, let us assume (as generally is the case in disciplinary matters) that regulators may enforce the competence rule without establishing that the prosecutor's acts caused actual harm. Disciplinary enforcement would be intended to encourage

⁷⁶ *In re Wolfram*, 847 P.2d 94, 100 (Ariz. 1993) ("We note that some of Respondent's acts and omissions, if viewed independently of one another, are not objectionable and may be explained by legitimate lawyering and trial strategy. Nevertheless, an examination of Respondent's conduct, in the aggregate, tells a much different story.").

prosecutors to evaluate and self-regulate their conduct prospectively, at a time when they can still avoid injuries to their client or third persons to whom they owe a duty. In effect, the competence rule would require prosecutors initially – and disciplinary agencies and reviewing courts ultimately – to consider whether the totality of the prosecutorial conduct creates an unreasonable risk of producing a false conviction.

Two practical impediments to enforcing the competence rule in this way should be noted at the outset. The first involves a problem of proof. Prosecutions are not transparent. Only a small amount of prosecutors' work takes place in court. Even when a prosecutor's conduct is on the record, its propriety may depend on related off-the-record conduct. Disciplinary agencies may have difficulty obtaining evidence of a prosecutor's out-of-court misconduct or behavior that would be necessary to evaluate the prosecutor's in-court activities.⁷⁷

The second impediment to enforcing rules like Model Rule 1.1 is that disciplinary agencies have limited resources. Proving prosecutors' conduct and knowledge can be labor-intensive, because prosecution offices tend to resist any suggestion that they have acted improperly.⁷⁸ This problem is exacerbated by the vagueness of the competence standard; accused prosecutors often will be able to challenge the fairness of being second-guessed.⁷⁹ In practice, therefore, disciplinary agencies might be inclined to limit their inquiries to easy cases, such as those in which a prosecutor transparently violates a specific rule.⁸⁰

This Article does not disregard these practical considerations, but it does assume for purposes of its thought experiment that disciplinary agencies nevertheless will pursue some cases involving breaches of the duty to avoid wrongful convictions. It also assumes that, in some cases, the regulators ultimately will be able to ascertain the relevant prosecutorial conduct. The Article will, however, take the proof and resource issues into account when analyzing the implications of enforcing the competence rule.

C. *The Potential Benefits of Enforcing the Competence Rule*

Enforcing the competence rule would influence how prosecutors approach their work. Some prosecutors may currently value convicting the guilty over screening out false charges.⁸¹ Increasing the disciplinary risk of indifference to innocence provides prosecutors with an incentive to take gate-

⁷⁷ For example, the trial record will not show whether, in interviewing and preparing a witness in an unrecorded meeting, the prosecutor contributed to creating false testimony. Observers of the behavior will have reasons to give self-serving testimony.

⁷⁸ See Zacharias, *Professional Discipline*, *supra* note 11, at 737.

⁷⁹ See *infra* Part V.A.2.

⁸⁰ These resource limitations are one reason why prosecutors are rarely, if ever, sanctioned under Rule 1.1 and other rules.

⁸¹ See *supra* text accompanying note 34.

keeping seriously. It encourages prosecutors to temper overzealousness and consider how their behavior can produce untoward results.

Similarly, implementing the competence rule would positively influence institutional practices. The desire to guide line prosecutors and avoid disruptions inherent in disciplinary inquiries should lead supervisory prosecutors to help subordinate attorneys understand what competence entails, through training and direct supervision. Supervisory prosecutors would also be given a personal incentive to emphasize their subordinates' role in avoiding false convictions because, under most ethics codes, they have an independent duty to promote compliance with the professional rules.⁸² Thus, implementing the competence rule should improve prosecutorial cultures; offices with a "win at all cost" mentality would be encouraged to place greater weight on the government interest in preventing unjust outcomes.⁸³

Disciplinary enforcement might lead to a better understanding of appropriate prosecutorial conduct in other ways. Judges reviewing disciplinary decisions would have an opportunity to express their views. Their opinions might well go beyond what judges say in the course of trials, where they are constrained by constitutional limits,⁸⁴ evidentiary considerations,⁸⁵ and (in civil cases) prosecutorial immunity.⁸⁶ A broader jurisprudence of prosecutorial competence should result.⁸⁷

As a consequence, prosecutors would inevitably become more explicit about what they expect of themselves and each other. Prosecutors' offices might develop internal guidelines based on the developing judicial standards because

⁸² E.g., MODEL RULES OF PROF'L CONDUCT R. 5.1(b) (2008) (imposing supervisory obligations).

⁸³ See Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. (forthcoming 2009) (manuscript at 4-8, available at <http://www.ssrn.com/abstract=1273657>) (explaining why even "ethical prosecutors" will err on the side of under-disclosing exculpatory material); George C. Thomas III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25, 32 ("Prosecutors should be encouraged to avoid tunnel vision. . . . [W]e need to find more effective ways to encourage prosecutors to seek justice rather than to win all the cases where they decide that the defendant is guilty.").

⁸⁴ In other words, the judges will typically decide only whether constitutional minimums have been satisfied.

⁸⁵ Judges can only act based on the evidence that comes before them, which in turn is determined by what is relevant to the legal issues in the criminal trial.

⁸⁶ See *supra* note 43. Because of the immunity doctrine, cases rarely are brought in which courts can express their expectations of prosecutors. Courts sometimes have opportunities to express positions about prosecutorial conduct when dismissing civil liability claims, but generally decline those opportunities out of a legitimate concern for judicial restraint.

⁸⁷ The jurisprudence would presumably address aspects of prosecutorial conduct about which courts and regulators have been silent because the conduct is not governed by a specific disciplinary rule.

courts, in future cases, are likely to defer to internal standards adopted in good faith.⁸⁸ But even if prosecution offices do not promulgate internal regulations, prosecutors individually, in groups within an office, or collectively through national organizations might do so. They would be motivated to identify and address gaps in the competence jurisprudence, both for their own protection and to influence future judicial decision-making, by developing, collecting, and memorializing specific conceptions of what it means to be competent.

It is unnecessary for purposes of this Article's thought experiment to detail all the categories of prosecutorial activity in which improved understandings regarding appropriate conduct might develop, but it is worthwhile to consider a few. Prosecutorial participation in gathering evidence, for example, is an area that cries out for better analysis because it is both lightly regulated and critical to the reliability of criminal proceedings. Many recently publicized wrongful convictions resulted from faulty evidence produced by eyewitnesses or experts, false confessions, and perjured accomplice testimony that prosecutors helped prepare.⁸⁹ Prosecutors could have taken steps in many of these cases to minimize the likelihood of the faulty convictions.⁹⁰ Especially when the facts are in doubt, competent representation of the state arguably requires prosecutors to ascertain the reliability of the evidence before relying on it.⁹¹ Resource limitations may justify some omissions, but surely not all.

Prosecutors' role in affirmatively producing false evidence might be another fertile area for the development of standards. Prosecutors sometimes create false evidence unintentionally – for example, by browbeating accomplice witnesses or threatening to withhold leniency from witnesses who do not support the

⁸⁸ Judges typically assume that prosecutors themselves are best able to evaluate the practical pressures involved in handling their cases. See Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 441-42 (2003) [hereinafter Green & Zacharias, *Regulating Federal Prosecutors' Ethics*] (explaining that "federal prosecutors [have] largely unfettered discretion" in some areas, in part because courts assume they have "unique access to information relevant to how prosecutors should operate").

⁸⁹ See, e.g., SCHECK, *supra* note 15, at 53-55, 117-21, 202-03 (discussing wrongful convictions and their causes); The Innocence Project, <http://www.innocenceproject.org/understand/> (last visited Nov. 9, 2008) (same).

⁹⁰ See CTR. FOR PUB. INTEGRITY, *supra* note 16, at 15 (discussing one prosecutor's review of cases based on eyewitness accounts, in an attempt to avoid continuing a string of wrongful convictions).

⁹¹ Prosecutors have the unique capacity to probe the accuracy of evidence by questioning the police about the information they have collected and matters they have neglected. Prosecutors can interview witnesses to determine their motivation. See Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis – Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 69 (2008) (arguing that prosecutors have a duty "to thoroughly and thoughtfully evaluate a cooperating defendant's information"). Prosecutors can also use their own investigative resources, such as the grand jury, to seek supplemental information.

version of events the prosecutor believes to be true.⁹² In preparing witnesses, prosecutors often cause witnesses to minimize their uncertainty about inculpatory facts or to withhold potentially exculpatory facts about which they are uncertain.⁹³ Disciplinary decisions, judicial opinions, and prosecutorial guidelines can play a valuable role in identifying when interviewing and preparation techniques are unreasonable because of the likelihood that they will elicit false testimony.

A third promising subject for competence jurisprudence relates to prosecutors' preservation and production of exculpatory and impeachment material. Arguably, prosecutors act unreasonably when they interfere with defense lawyers' ability to establish their clients' innocence. Prosecutors have been known to engage in such tactics as: (1) refraining from memorializing witness statements to avoid discovery; (2) producing discoverable information in a manner that obscures its significance; (3) coaching witnesses to hide inconsistencies or biases; (4) discouraging witnesses from speaking or cooperating with defense attorneys; and (5) refusing defense requests to immunize witnesses or perform scientific tests the defense cannot afford.⁹⁴ Although these activities are not categorically illegal or improper, they may unreasonably contribute to false convictions in some contexts, particularly when used in conjunction with other tactics. Vigorous enforcement of the prosecutorial competence rule would encourage courts and prosecutors to develop clearer understandings about when such conduct crosses the line.

These are just a few areas in which disciplinary enforcement of rules like Model Rule 1.1 might lead to a more coherent view of when prosecutorial conduct is too risky, which in turn would produce improved internal training and oversight of prosecutors. The salutary results would be twofold: first, to reduce the number of cases in which innocent individuals are convicted, the ultimate point of the exercise; and second, to enhance public confidence in prosecutors, the criminal justice system, the legal profession, and professional self-regulation.

D. *Disciplinary Alternatives to Enforcing the Competence Rule*

Let us assume the Supreme Court in *Imbler* was justified in looking to professional discipline of prosecutors as a viable alternative to regulation by civil liability. One way to analyze whether enforcing the competence rule makes sense is to consider whether other mechanisms for invigorating the disciplinary regime would better encourage prosecutors to avoid inculpatory the innocent.

⁹² See Yaroshefsky, *Cooperation with Federal Prosecutors*, *supra* note 18, at 953-60 (illustrating ways prosecutors unwittingly induce cooperators to corroborate prosecutors' erroneous understandings).

⁹³ See Bennett Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 833-34, 849 (2002).

⁹⁴ See, e.g., Rosenthal, *supra* note 11, at 895-97.

1. Enhancing Enforcement of the Existing Rules

Disciplinary agencies might increase their enforcement of the existing specific code provisions that address prosecutors. In practice, disciplinary regulators have not targeted prosecutors' unintentional or good faith violations of these provisions.⁹⁵ This tendency can be explained not only by the regulators' sense of fairness and desire to preserve resources for more serious wrongdoing, but also by their uncertainty about whether the rules encompass negligent or reckless conduct. Nevertheless, the option of more cutting-edge enforcement clearly exists.

One problem with this approach is that the existing specific rules do not address much of the conduct that contributes to unjust convictions. For example, most ethics codes address prosecutors' screening function solely through provisions forbidding prosecution on less than probable cause.⁹⁶ These provisions fail to implement the intuition (accepted by many prosecutors) that it is unreasonable for a prosecutor to pursue a case when he has significant doubts about the defendant's guilt, even though a conviction might be obtained. Likewise, the codes seem to allow prosecutors to offer questionable evidence unless they "know" it to be false,⁹⁷ even though exploiting unreliable evidence may lead to an unjust conviction. Simply enforcing the terms of the rules therefore will not suffice to turn society's general concern about wrongful convictions into a meaningful prosecutorial obligation to avoid them.

Moreover, in practice, aggressive enforcement of the concrete existing rules – but only these rules – would lead to punishment for prosecutorial misconduct that is less significant than other behavior the codes do not cover. The punishable act of willfully withholding unimportant discovery material in a slam-dunk prosecution, for example, warrants no more attention than the unpunishable failure to take easy steps to find exculpatory evidence in a borderline case.⁹⁸ If protecting innocent defendants is the primary concern, disciplinary enforcement priorities should not always turn solely on the relative specificity of the provisions that apply.

⁹⁵ The regulators may, for example, overlook a failure to produce exculpatory evidence that resulted from simple neglect or an erroneous legal conclusion that production was not required.

⁹⁶ *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2008).

⁹⁷ *E.g.*, *id.* R. 3.3(a)(3).

⁹⁸ It is important to note that prosecutors may engage in the worst excesses where their evidence is weakest, in the interest of securing the conviction of defendants of whose guilt the prosecutors are convinced. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 431 (1992). Failing to pursue investigative leads or provide evidence that could exonerate the defendant may be reasonable when there is overwhelming evidence of guilt but not when the evidence is thin.

2. Expanding the Reach of Existing Rules

An alternative for invigorating the disciplinary regime might be to liberalize the mens rea elements of the existing rules.⁹⁹ Many provisions regulating prosecutorial behavior either require knowing misconduct or are unclear about the applicable mens rea requirement.¹⁰⁰ Amending the rules to address categories of negligent or reckless behavior would facilitate discipline and, in some cases, better align prosecutors' professional obligations with constitutional and statutory requirements.¹⁰¹

The approach of liberalizing the rules' mens rea elements suffers from three significant defects, however. First, it could cause prosecutors to become excessively cautious. A strict liability or negligence standard for prosecutors' use of false testimony, for example, would create a powerful incentive for prosecutors to disregard all informants or cooperating witnesses who have reasons to lie. The inflexibility of an overly demanding rule would undermine society's expectation that prosecutors confronting potentially unreliable witnesses will exercise reasoned discretion – balancing the goal of achieving appropriate convictions against the risk of convicting the innocent.

Second, reducing the state of mind requirements too far would be unfair to prosecutors. Strict liability for an unintentional failure to disclose particular evidence, for example, makes sense if the remedy is to correct an injustice done to the defendant – as when an appellate court orders a new trial. Sanctioning the prosecutor personally for a result he had little ability to control, however, may not serve the primary goals of professional discipline; namely, assuring that practicing lawyers have the integrity, skills, and judgment to continue in their profession.¹⁰²

⁹⁹ See Yaroshefsky, *Wrongful Convictions*, *supra* note 11, at 282-83, 299 (arguing for discipline of prosecutors' gross negligence).

¹⁰⁰ For example, Model Rules 3.3(a) forbids a lawyer to “knowingly” make false statements or offer false evidence whereas Model Rule 1.7(a), forbidding the disclosure of client confidences and the representation of conflicting interests without client consent, has no explicit mens rea requirement. MODEL RULES OF PROF'L CONDUCT R. 1.7(a), 3.3(a). Lawyers clearly may be sanctioned for some well-intentioned misconduct, as when they commingle client and personal funds with client consent. See WOLFRAM, *supra* note 60, at 177 & n.2 (1986) (discussing disciplinary regulators' strict approach to commingling). But when the rules are silent regarding mens rea, the requisite level of culpability often is contestable.

¹⁰¹ See, e.g., *United States v. Wallach*, 935 F.2d 445, 455-59 (2d Cir. 1991) (overturning a conviction where prosecutors should have known that a key witness was lying); *United States v. Butler*, 567 F.2d 885, 890 (9th Cir. 1978) (overturning a conviction where the prosecution negligently failed to disclose witness impeachment material). Because judicial decisions tend to focus on whether the defendant has received due process, they ordinarily do not require intentional prosecutorial misconduct before a court will remedy a deficiency in the trial.

¹⁰² See Fred C. Zacharias, *The Purposes of Discipline*, 45 WM. & MARY L. REV. 675, 687 (2004) [hereinafter Zacharias, *Purposes of Discipline*] (discussing the licensing goals of

Third, simply tinkering with the existing rules (whether by reducing the mens rea requirements or otherwise expanding the rules' reach), would probably not address the more global causes of false convictions. The substantive scope of the existing rules is narrow. Prosecutorial conduct falling outside the rules' limited purview is as likely to produce erroneous convictions as the conduct the rules cover. Under the existing rules, for example, failing to disclose exculpatory evidence is covered but failing to seek likely exculpatory evidence is not. Indeed, as the corporate fraud scenario described in Section B illustrates, prosecutors can contribute to faulty convictions through a series of acts none of which alone would be punishable under the ethics codes' targeted provisions. Reformulating the existing standards' knowledge requirements or otherwise tinkering with the existing rules thus might cause prosecutors to become vigilant in a few narrow contexts, but would ignore equally or more problematic, yet unregulated, behavior.

3. Codifying New Obligations

The most plausible alternative to enforcing an open-ended provision, such as the general competence rule, would involve a dedicated recodification effort. The professional code drafters might adopt a series of additional provisions specifying actions prosecutors must take to minimize the risk of false convictions. Presumably, each new rule would target the kinds of conduct that are likely to, and have in the past, led to erroneous results.

While intuitively appealing, this approach, too, has limitations.¹⁰³ Initially, it would be difficult for a code to anticipate or define with precision all illegitimate conduct that is likely to result in wrongful convictions.¹⁰⁴ One may simply not be able to codify society's intuitions about when prosecutors should pursue investigative leads that might exonerate a defendant, when rigorous preparation or questioning of witnesses becomes unreasonable, and when facts suggesting guilt are too attenuated to justify a prosecution. More importantly, as already mentioned, prosecutorial behavior that is likely to result in a false conviction often will not reflect a discrete act or omission, but rather a course of conduct.¹⁰⁵

discipline and suggesting that punishment is a relatively minor goal); *see also* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. (forthcoming 2009) (manuscript at 38, on file with authors) ("Professional discipline serves many functions, of which punishment of the lawyer may be the least important.").

¹⁰³ Cf. Green, *Prosecutorial Ethics as Usual*, *supra* note 52, at 1581-85.

¹⁰⁴ Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. (forthcoming 2009) (manuscript at 47, available at <http://ssrn.com/abstract=1313215>) ("Bar rules cannot capture the myriad complex factors that rightly or wrongly influence patterns of prosecutorial discretion across cases.").

¹⁰⁵ *United States v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004), a recent terrorism prosecution, has frequently been used to illustrate how a course of prosecutorial conduct – involving, among other things, witness coaching, failure to record interviews, withholding discovery, and inflammatory arguments – can lead to false convictions. *E.g.*, Bennett L.

Moreover, extensive but incomplete codification of rules designed to prevent prosecutorial participation in wrongful convictions could be counterproductive. When code drafters reduce broad principles of fairness and reasonableness to specific actions prosecutors must undertake or avoid, prosecutors are likely to develop rule-centered mind-sets. Prosecutors may come to focus exclusively on particular prohibitions and avoid introspection about the broader obligation to avoid false convictions from which the prohibitions stem.¹⁰⁶ A game-like attitude would result, with prosecutors interpreting the rules literally and viewing the codes as requiring nothing more than the specified behavior.¹⁰⁷ A rule-based focus also creates a danger that prosecutors will attempt to circumvent even the concrete prohibitions rather than seeking to comply with the code's spirit.¹⁰⁸

E. *Concluding Thoughts*

Code provisions, statutes, and administrative regulations that identify and prohibit (or require) particular prosecutorial conduct deserve a role in prosecutorial regulation. When it is obvious that specific categories of behavior are improper, clear, enforceable, and enforced prohibitions work better than general standards subject to interpretation by prosecutors and regulators. Thus, for example, rules forbidding the intentional use of false

Gershman, *How Juries Get It Wrong: Anatomy of the Detroit Terror Case*, 44 WASHBURN L.J. 327, 330-41 (2005); Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257, 257-60 (2005).

¹⁰⁶ One benefit of constructing general rules is that "leaving implementation to lawyers may encourage lawyers to think about the appropriateness of their conduct – be it in 'ethical' or simply 'role appropriate' terms." Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 261 (1993) [hereinafter Zacharias, *Specificity*]. Conversely, "strict rules tend to prevent lawyers from engaging in serious introspection concerning their personal responsibility to help achieve good results." *Id.* at 262.

¹⁰⁷ Overly precise rules have the affect of appearing all-inclusive, and consequently fail to identify broader goals and standards lawyers can apply in a variety of situations. *See id.* at 262 ("A highly specific professional requirement . . . risks stultifying lawyers' independent evaluation of appropriate responses.").

¹⁰⁸ To give an example: Granting immunity to prosecution witnesses increases the possibility of false testimony but cannot be completely forbidden because some matters justify immunity. A specific rule forbidding immunity grants would necessarily be written in an under-inclusive way. Prosecutors, however, might come to view the rule as establishing the outer limits on their behavior rather than as a disciplinary minimum. In other words, the specific but under-inclusive rule could discourage prosecutors from considering when grants of immunity not proscribed by the rule are inappropriate. Moreover, even in covered situations, prosecutors might seek alternative means for encouraging the potentially unreliable testimony because the rule teaches them to think only in the concrete terms of "no immunity" rather than the principle that prosecutors should avoid tainting testimony.

evidence or the intentional failure to disclose exculpatory material make considerable sense.

In other circumstances, however, implementing a broad prosecutorial competence rule has obvious advantages. The primary benefit is that it can take into account the totality of a prosecutor's behavior.¹⁰⁹ It enables regulators to consider whether the cumulative effect of a series of actions, each of which alone might be harmless or forgivable, created an unreasonable risk of convicting the innocent. More importantly, the open-textured standard forces prosecutors to evaluate their own conduct *in context* – to determine not only whether it violates a specific prohibition or legal standard, but also whether it contributes to an inappropriate result.

If the only goal in regulating prosecutorial conduct were to prevent wrongful convictions, a better alternative might be the legalization (through codes or statutes) of a series of prophylactic protections for defendants. Society might require prosecutors to videotape all witness and suspect interviews, open their files, identify all potential witnesses for either side, conduct any scientific tests or investigations requested by the defense, or even conduct examinations of all witnesses in a way that elicits information beneficial to the defendant. Some or all of these approaches, however, might increase the risk of perjury or witness tampering by the defendant or simply tilt the balance in criminal law enforcement too far in favor of the defense. Employing the general competence standard would allow the regulators to take equal account of society's interest in maintaining zealous advocates for the prosecution. By definition, the standard itself is neither over- nor under-inclusive because it is flexible, as broad principles tend to be.

If courts and disciplinary agencies take seriously the project of implementing a competence rule against prosecutors, their interpretations of the rule can lead to common law development of standards providing real guidance for future conduct. In other words, the regulators – and ultimately the state supreme courts – would be able to elaborate upon societal intuitions regarding a variety of prosecutorial behavior in the context of concrete facts.¹¹⁰ The emerging jurisprudence in turn would strengthen the hands of trial judges exercising supervisory authority over prosecutors by providing a basis for assessing prosecutorial behavior. The possibility of disciplinary and judicial enforcement would create incentives for prosecutors' offices to develop and codify their own understandings of reasonable conduct.

¹⁰⁹ Much of the Article's analysis may apply equally to the implementation of general ethics concepts governing prosecutors other than competence (e.g., the duties to avoid "conduct prejudicial to the administration of justice" or to "serve justice").

¹¹⁰ See Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. (forthcoming 2009) (manuscript at 2-6, on file authors) [hereinafter Zacharias & Green, *Rationalizing Judicial Regulation*] (discussing the differences between adopting ethics rules ex ante and developing standards in concrete cases).

Of course, the most important impact of enforcing a general duty of care would be on the mind-set of individual prosecutors. It would require them to engage in introspection about their conduct, not simply assess its compliance with specific code requirements. Thus, in every case, prosecutors would need to act carefully in all aspects of their work that give rise to a risk of false convictions, including post-conviction work.

When we propose, as our thought experiment, serious disciplinary enforcement of the competence rule, we are simply suggesting that the regulators depart from the current, *de facto* policy of abstaining from prosecutorial discipline. In practice, we assume that even the proposed enforcement policy would lead to discipline relatively rarely, because investigations into prosecutorial conduct would probably require a triggering event highlighting unreasonably risky conduct – including, but not limited to, a judicial or prosecutorial repudiation of a previous conviction, a judicial referral of a prosecutor for discipline, or news reports concerning prosecutors who have engaged in improprieties.

If disciplinary inquiries are likely to be rare, however, one might ask “what is the point”? The broad answer is that the potential for external regulation in general has proven to be a positive influence upon lawyers.¹¹¹ There is a virtue in affirming the possibility of enforcing prosecutorial obligations that ordinarily are left to self-regulation. Occasional implementation of the competence rule will ideally result in clearer standards of conduct, thereby providing guidance for well-intentioned prosecutors that cannot develop when the rule is entirely unenforced.

Moreover, even occasional instances of discipline may have a beneficial effect on public perceptions. It is fair to say that lay and scholarly criticism of disciplinary regulators’ failure to control prosecutors has sometimes been exaggerated; there are reasons why professional discipline of prosecutors historically has been muted, some having to do with practical concerns, others with resource-allocation issues.¹¹² Nevertheless, when prosecutorial misconduct and the innocence of convicted defendants are reported in the press, it creates a natural sense in the public that “something should be done.”¹¹³ The failure of disciplinary agencies to pursue the participating prosecutors creates mistrust in the lawyer-regulatory system. Providing disciplinary regulators with a tool

¹¹¹ See Wilkins, *supra* note 66, at 832 (discussing how credible threats of malpractice liability have influenced lawyers’ conduct).

¹¹² See Zacharias, *Professional Discipline*, *supra* note 11, at 756-62.

¹¹³ See Genson & Martin, *supra* note 11, at 40 (suggesting that disciplinary authorities should have responded to reported instances of prosecutorial misconduct in Cook County); Rosen, *supra* note 11, at 697, 733-36 (arguing that judicial decisions revealing *Brady* violations should have been followed by professional discipline); cf. JOHN WESLEY HALL, JR., *PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER* § 11:3, at 390 (2d ed. 1996) (“The relative paucity of disciplinary actions against prosecutors . . . demonstrates that there is a disciplinary double standard.”).

they can realistically implement in such cases, even if only occasionally, would help address the demand for reform.

A full definition of the prosecutorial duty to avoid wrongful convictions under provisions like Model Rule 1.1 would need to await judicial interpretation over time. But our understanding of the competence rule envisions application of an objective standard – a focus upon the reasonableness of the prosecutor’s conduct, not the prosecutor’s subjective intentions or beliefs. For reasons discussed in Part IV,¹¹⁴ our proposal also presumes that the reasonableness of a prosecutor’s conduct will not turn on an evaluation of whether the conduct is conventional, as in legal malpractice cases. The disciplinary standard should focus on the actual risk of false conviction that each prosecutor’s own behavior creates.

IV. OBJECTIONS TO INTERPRETING THE COMPETENCE RULE AS ENCOMPASSING PROSECUTORIAL NEGLIGENCE

The proposed application of Model Rule 1.1 requires an interpretation that the rule’s vague competence standard encompasses unreasonable prosecutorial behavior. The assumption that the term “competent representation” applies to all lawyers, in all their functions, is intuitively appealing. One can imagine a series of interpretive arguments, however, that would confine the rule to representation of individual clients by private attorneys. Alternatively, insofar as the rule applies to prosecutors, it might be limited to behavior that undermines the prosecutorial objective of convicting the guilty. We identify the best of these arguments and offer refutations below.

Before proceeding, however, it is worth noting that the viability of the enforcement regime proposed in this Article ultimately does not rest on the interpretive issues discussed here. Even if the existing competence rule could not be read to encompass unreasonable prosecutorial acts that risk false convictions, the rule could be amended to include those acts. At its core, this Article challenges proponents of the proposal to justify discipline of prosecutors on policy grounds, as earlier Parts of the Article have attempted to do,¹¹⁵ and challenges opponents to counter the policy justifications with equally significant policy concerns. Some of these concerns will be discussed in Parts V and VI.

That said, the interpretive questions are important from both a normative perspective and the perspective of institutional legitimacy. If the proposed interpretation of Model Rule 1.1 is implausible and a significantly different rule would be necessary to police the prosecutorial conduct in question, that might support a claim that the effort to discipline prosecutors unfairly singles them out¹¹⁶ or goes beyond the type of ethics concerns that are traditionally

¹¹⁴ See *infra* Part IV.E.

¹¹⁵ See *supra* Part III.E.

¹¹⁶ See *infra* Part V.A.1.

within the province of disciplinary regulators.¹¹⁷ The following analysis, however, suggests that the existing rule, which captures a core expectation of competence by all lawyers, can comfortably be interpreted as addressing prosecutorial negligence.

A. *Prosecutors Do Not Represent the Defendant*

Model Rule 1.1 is a client-protective rule that derives from the lawyer's fiduciary duty to his clients. Hence, the rule refers to competent representation of "a client," which generally means acting in a manner reasonably necessary to achieve the client's objectives. In the scenarios encompassed by this Article's proposal, however, the main beneficiaries of the duty to avoid wrongful convictions are criminal defendants, who are not a prosecutor's clients. Moreover, prosecutors owe defendants no fiduciary obligations. Because defendants have no personal claim upon a prosecutor's representation, interpreting Model Rule 1.1 as establishing defendants' rights is arguably an unwarranted departure from the rule's client-protective objectives.

This view is strengthened when one analogizes incompetence under the disciplinary rule to the notion of incompetence in professional malpractice law. Legal malpractice decisions recognize only a few areas in which lawyers owe a duty of competence to non-clients,¹¹⁸ and these mostly involve situations in which the non-clients' interests are aligned with those of the client.¹¹⁹ Malpractice jurisprudence usually does not authorize liability for acts or omissions harmful to targets of a client's lawsuit. If one conceives of the prosecutor's role as equivalent to that of a private lawyer suing an adversary, the requirement of competence could not include a vigorous obligation to protect the adversary's interests.

The flaw in this interpretation of Model Rule 1.1 is the assumption that a prosecutor's actual client, the state, has no interest in avoiding false convictions. Competent representation of the state is unique in that government lawyers are not expected to engage exclusively in an adversarial quest for victory.¹²⁰ Prosecutors are charged with seeking to achieve the

¹¹⁷ See *infra* Part VI.B.

¹¹⁸ See Fred C. Zacharias, *Lawyer Duties to Amorphous Non-Clients*, PROF. LAW., Aug. 1997, at 1, 4-5 (1997) (discussing situations in which lawyers have enforceable obligations to third parties).

¹¹⁹ For example, when the non-client is a third-party beneficiary of a contract or will or when the client has obtained an opinion letter for the benefit of the non-client in order to complete a cooperative venture. See *id.*

¹²⁰ See, e.g., George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 110 (1975) (arguing that one of prosecutors' "major functions" is seeking "release of the innocent"); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1704 (2000) ("The mindset with which the prosecutor should approach [investigation and screening] is different from the advocate shoring up a somewhat equivocal case; it is the mindset of the true skeptic, the inquisitive

multiple objectives of criminal law enforcement.¹²¹ These include not only convicting (some of) the guilty and seeking proportional punishment, but also obtaining results that are just and that afford defendants fair process.¹²² Thus, when prosecutors promote wrongful convictions, they undermine the objectives of their client, the state, as well as the interests of the third-party defendant. The duty of competence they violate runs to the client.

Of course, the fact that prosecutors serve multiple, potentially conflicting objectives adds a level of complexity. Prosecutors can hardly be expected to go to the same lengths to avoid wrongful convictions as criminal defense lawyers, for whom the paramount objective is preventing convictions and minimizing punishment. From the prosecutor's perspective, the objective of safeguarding defendants' interests must be balanced against the mandate to pursue just prosecutions zealously, within the bounds of the law. Nevertheless, the fairest view of the prosecutorial function is that good representation of the state includes a serious effort to assure accurate verdicts. On that view, the failure to fulfill that function is incompetence within the meaning of Model Rule 1.1.

B. *The Adversarial Criminal Justice Process Prevents and Corrects Error*

A second possible objection to this Article's interpretation of Model Rule 1.1 centers on the assumption that creating a risk of a false conviction can be unreasonable. Prosecutors act within an adversary system. In the purest conception of the adversary system, so long as prosecutors operate legally, the system will compensate for litigation conduct that is prejudicial to defendants. For example, defense attorneys will be able to elicit that prosecutors have browbeaten or over-influenced witnesses, jurors will avoid false inferences prosecutors urge them to draw, and the combination of cross-examination, judicial oversight, and juror wisdom will expose the unreliability of evidence prosecutors introduce. Unlike a prosecutor's under-zealousness, over-zealousness is presumptively corrected by other players in the adversary

neutral."). Stated another way, victory for the state is not always equivalent to a verdict of guilty.

¹²¹ Cumulatively, these objectives are commonly termed the prosecutor's obligation to serve justice.

¹²² See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 236-37 (1988) (discussing prosecutors' role in protecting defendants' procedural and substantive rights); Green, *Prosecutorial Ethics as Usual*, *supra* note 52, at 1577 (identifying the prosecutorial functions of "assuring fair and proportional punishment of the guilty, protecting the innocent from punishment, assuring fair treatment of those affected by the criminal process, and assuring compliance with constitutional and other legal provisions"); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1168 (1973) (arguing that prosecutors have some obligation "to protect the innocent" by sifting the evidence, but that they should not act as the "sole arbiter of truth and justice"); Zacharias, *Can Prosecutors Do Justice?*, *supra* note 35, at 60 (discussing the prosecutor's obligation to assure a fair playing field).

system.¹²³ Under this conception, prosecutors never create an “unreasonable” risk of a false conviction because the adversary process, by definition, produces reasonable results. Thus, prosecutors should not be subject to discipline for unreasonable behavior under rules like Model Rule 1.1.

This interpretation of competent representation suggests that a prosecutor has an obligation to exercise care in carrying out legally assigned tasks (including those aimed at preventing wrongful convictions), but no broader duty. Thus, for example, a prosecutor would need to comply with statutory and constitutional discovery obligations. He would, however, have no duty to refrain from prosecuting doubtful cases, to avoid unintentionally producing or presenting perjured testimony, or to take steps to exculpate a defendant. The adversary system will address those issues better than any prosecutorial incentives that might be created by an over-inclusive reading of the competence rule.

This interpretation, however, reflects a misunderstanding of the prosecutorial role. Both courts and professional code drafters have recognized that prosecutors do have some duty to serve “justice.”¹²⁴ Implicit in this conclusion is a recognition that the criminal investigative and trial processes are fallible and that prosecutors therefore have some functions, beyond simply presenting the prosecution’s case, that compensate for the fallibility of the process.¹²⁵ Even if one believes strongly in the adversary system, the codes’ and judicial references to prosecutors’ “justice” role suggest it would be wrong to assume that the code drafters rely on the purest form of adversarial ideals.¹²⁶

What does this signify for the interpretation of Model Rule 1.1? First, it disposes of the claim that the rule could not be intended to cover unreasonable prosecutorial acts because the adversary system is infallible and prevents any acts from “unreasonably” risking an erroneous result. Second, it militates against the notion that “illegality” provides the appropriate dividing line for when prosecutorial behavior is unreasonable. There is simply no basis for believing that legal standards existing at any point in time encompass all unduly risky behavior or prevent all imbalances within the adversary system; to the contrary, specific rules governing prosecutorial conduct are scarce. The competence rule arguably serves to fill the most significant gaps.

¹²³ Cf. Thomas, *supra* note 83, at 27 (“One reason we argue about procedural niceties rather than fundamental questions about justice is our smug belief that few criminal convictions are wrongful.”).

¹²⁴ E.g., *Berger v. United States*, 295 U.S. 78, 88 (1935); MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2008).

¹²⁵ See Zacharias, *Can Prosecutors Do Justice?*, *supra* note 35, at 49.

¹²⁶ See *id.* at 66-79 (discussing contexts in which, even under a model emphasizing the adversary system, prosecutors sometimes have an obligation to assist or remedy defects in the defense).

C. *Other Players' Negligence*

It might be argued that prosecutors are *less* responsible for avoiding erroneous convictions than other participants in the adversary system. Even if avoiding wrongful convictions is a goal of Model Rule 1.1, it may be the competence of these other participants that the rule calls into question. Thus, for example, a prosecutor's successful introduction of false testimony or reliance on a defendant's false plea usually results primarily from the defense attorney's failure to investigate or to counsel her client adequately. On this view, one should interpret the competence rule in adversarial terms – as providing a basis for discipline only for those lawyers who fail to do their own jobs well enough to prevent the adversary (e.g., the prosecutor) from achieving an inappropriate victory. This interpretation, for the most part, would foreclose the rule from prescribing affirmative prosecutorial obligations to assist (or avoid risky behavior against) the defense.

This argument is unpersuasive for several reasons. First, it suffers from an inaccurate, or exaggerated, factual assumption. Although other actors may sometimes be more responsible than prosecutors for aspects of criminal trials that result in false convictions, that is not always the case. A prosecutor may, for instance, be in sole possession of information about the pressure he has brought to bear on witnesses. The prosecutor may alone have the resources to conduct investigations that might exonerate a defendant.

Second, although this form of adversary system argument might make sense with respect to errors produced in part by the failure of defense counsel, it does not follow equally with respect to errors produced by non-lawyer participants in the system – including police, witnesses, judges, and jurors. The professional rules cannot control the actions of these participants. So in assessing whether the competence provisions address potentially inaccurate verdicts, the choice becomes one of regulating prosecutors, who contribute somewhat to the false convictions, or of regulating no one.

Third, the argument overlooks the fact that competence as a lawyer often includes rectifying others' failures. For example, criminal defense lawyers must consider whether their clients have lied to them. Civil litigators must counteract potential witnesses who hide evidence. Prosecutors are no different; competent prosecuting involves rooting out the errors and misconduct of other actors who fail to play their assigned roles.¹²⁷ The only distinction is that this effort must sometimes be taken not with an eye toward winning, but rather with an eye toward the government-client's alternative objective of avoiding false convictions.

Finally, the notion that others share responsibility for producing false convictions does not justify the conclusion that prosecutors should not be, and therefore are not intended to be, regulated under Model Rule 1.1. Nothing about the rule suggests that it incorporates ideas of comparative negligence.

¹²⁷ See *id.* at 71-72, 87-88 (arguing, inter alia, that prosecutors must sometimes correct for deficiencies in the performance of defense counsel and judges).

So long as avoiding behavior likely to produce a false conviction is part of the function of a lawyer representing a client – be it the lawyer representing the defendant or the prosecutor representing the state – failing in that function seems to be incompetence even if others are incompetent as well.

D. *Specific Rules Cover the Field of Prosecutorial Care*

One might argue that the existence of specific professional rules governing prosecutorial behavior militates against interpreting the vague competence rule as imposing additional obligations. The argument has two variations. First, it may rely on the principle of construction, *expressio unius est exclusio alterius*. In other words, when rules forbid particular conduct, they should be read implicitly to authorize related conduct that is not proscribed. Second, even if the existing rules governing prosecutorial conduct are not meant to cover the entire field, the existing rules arguably cover so much of the field that the competence rule has no meaningful part to play in regulating prosecutors.

In the context of the disciplinary codes, both arguments have inherent flaws. The codes are full of examples in which the drafters provide both general and specific rules governing the same category of conduct.¹²⁸ With respect to regulation of prosecutorial conduct in particular, the existence of specific prohibitions in Model Rule 3.8¹²⁹ do not obviate the applicability to prosecutors of other provisions governing all lawyers, such as confidentiality rules and rules governing candor to the courts.¹³⁰ The *expressio unius* principle clearly has no general role to play in the interpretation of the professional codes.¹³¹

The argument from the content of the specific rules governing prosecutorial conduct is even weaker. The specific rules cover very little prosecutorial activity. It is simply counter-factual to assume that they are intended to preempt the field.

More generally, both arguments overlook the fact that separate rules often encompass the same behavior for different reasons, with the result that one rule can provide a basis for discipline when the other would not. Consider, for

¹²⁸ Most notably, the general conflict of interest provision (Model Rule 1.7) is followed immediately by a series of specific conflict prohibitions (Model Rule 1.8), some of which are encompassed by the general provision, and some of which are not. MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8 (2008); cf. Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 292-94 (2006) (suggesting that disciplinary rules which appear to give lawyers discretion do not invariably reflect a judgment that other rules impose no further restrictions).

¹²⁹ MODEL RULES OF PROF'L CONDUCT R. 3.8 (describing the special responsibilities, prohibitions, and affirmative obligations of a prosecutor).

¹³⁰ See Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1035 (2007) (“[G]overnment lawyers appear to be bound by the same broad confidentiality obligation as lawyers for private sector clients.”).

¹³¹ That is not to gainsay the possibility that the principle can be helpful in interpreting specific language of a particular rule.

example, Model Rule 3.3(a)(3) – a rule equally applicable to prosecutors and defense attorneys – and its relationship to the general competence provision. Model Rule 3.3(a)(3) forbids a lawyer to “offer evidence that the lawyer *knows* to be false.”¹³² The arguments discussed here would suggest that because Model Rule 3.3(a) forbids only knowing acts, it reflects a judgment that a lawyer should not be disciplined for negligently or recklessly offering false testimony. This conclusion does not hold true, however, because the competence rule might separately authorize discipline in some situations in which a lawyer offers false testimony with lesser mens rea.

To illustrate the point, assume that a civil litigator does not know, but reasonably believes, that particular prospective testimony is false. She also knows that the jury is likely to view the testimony as perjured and, if it is introduced, would discredit separate, more important testimony that is otherwise credible. The lawyer nevertheless introduces the questionable testimony, in the process undermining the client’s chances of winning the case. This lawyer would not be disciplinable under Model Rule 3.3(a), but might be subject to discipline for incompetence under Model Rule 1.1.

The same syllogism should hold true for prosecutors. A prosecutor who offers testimony he reasonably believes, but does not know, to be false cannot be disciplined under Model Rule 3.3(a). If, however, introducing that testimony would undermine the government-client’s objectives, the prosecutor should be subject to discipline under the competence rule, just like the private attorney in the scenario above. The fact that other specific rules govern prosecutorial behavior does not change the equation.

E. *Prosecutors’ Competence Should Be Defined by Convention*

In civil malpractice cases, negligence is ordinarily determined by resort to the prevailing norms in the local professional community.¹³³ The test for constitutionally ineffective representation by criminal defense counsel is essentially the same.¹³⁴ One might therefore argue that community standards – i.e., what prosecutors ordinarily do – are the appropriate benchmark of prosecutorial competence. If Model Rule 1.1 is interpreted with that conception in mind, disciplining prosecutors who create an unreasonable risk of false convictions would become difficult, because disciplinary agencies could only target prosecutors who depart from the practices typically employed in their offices. The regulators could not develop independent prosecutorial standards.

¹³² MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (emphasis added).

¹³³ See WOLFRAM, *supra* note 60, at 213 (“A lawyer’s duty under malpractice law is to conform to the commonly prevailing and reasonable standards of practice.”).

¹³⁴ See *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (“The court must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.”).

In the private lawyer context, it might make sense to resort to conventional practice when defining disciplinary incompetence. The malpractice case law is extensive, providing substantial insights into what constitutes negligence and the sense in which courts use the term “competence.” Case law is less helpful in the prosecutorial context, because prosecutorial immunity has foreclosed judicial inquiry into these issues. This complicates the ability of disciplinary regulators to assess either what acts constitute incompetence under the community standard or whether applying a community standard is a viable approach for setting prosecutorial practice norms.

Moreover, unlike conventional practices identified in civil malpractice cases, standards developed by prosecutors as a professional subgroup are not self-validating. They are neither adopted transparently nor subject to market forces that encourage competent practice. Prosecutors’ conventions therefore may be based on a shared view of self-interest or a mistaken perspective on what benefits the state.

Intuitively, there are at least two other reasons to doubt that a community standard could produce meaningful behavioral norms. First, all the prosecutors in each jurisdiction’s prosecuting office are governed by a single set of internal commands and regulations, so the community standard would simply become “whatever the chief prosecutor wants his office to do.” Second, when a community standard is applied in civil malpractice cases, courts start from the premise that the clients disapprove of the lawyers’ conduct because they have sued. In contrast, prosecutors who comply with the office’s internal commands can reasonably assert that the client has blessed their conduct, because the chief prosecutor personifies the client and makes the client decisions in criminal cases. Presumably, disciplinary regulators should be able to assess and take into account the government-client’s interest in avoiding false convictions through a more impartial mechanism.

For purposes of this Article’s inquiry, we therefore posit that disciplinary regulators should avoid a community-based standard for competence. The regulators need to render an independent policy judgment about the reasonableness of conduct that undermines the reliability of the criminal process. Thus, for example, even if prosecutors’ conventions would allow prosecutors to introduce inculpatory evidence they believe (but do not know) to be false, in pertinent cases prosecutors would be required to justify the conventions in light of prosecutors’ multiple objectives.

V. NORMATIVE OBJECTIONS TO IMPLEMENTING THE COMPETENCE RULE AGAINST PROSECUTORS

Thus far, this Article has identified reasons to discipline prosecutors for negligent conduct that risks false convictions, suggested the contours of potential disciplinary proceedings, and demonstrated the plausibility of interpreting the competence rule to reach such conduct. Here we look at the possible normative objections to implementing the competence standard

against prosecutors and consider whether more harm than good would result from doing so.

A. *Fairness Considerations*

1. *Asymmetry or Singling Out*

Prosecutors might argue that robust enforcement of the competence rule would result in a harsher sanctioning standard for them than for private attorneys. In theory, all lawyers must be competent. This Article has proposed, however, that prosecutors might be disciplined not only when they fail to represent their clients aggressively, but also when they fail to adequately protect the interests of their adversary. Although we have justified discipline as vindicating the objectives of the prosecutor's client – the state – the proposal in practice may result in a disproportionate number of disciplinary sanctions against government attorneys or the sanctioning of prosecutors when private lawyers with comparable culpability would not be sanctioned.

Arguably, such asymmetry is appropriate because prosecutorial negligence has unusually serious consequences, including the stigma of false convictions and a possible loss of liberty. That is not invariably true, however. Incompetence by criminal defense attorneys poses an equal risk of faulty convictions. Private lawyers' errors in civil matters also can cause serious harm.¹³⁵

Focusing on prosecutorial incompetence through the disciplinary process may nevertheless be justified as a counter-balance to prosecutors' more favorable treatment in other contexts and the absence of alternative deterrents to prosecutorial misconduct. The potential for malpractice liability and discipline for violating specific professional rules provide incentives for private lawyers to exercise care and minimize even inadvertent mistakes. Prosecutors, in contrast, are immune from civil liability¹³⁶ and, historically, have had little reason to fear enforcement of specific ethics rules.¹³⁷ Other legal mechanisms addressing prosecutorial misconduct do not effectively promote competence: judicial reversals of convictions for prosecutorial misconduct impose no sanctions directly on offending prosecutors,¹³⁸ and administrative sanctions

¹³⁵ See Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 172-73 (1996) (questioning the assumption that criminal and civil matters should be treated differently because criminal cases automatically encompass more serious consequences).

¹³⁶ See *supra* text accompanying note 43.

¹³⁷ See Zacharias, *Professional Discipline*, *supra* note 11, at 743-55 (demonstrating empirically the rarity of prosecutor discipline).

¹³⁸ See Meares, *supra* note 60, at 900 ("Reversal is not a true sanction, as it is not specifically directed towards punishing the prosecutor.").

often fail because, by the time misconduct is identified, offending prosecutors are no longer members of the office that had jurisdiction over them.¹³⁹

The general history of infrequent prosecutorial discipline also supports treating prosecutors uniquely.¹⁴⁰ Whenever ethics rules are under-enforced, there is a significant likelihood that the absence of discipline will foster complacency – if not utter disregard for the code – among the rules’ targets.¹⁴¹ Enforcement of the competence provision against prosecutors would help counteract this phenomenon; it would encourage prosecutors to treat with respect the body of ethics obligations that are imposed on them.

2. Vagueness and the Absence of Standards

Model Rule 1.1 defines competence as “requir[ing] the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁴² Whether a prosecutor has performed negligently thus would depend on application of the open-textured standard of whether he has exercised judgment or thoroughness that is “reasonably necessary” under the circumstances of the case. Allowing discipline based on such a vague standard arguably puts prosecutors at the mercy of haphazard review.¹⁴³ The virtue of the vague standard is that, in theory, it is neither over- nor under-inclusive – allowing judges to adjust the standard in the context of each case. But the corresponding vice is that the standard deprives prosecutors of antecedent notice regarding appropriate conduct.

Over time, disciplinary opinions may flesh out the standard by explaining the regulators’ conclusions about particular factual scenarios. That presumes, however, that the regulators will avoid private reprimands and publicize their decisions.¹⁴⁴ And even if a prosecutorial competence standard can develop in

¹³⁹ See Green, *Policing Federal Prosecutors*, *supra* note 75, at 85 (“[A] federal prosecutor may avoid [OPR] scrutiny by leaving government employ.”); Green & Zacharias, *Regulating Federal Prosecutors’ Ethics*, *supra* note 88, at 404 (“Reversals frequently occur after the prosecutor has left office, so that even administrative reprisals will have no effect on him.”).

¹⁴⁰ See sources cited *supra* note 11.

¹⁴¹ See Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1005-12 (2002).

¹⁴² MODEL RULES OF PROF’L CONDUCT R. 1.1 (2008).

¹⁴³ In applying a professional code’s competence standard to private attorneys, lawyers and disciplinary courts can look to the parallel civil law, an approach that is not equally available in the prosecutorial context. See *supra* text accompanying note 133.

¹⁴⁴ Many jurisdictions frequently rely on private reprimands in cases involving private attorneys. Moreover, in most jurisdictions, when disciplinary verdicts exonerate an accused lawyer, the entire proceedings remain secret, thus preventing those decisions from contributing to the development of legal standards. See Green, *Policing Federal Prosecutors*, *supra* note 75, at 88 (“[T]he secrecy of disciplinary proceedings makes the

common-law fashion, prosecutors have a fair complaint that the vague rule initially leaves them uncertain about their obligations. It poses a risk that well-intentioned but insufficiently cautious prosecutors will be sanctioned.

The problem of inadequate notice is not unique to prosecutors.¹⁴⁵ Individuals with doubt about the reach of the criminal law are expected to steer clear of areas of uncertainty. Because ethics codes govern lawyers, who are specifically trained to ascertain the law's reach, disciplinary authorities have reason to be unsympathetic to an argument by prosecutors based on a lack of specificity.¹⁴⁶

Prosecutors might contend, however, that the decision not to measure competence according to conventional practice¹⁴⁷ makes it especially difficult for prosecutors to identify appropriate conduct on their own. Similarly, because a well-run prosecution office depends on a chain of command, prosecutors may claim that disciplinary authorities should excuse prosecutorial conduct that satisfies supervisors' instructions or internal office policies.¹⁴⁸ From a disciplinary perspective, however, lawyers must think for themselves.¹⁴⁹ Given the power prosecutors wield – often without direct, hands-on supervision – it is particularly important for them to exercise independent professional judgment.

To respond to the hazards inherent in the vagueness of the competence rule, disciplinary agencies might be tempted to limit discipline to cases in which (1) a prosecutor has intentionally sought an inappropriate result or engaged in reckless behavior, or (2) it is established that an innocent defendant has in fact been convicted. These limitations, however, would undermine the goal of encouraging prosecutors to evaluate the effects of their behavior in a wide range of situations in which faulty convictions may occur. Requiring proof of

disciplinary process almost entirely ineffective in defining and deterring prosecutorial misconduct.”).

¹⁴⁵ See Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 386-87 (2007) (observing that “[c]riminal defense lawyers, and others, still encounter many uncertainties [regarding their ethical obligations]”).

¹⁴⁶ See *Howell v. State Bar of Tex.*, 843 F.2d 205, 208 (5th Cir. 1988) (holding that a disciplinary rule was not unconstitutionally vague because lawyers have the benefit of guidance provided by “case law, court rules and the ‘lore of the profession’” (citation omitted)).

¹⁴⁷ See *supra* text accompanying note 133.

¹⁴⁸ The claim is strongest with respect to arguably proper conduct that a subordinate prosecutor undertakes in reliance upon a supervisor's reasonable instruction. See MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2008) (“A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.”).

¹⁴⁹ See, e.g., N.Y. City Bar Ass'n, Op. 82-79 (1982) (providing a suggested course of action for associates who suspect misconduct by partners), reprinted in STEPHEN GILLERS & NORMAN DORSEN, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 735-36 (2d ed. 1989).

actual harm would also be inconsistent with the thrust of the professional codes, which seek to deter misconduct *ex ante*; the competence rule does not include causation and harm requirements precisely because its purpose is guidance.¹⁵⁰

Disciplinary authorities, of course, are free to exercise discretion to implement the competence rule more frequently in cases involving intentional misconduct or in which a false conviction has occurred.¹⁵¹ As a practical matter, evidence of intentionality or innocence would confirm the regulators' intuitions about the wrongfulness of a prosecutor's conduct and make incompetence easier to prove. Emphasizing proof of innocence would help counteract the consequences of vagueness in the standard by limiting discipline to serious cases. Nevertheless, completely restricting the rule to such cases simply because of the practical concerns would unjustifiably reduce the rule's impact.

The conflicting benefits and costs of specificity in professional rulemaking is not a new conundrum.¹⁵² Enforcement of the open-textured competence provision would give rise to reasonable concerns both about how standards will develop and about the provision of fair notice. But, given the ordinary premises of attorney discipline, these concerns alone are not sufficient to dispense with the competence remedy for prosecutorial misconduct.

B. *The Psychological Impact of Discipline on Prosecutors*

The proposal to enforce the competence rule against prosecutors presumes that enforcement will affect prosecutors' approach to their work. The proposal anticipates a positive influence. Arguably, however, the potential for discipline can also have adverse effects on prosecutors' attitudes.

1. The Risk of Over-Deterrence

In *Imbler v. Pachtman*, the Supreme Court suggested that, if aggrieved defendants could sue prosecutors civilly, "harassment by unfounded litigation"

¹⁵⁰ See Zacharias, *Purposes of Discipline*, *supra* note 102, at 698 (identifying nine goals of imposing professional discipline, only two of which turn on actual injury having resulted from the sanctioned lawyer's conduct).

¹⁵¹ Defining the "exoneration" necessary to trigger a disciplinary investigation might prove conceptually difficult. Very few wrongly convicted defendants are ever exonerated completely. In some cases, a defendant may receive a new trial because the original conviction was procedurally defective and, because of doubts about guilt or the loss of evidence resulting from the passage of time, the prosecution office may decide not to proceed. In other cases, a prosecutor can reasonably insist upon the defendant's guilt despite new evidence to the contrary. Requiring disciplinary agencies to prove factual innocence, as opposed to focusing on the justification for the prosecutors' actions, would require an expenditure of resources equivalent to trying the underlying criminal case.

¹⁵² See generally Zacharias, *Specificity*, *supra* note 106 (analyzing the issue of specificity in ethics code drafting).

might deflect prosecutors from performing their duties impartially, cause them to “shade” their decisions, and induce a loss of “courage and independence.”¹⁵³ On the surface, the same concerns seem to apply to professional discipline.¹⁵⁴

As a practical matter, applying the vague competence standard in disciplinary proceedings may make it difficult for prosecutors to defend judgment calls they have made. Prosecutors implement discretion when dealing with informants, cooperating witnesses, and police investigators who have significant incentives to lie or manufacture evidence. Whether and how to use the evidence depends on the prosecutor’s intuitive assessment of the individual’s veracity – an assessment that in hindsight might prove unfounded. The prospect of discipline, and of having to justify their exercise of discretion in disciplinary hearings, can cause prosecutors to second-guess themselves: should they routinely disregard potentially questionable evidence, presumptively disregard it, or leave to juries the task of separating the wheat from the chaff? More radically, the threat of personal sanctions can, in theory, cause prosecutors to execute their functions less aggressively across the board. They might investigate cases less vigorously, prepare witnesses too passively, or litigate in neutral, non-adversarial ways.

Yet these scenarios cannot confidently be predicted. The opposite conduct is equally plausible; prosecutors may investigate and prosecute cases just as aggressively as before, but simply be more mindful of the pitfalls of questionable evidence. Alternatively, to avoid participating in potentially disciplinable conduct, prosecutors may leave more matters to the police to handle, including questioning and preparing cooperating witnesses.

Assessed realistically, the potential for discipline for incompetence is unlikely to deter prosecutors from performing their functions to the same degree as the potential for civil liability. Criminal defendants would file fewer disciplinary complaints than civil complaints because the disciplinary process

¹⁵³ *Imbler v. Pachtman*, 424 U.S. 409, 423-24 (1976).

¹⁵⁴ Many of the *Imbler* Court’s concerns about civil liability do not apply equally to the disciplinary remedy. For example, the *Imbler* Court feared that the profit incentive inherent in filing civil lawsuits against prosecutors might result in “unlimited harassment and embarrassment of the most conscientious [prosecutors].” *Id.* at 423 (quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. 1935)). Disciplinary complaints typically provide no similar hope of profit. The *Imbler* Court also suggested that “public trust of the prosecutor’s office would suffer if [the prosecutor] were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.” *Id.* at 424-25. Fear of professional discipline might constrain prosecutors somewhat, but not nearly as much as the potential for damages. More importantly, society wants prosecutors to self-regulate to some extent; the *Imbler* Court specifically recognized professional discipline as a constraint on prosecutorial conduct and identified the potential for discipline as a positive factor. Finally, *Imbler*’s rejection of civil liability for prosecutors was based in part on fear that jury decision-making would create an undue danger of liability for even honest and competent prosecutors. *Id.* at 425-26. Because the disciplinary process does not depend on juries as fact finders, this concern is not germane here.

offers no monetary reward. Non-meritorious complaints can be disposed of more quickly and with less burden on prosecutors in the disciplinary process.¹⁵⁵

Moreover, unlike the aggrieved plaintiffs in civil suits against prosecutors, disciplinary regulators responsible for instituting investigations under the competence rule have no cross to bear. The regulators are unlikely to press prosecutors to perform in an exclusively defendant-friendly way. Like society more generally, the regulators will want prosecutors to litigate zealously in the public's interest.

Finally, the prospect of discipline is unlikely to cause prosecutors to overemphasize defendants' interests because countervailing incentives exist. These include prosecutors' personal interests in performing their jobs well and satisfying superiors and the public by obtaining convictions.¹⁵⁶

2. The Risk of Cover Up

Imbler noted that the potential for prosecutorial sanctions may adversely affect the willingness of prosecutors to assist defendants in post-conviction proceedings.¹⁵⁷ In the *Imbler* case itself, for example, the prosecutor volunteered information that enabled the defendant to make a claim that he had been improperly convicted.¹⁵⁸ A prosecutor who anticipates that he or a colleague will be disciplined upon a finding that a defendant was denied exculpatory evidence or convicted based on questionable evidence may be less likely to reveal prior deficiencies in the process. Thus, we find a paradox. One goal of enforcing competence rules against prosecutors is to encourage prosecutors to take into account their obligations to help avoid improper convictions and incarceration. In the post-conviction context, however, the presence of a disciplinary remedy for prosecutorial negligence may have the opposite effect on prosecutorial conduct.

This concern, though legitimate, should not be overstated. Prosecutors know that evidence supporting a claim of prosecutorial negligence can eventually come out whether or not the prosecutor discloses it.¹⁵⁹ Immediate

¹⁵⁵ In a civil action, even a frivolous complaint requires a motion before it can be dismissed. A factually unwarranted complaint may require significant labor to secure its dismissal. In contrast, disciplinary agencies often dismiss complaints without requiring any response from the accused lawyer or based solely on the lawyer's letter response.

¹⁵⁶ *Imbler* suggested, in particular, that a prosecutor might hesitate to go forward in a close case where an acquittal might trigger a suit for damages. *Id.* at 426 n.24. A prosecutor probably would have less reason to fear discipline in such cases because, if they are truly "close," a decision in either direction is unlikely to constitute negligence in a disciplinary sense.

¹⁵⁷ *Id.* at 427 & n.25 (suggesting that prosecutors would have no incentive to aid the accused because there is a risk that he might be "called upon to respond in damages for his error or mistaken judgment").

¹⁵⁸ *Id.* at 412.

¹⁵⁹ Indeed, prosecutors' duty to "confess error" includes revealing new facts that would correct an earlier error. See *Young v. United States*, 315 U.S. 257, 258 (1942) (referring to

disclosure by the prosecutor, if he was involved in the initial conviction, would be a factor in mitigation. Conversely, disciplinary regulators are likely to deem covering up an error a far more serious offense than negligently prosecuting originally. A cover up also is likely to reinforce the regulators' perception that the initial conduct was culpable; it appears to reflect a consciousness of guilt. Prosecutors are aware of these countervailing considerations because the same considerations arise in criminal prosecutions.

C. *By-Products of Discipline*

Critics of this Article's proposal might argue that the need to respond to frivolous disciplinary inquiries would divert prosecutors from their other duties.¹⁶⁰ Even if enforcing the competence rule would increase the number of disciplinary complaints, however, responding would not be as burdensome as responding to unfounded civil claims. Initially, a disciplinary complaint merely requires an informal written response.¹⁶¹ Disciplinary regulators have broad discretion to dismiss frivolous claims; unlike in civil cases, they may accept prosecutors' justifications as plausible, even when a factual dispute exists in theory.¹⁶² The regulators, most likely, would emphasize cases in which a judicial decision or media report independently raises questions about a prosecutor's conduct.

Critics might also claim that enhancing prosecutorial discipline would adversely affect the staffing of prosecution offices by making the position of prosecutor less inviting because of the economic and psychological consequences of becoming a disciplinary target. Of course, this claim is speculative. The attractive features of prosecutors' work may continue to be more influential.

Finally, there is some possibility that enhancing prosecutorial discipline might derail broader reform of the criminal justice system. Although prosecutors contribute to the conviction of innocent defendants, police negligence or misconduct, inadequate defense representation, and poor judicial oversight are at least equally responsible. The disciplinary remedy might in some sense make prosecutors scapegoats and lessen attention to other flaws in the system.

law enforcement officers' duty to "confess error when . . . a miscarriage of justice may result from their remaining silent"); *United States v. Koubriti*, 336 F. Supp. 2d 676, 679 (E.D. Mich. 2004) (referring to a prosecutor's confession of error as the "legally and ethically correct decision"); *see also* Green, *Why "Seek Justice"?*, *supra* note 63, at 615 (referring to a state Attorney General's confession of error and suggesting that a prosecutor's role is to do justice, not just convict).

¹⁶⁰ *See Imbler*, 424 U.S. at 425 (expressing concern that responding to complaints in civil lawsuits might divert prosecutors' "energy and attention . . . from the pressing duty of enforcing the criminal law").

¹⁶¹ *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 605.6(d)(2) (2008).

¹⁶² *See, e.g., id.* § 605.6(e)(2).

VI. INSTITUTIONAL CONCERNS

Assuming that the competence rule sets an appropriate substantive standard for prosecutorial conduct, the question remains whether the standard is best enforced through the judicially supervised attorney discipline process rather than some other mechanism, such as internal discipline within prosecution offices.¹⁶³ There is no reason to be confident that any American jurisdiction has an effective internal system for reviewing the conduct of prosecutors who risk false convictions. The federal Office of Professional Responsibility is not transparent, making it impossible to determine its efficacy.¹⁶⁴ Little is known about district and county attorney offices' and state attorney general offices' internal processes for disciplining prosecutors. Nevertheless, in keeping with the experimental nature of this Article's analytic inquiry, one must consider how enforcing the competence rule through external attorney discipline, in theory, compares with internal enforcement. Institutional concerns about external enforcement through disciplinary agencies may prompt or require procedural limitations on this Article's proposal that would not be called for in internal oversight processes.

Section A explores a series of concerns about how vigorous external review of prosecutorial competence will mesh with, or affect, the ongoing work of prosecution offices and courts. Section B focuses on the competence of disciplinary agencies to review prosecutorial decisions. Section C offers institutional reasons why disciplinary agencies and reviewing courts may hesitate to regulate prosecutors under the competence rule. Ultimately, the concerns discussed in this Part suggest problems not simply with invigorating disciplinary enforcement of the competence rule but also with invigorating external disciplinary regulation of prosecutors more generally.

A. *Effects of Disciplinary Agency Activities on the Work of Other Institutions*

1. Concerns About Interfering with Criminal Prosecutions

External disciplinary proceedings can interfere with the operation of the criminal justice system in at least two ways. First, responding to disciplinary inquiries may require prosecution offices to disclose information that they legitimately wish to keep confidential. Second, the need to deal with an external disciplinary agency may interfere with a prosecution office's investigation, an individual prosecutor's discretionary decision-making, and judicial decision-making in ongoing cases.

¹⁶³ Bibas, *supra* note 104 (manuscript at 93) (discussing various internal mechanisms head prosecutors could use to shape their offices' work).

¹⁶⁴ See *supra* note 75 and accompanying text.

a. *The Threat to Government Confidentiality*

The magnitude of the confidentiality problem depends on the nature of the disciplinary process. Consider a jurisdiction in which disciplinary complaints and proceedings are public. Suppose, further, that a particular complaint relates to pretrial conduct in cases that have not yet gone to trial. A disciplinary inquiry could cause the prosecutor's office to reveal information that would hamper its ability to investigate or try the pending or related cases.

Few jurisdictions currently require prosecutors to open their investigative files to criminal defendants¹⁶⁵ and none require prosecutors to reveal information to persons not yet charged. Making information publicly available through the disciplinary process would enable suspects to flee, create false defenses, and find means of undermining the potential evidence against them. Breaching government confidentiality can also impede prosecutions by endangering witnesses, revealing informants, or educating targets about the methods the prosecution office employs.

For purposes of confidentiality, disciplinary inquiries into prosecutorial competence differ dramatically from inquiries into private lawyers' competence. Cases against private lawyers typically begin with a client's complaint, which waives client confidentiality for purposes of the proceeding.¹⁶⁶ Complaints against prosecutors almost certainly will have a different source – an aggrieved defendant, a judicial referral, or a proactive agency inquiry based on a third-party or media report. The government-client will have a continuing interest in preserving confidentiality with respect to the information in the prosecutors' possession.

In cases involving specific rule violations, like the *Nifong* case, disciplinary proceedings apparently have not undermined the ability of the prosecutor's office to conduct future business. Discipline for general incompetence presents a far greater risk. For instance, an investigation into whether a prosecutor intentionally withheld exculpatory material or presented false testimony focuses on a discrete act, and therefore requires only limited inquiry into the office's fact-gathering, strategic decisions, and research. In contrast, a competence inquiry can be wide-ranging because it turns on a prosecutor's entire course of conduct in context.

At a minimum, these concerns warrant care and sensitivity on the part of disciplinary agencies inquiring into prosecutorial competence. The agencies might need to adopt special procedures. In jurisdictions where disciplinary

¹⁶⁵ Cf. Mosteller, *Disbarment of Nifong*, *supra* note 50, at 262-76 (discussing the origins and development of North Carolina's open-file discovery rules).

¹⁶⁶ See, e.g., *Brockway v. State Bar of Cal.*, 806 P.2d 308, 315 (Cal. 1991) (discussing an exception to the California attorney-client privilege for "relevant communications between a client . . . and an attorney charged with professional wrongdoing"); Samuel L. Goodman, *Responding to THAT Letter*, 37 RES GESTAE 506, 506 (1994) ("Once your client has filed a grievance against you, the prohibition against disclosure of a client confidence is waived if necessary to defend yourself . . .").

proceedings are public, prosecutorial inquiries arguably should be closed. The timing of disciplinary prosecutions may also have to be controlled so that proceedings begin only after the completion of the criminal prosecutions from which they arise.

b. *Interference with Prosecutorial and Judicial Decision-Making*

External enforcement of the competence rule can interact with executive decisions and judicial oversight of the criminal process in problematic ways. Disciplinary evaluations of prosecutorial conduct while the underlying cases are still in process may influence or chill prosecutors' choices about whether and how to pursue prosecutions. A disciplinary agency's conclusions also may pre-judge a court's assessment of what constitutes unconstitutional behavior and force the court to consider whether its views need to be reconciled with the disciplinary ruling.¹⁶⁷

Suppose, for example, that a disciplinary agency proceeds with a complaint that a prosecutor's participation in incarcerating alleged foreign terrorists at Guantanamo Bay without trial is incompetent, and potentially disbarment-worthy, before the courts have an opportunity to decide the constitutionality of the incarcerations. The possibility of disciplinary sanctions may cause the prosecutor to arrange for the release of prisoners even if the release is neither legally required nor the action the Executive Branch should take. A disciplinary decision can also undermine the authority of the judge who must ultimately decide the constitutional issues; the disciplinary finding threatens to reduce public confidence in a subsequent conflicting judicial opinion. In short, implementing the prosecutorial competence norm through professional discipline can serve as a backdoor method for creating practice or legal standards that the code-drafting authorities might not be willing or able to establish directly through specific professional rules; prosecutorial discipline can influence ongoing proceedings in a way ethics regulation ordinarily should not.

These concerns again suggest the need either to look to other means for enforcing prosecutorial competence, such as internal oversight, or to implement special procedures for prosecutorial discipline. In theory, professional discipline can occur at any time – before a prosecution is complete, during or after appeals, or subsequent to some event that casts doubt on a prosecutors' performance (such as an appellate finding of misconduct or a determination that a defendant has been wrongfully convicted). Although investigations into prosecutorial misconduct while it occurs can benefit aggrieved defendants and usefully deter some prosecutorial misconduct, the

¹⁶⁷ See Zacharias & Green, *Rationalizing Judicial Regulation*, *supra* note 110 (manuscript at 2-6) (analyzing the problem of harmonizing code adoption, disciplinary, and other judicial decisions).

costs of early external discipline are great.¹⁶⁸ These costs may convince disciplinary agencies to limit investigations to a time after the prosecution office has exercised its executive discretion and the trial and appellate courts have had an opportunity to evaluate the individual prosecutor's conduct.

c. *The Benefits of Internal Oversight*

The concerns about interacting with the work of other institutions help explain why, traditionally, disciplinary agencies have resisted investigating prosecutorial activities. Disciplinary regulators who assume that prosecutors' offices employ viable mechanisms for overseeing and ensuring competence may prefer to risk some prosecutorial misbehavior over the prospect of undermining effective law enforcement. Internal oversight does not share the defects, or risks, inherent in the external discipline previously discussed: government information can remain confidential within the prosecution office; supervisors can reconcile executive interests with the evaluation of an individual prosecutor's competence; and no public decisions that might unduly influence judicial decision-making need to be issued. As a matter of institutional choice, therefore, there are reasons to prefer internal methods of discipline – if these can be made effective.

2. Concerns About Undermining the Finality of Criminal Proceedings

A paradoxical concern arises from the conclusion that external enforcement of the competence rule might need to await completion of the underlying criminal prosecution. Waiting may endanger the finality of criminal cases.

Consider a defendant who accepts a guilty plea but later claims, in a disciplinary complaint, that the prosecutor negligently withheld evidence of his innocence. One goal of allowing plea bargaining is to end the process so that participants in the criminal justice system can focus their resources on other matters. To the extent that a disciplinary finding of prosecutorial negligence can prompt a post-conviction review of the plea, discipline may undermine finality. This would have two consequences: (1) it will encourage disciplinary complaints; and (2) it may make disciplinary agencies hesitant to find substance to complaints.

This phenomenon is unavoidable. But it suggests the need for additional procedural mechanisms to minimize the adverse consequences – procedures that carry with them the potential to undermine the effectiveness of external discipline. Because of the risk that disciplinary complaints by convicted defendants will be tactical, the regulators might justifiably reject some complaints

¹⁶⁸ In the *Nifong* case, for example, the early disciplinary inquiry apparently influenced Nifong to reconsider his decision to prosecute and helped prevent the trial of falsely accused suspects. The day after the bar's Grievance Committee filed a complaint alleging improper pretrial publicity, Nifong realized that he would have to recuse himself because he had a conflict of interest. Mosteller, *Disbarment of Nifong*, *supra* note 50, at 304-05. Nifong's recusal ultimately led to the dismissal of the charges. *Id.* at 305.

summarily. To avoid a floodgate of complaints, disciplinary agencies might also institute a preference for initiating investigations based on factors other than defendants' complaints, such as judicial decisions overturning convictions, decisions identifying procedural wrongs, actual exonerations of defendants, and media reports documenting improprieties.

Nevertheless, the adoption of disciplinary policies of ignoring (or minimizing reliance on) defendants' complaints seems inconsistent with the objective of preventing wrongful convictions. One might even question whether prosecutorial discipline would serve *any* useful function if it builds mainly upon prior judicial findings. The best justification for continuing disciplinary enforcement of the competence rule under this scenario is that sanctions rarely follow judicial findings of prosecutorial misconduct.¹⁶⁹ The potential for professional discipline thus provides some supplemental deterrence *ex ante*. More importantly, in the absence of effective internal oversight, post-proceeding disciplinary inquiries may serve as the only vehicle to inquire fully into a prosecutor's behavior, elaborate on the prosecutor's standard of care, and sanction improper conduct.

3. Concerns About Coordinating Disciplinary Decisions with Legislative and Judicial Standards

One troubling issue that underlies all professional regulation of prosecutors is magnified in the context of the proposed enforcement of the competence provision; namely, whether disciplinary regulators have the authority to impose standards inconsistent with prevailing law. For example, rules of criminal procedure and constitutional decisions impose discovery obligations.¹⁷⁰ The legal standards balance competing interests in the criminal justice system; they define what prosecutors must turn over to criminal defendants, while implicitly suggesting what need not be revealed. When disciplinary authorities impose sanctions for a prosecutor's failure to disclose information that is not required to be disclosed – on the grounds that non-disclosure (together with other conduct) has contributed to a false conviction – are they overruling the legal standards? If so, is that appropriate?

This issue is not new, nor is it confined to disciplinary oversight of competence. For instance, many jurisdictions have adopted ethics rules requiring prosecutorial disclosures that exceed legal requirements. Model Rule 3.8(d) demands disclosure not only of material exculpatory information, but also of “all evidence or information known to the prosecutor that tends to

¹⁶⁹ Judicial findings often do not establish prosecutorial negligence, but simply raise questions about the prosecutor's conduct that warrant further inquiry. *See Rosen, supra* note 11, at 720-31 (discussing cases in which judicial findings of prosecutors' failure to disclose exculpatory evidence have not led to professional discipline).

¹⁷⁰ *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 20.2-.3, 24.3 (4th ed. 2004) (setting forth prosecutors' statutory and constitutional disclosure obligations).

negate the guilt of the accused or mitigates the offense.”¹⁷¹ Such rules go far down the path of requiring open-file discovery, a procedure that constitutional decisions and most states’ criminal procedure rules avoid.¹⁷² State supreme courts ultimately adopt these rules, but local bar drafting committees typically are responsible for their content.¹⁷³ One can plausibly argue that ethics regulation based on these committees’ views of appropriate prosecutorial conduct or the views of individual disciplinary regulators encroaches on the law-making authority of courts and legislators and should not be allowed to trump external law.

4. Conclusions

Disciplinary agencies do not operate in a vacuum. Their activities influence the work of other institutions. This may cause disciplinary regulators to limit the scope of their activities or to adopt procedures that minimize interference and help harmonize the standards the various institutions produce.

Narrowly confining disciplinary enforcement of the competence rule in the ways suggested above arguably robs this Article’s proposal of much of its remedial force. Yet it makes adoption of the remedy more palatable and implementation more plausible. Applying the competence rule more forcefully, while likely to deter a broader array of prosecutions that risk wrongful convictions, would maximize the institutional concerns we have identified.

Significantly, these concerns are common to most forms of external prosecutorial regulation. Their existence helps explain why disciplinary agencies have always been reluctant to enforce ethics standards against prosecutors. It may also explain why code drafters have shied from adopting broad regulations of prosecutorial performance and, in the absence of intentional misconduct, have preferred to rely on prosecutorial discretion and self-restraint to assure reasonable behavior.

If prosecutors’ offices were to develop effective internal disciplinary processes, such self-restraint on the part of the disciplinary agencies would be fully justified.¹⁷⁴ But for now, the short answer to the institutional concerns is

¹⁷¹ MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2008); *cf.* Leila Atassi, *Judges Approve Open Discovery*, CLEVELAND PLAIN DEALER, Nov. 13, 2008, at B1 (reporting the adoption of a judicial rule requiring open discovery in Cuyahoga County, Ohio).

¹⁷² *See* Burke, *supra* note 83, at 61 (discussing the U.S. Supreme Court’s “refusal” to mandate open-file discovery and urging “voluntary adoption” by prosecutors of open-file policies as a means of preventing false convictions).

¹⁷³ These committees typically consist of few prosecutors and a substantial number of defense attorneys. *Cf.* Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors*, 65 FORDHAM L. REV. 429, 449 n.84 (1996) [hereinafter Zacharias, *Who Can Best Regulate*] (discussing the make-up of interest groups within the ABA).

¹⁷⁴ *Cf.* CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON COMPLIANCE WITH THE PROSECUTORIAL DUTY TO DISCLOSE EXCULPATORY EVIDENCE 1-2, 6-8 (2008), available at <http://www.ccfaj.org/tr-pros-official.html> (surveying various

that the choice is enforcement of the competence rule or nothing, because meaningful self-regulation on the part of federal or state prosecutors' offices does not appear to exist. The institutional concerns suggest weaknesses inherent in the attorney disciplinary process, but these do not justify an entirely hands-off approach.

B. *The Relative Competence of Disciplinary Regulators*

A potentially more compelling objection to implementation of rules like Model Rule 1.1 is that disciplinary regulators may lack the institutional competence to evaluate and set standards for prosecutorial conduct. Legal norms governing prosecutors tend to defer to prosecutorial discretion because effective prosecutorial decision-making often turns on prosecutors' intuitive judgments, informed by experience, regarding the credibility of witnesses and suspects, the importance of obtaining particular evidence, the likelihood of securing convictions, and the effectiveness of investigative mechanisms and interrogation techniques.¹⁷⁵ Disciplinary regulators (including disciplinary counsel and judges who review the decisions of disciplinary counsel) are unlikely to possess equivalent experience.

There are other reasons to distrust disciplinary regulators when prosecutorial misconduct is at issue. Most importantly, prosecutorial responsibility for producing false convictions is a hot button, political issue – one that observers often approach from liberal or conservative perspectives that can cause them to pre-judge prosecutorial behavior.¹⁷⁶ Disciplinary tribunals thus may evaluate prosecutorial competence on a subjective or even political basis. Because the notion of what constitutes justice in prosecutions is debatable,¹⁷⁷ defense and prosecution-oriented examiners will have very different views of reasonable behavior.

The fact that neutral judges ultimately can review disciplinary decisions does not alleviate this concern. Courts have their own interests in prosecutorial regulation. For example, judges have reason to err on the side of de-emphasizing disciplinary remedies against prosecutors. Elected chief

prosecution offices' practices and recommending improvements in office procedures and standards for ensuring compliance with discovery obligations).

¹⁷⁵ See *Wayte v. United States*, 470 U.S. 598, 607 (1984) (positing that charging discretion is best left to the prosecutor). *But see* WAYNE R. LAFAYE, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 536-37 (1970), reprinted in YALE KAMISAR ET. AL., *MODERN CRIMINAL PROCEDURE* 913-14 (1980) (arguing that a significant part of the discretion exercised by American prosecutors is "unnecessary").

¹⁷⁶ Certainly, the bar's efforts to impose new ethics standards upon prosecutors through professional rules have been marked by distinct partisanship. See Zacharias, *Who Can Best Regulate*, *supra* note 173, at 449 n.84 (discussing the heated dispute and clash of interests between the Department of Justice and the defense bar over rules governing communications with represented persons and subpoenas directed to attorneys).

¹⁷⁷ See Zacharias, *Can Prosecutors Do Justice?*, *supra* note 35, at 60-64 (discussing various approaches to defining prosecutorial "justice").

prosecutors often are politically powerful, with the ability to exact negative political consequences upon elected judges who act against the prosecutor's office. This may explain judges' historical reluctance to refer prosecutors for discipline even after writing an opinion finding misconduct.¹⁷⁸

The institutional competence of disciplinary regulators to fashion prosecutorial standards can be called into question for democratic reasons as well. Consider the issue of whether a prosecutor ought to be allowed to continue a prosecution when he honestly believes, as Nifong claimed he did, that a defendant is guilty but is unsure about his ability to obtain a conviction.¹⁷⁹ The professional codes forbid prosecutors to pursue charges on less than probable cause,¹⁸⁰ ostensibly leaving further analysis to prosecutorial discretion. In theory, however, the competence rule could apply whenever the prosecutor "unreasonably" fails to weed out uncertain cases. Should disciplinary regulators be able to impose a higher standard for prosecutorial screening through application of the competence provision, in the absence of open debate?

The academic literature reflects vigorous disagreement about how convinced of guilt prosecutors should be before bringing or continuing charges. Some commentators argue that the ethic codes' probable cause standard is too low.¹⁸¹ Advocating a standard at the other end of the spectrum, Professor Bennett Gershman maintains that prosecutors must give primacy to the state interest in avoiding wrongful convictions by never bringing charges unless convinced to a moral certainty of the defendant's guilt.¹⁸² Other commentators have identified intermediate thresholds.¹⁸³ Proponents of maintaining the probable cause standard suggest that

¹⁷⁸ See Williams, *supra* note 9, at 3477 (arguing for the development of mechanisms to force judges to report prosecutorial misconduct to disciplinary agencies more frequently).

¹⁷⁹ See Mosteller, *Disbarment of Nifong*, *supra* note 50, at 1375 (discussing that Nifong asserted his belief in the defendant's guilt at his disciplinary hearing, but questioning whether Nifong's assertion was credible given the facts Nifong learned as the case progressed).

¹⁸⁰ E.g., MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2008).

¹⁸¹ See Green, *Prosecutorial Ethics as Usual*, *supra* note 52, at 1584 n.53 ("[T]he 'probable cause' standard is widely considered too low . . .").

¹⁸² Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 522, 530 (1993).

¹⁸³ See Green, *Prosecutorial Ethics as Usual*, *supra* note 52, at 1589 (discussing the view of the ABA Standards and the Department of Justice that a prosecutor "should not try a defendant unless the prosecutor reasonably believes that there is legally sufficient evidence for a jury to convict the accused of the crimes charged" and suggesting the further view that "charges should not be brought unless the prosecutor reasonably believes that the accused is guilty of the crimes charged" (citing U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.220(A) (1997))).

determining guilt is a function of the jury that prosecutors should not preempt; the victim is entitled to her day in court.¹⁸⁴

The codes' probable cause standard seems to suggest that the balance between protecting the innocent and pursuing the guilty is best achieved by according prosecutors leeway. Allowing disciplinary regulators to second-guess prosecutors would encumber the exercise of prosecutorial discretion and prosecutorial self-regulation because the threat of sanctions provides an incentive to err in favor of non-prosecution. Yet, in effectively producing a higher screening norm, the regulators have no claim to special expertise in making screening decisions.¹⁸⁵ Indeed, given the legitimate arguments for each of the possible screening standards, one would expect regulators in different cases to apply the competence rule inconsistently, based on their individual views of appropriate policy. Arguably, society would be better served by a single standard set more democratically – by decision makers who must expose their judgment of how the benefits and risks of vigorous prosecutions should be balanced to scrutiny, debate, and review.

For these reasons, critics of this Article's proposal can reasonably suggest that disciplinary authorities are institutionally incapable of producing neutral, coherent standards governing prosecutorial incompetence. Prosecutors, in particular, might believe that internal regulation and discipline is the sole method of constraining prosecutorial behavior that can adequately account for the complexities and difficulty of exercising prosecutorial discretion. There are, of course, responses to this extreme anti-regulatory position – most notably that internal regulation lacks transparency, tends to be one-sided, and has not proven effective. Nevertheless, the view that disciplinary regulators lack the institutional capacity to fairly assess prosecutors' competence does reflect

¹⁸⁴ See Uviller, *supra* note 122, at 1155-59 (“[W]hen [a prosecutor] is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury.”); see also Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 57, at 893 (“If committed to the neutral principle that only the guilty should be punished, the neutral prosecutor arguably should rely on her view of the defendant's innocence. Yet institutional, systemic imperatives militate in favor of leaving that judgment to the jury.”).

¹⁸⁵ Prosecutors must assess defendants' likely guilt based on intuitions. No one knows how fallible the trial process is and how likely juries are to convict innocent defendants; society generally assumes that the reasonable doubt standard minimizes erroneous jury verdicts, at least when other constitutional and procedural protections also are implemented. The intuitive nature of the judgment that must be made makes it difficult for disciplinary regulators, particularly regulators without prosecutorial experience, to assess prosecutorial competence neutrally. Regulators who have confidence in the trial process may undervalue the necessity for prosecutorial screening; they may be reluctant to base a standard expressly on skepticism about the reliability of the trial process. In contrast, regulators who believe innocent defendants are routinely convicted may expect prosecutors to forgo prosecutions more readily.

legitimate concerns, which also help explain the general reluctance of disciplinary regulators to target prosecutorial misconduct.

C. *Institutional Reasons Why Disciplinary Agencies Might Decline to Implement the Competence Rule Forcefully*

Disciplinary agencies must allocate limited resources.¹⁸⁶ When deciding whether to pursue an inquiry, they take account of such considerations as the seriousness of the alleged misconduct, the potential difficulties of proof, and the office resources that will be required to bring the matter to a conclusion. The traditional selection criteria will militate against routine enforcement of the competence rule against prosecutors. In addition, disciplinary regulators might reasonably doubt the effectiveness of pursuing complaints of prosecutorial incompetence. Political considerations not present in cases against private practitioners also may heighten disciplinary agencies' reluctance to proceed.

1. Enforcement Priorities

In allocating their resources to the most serious cases of apparent misconduct, disciplinary regulators exercise a sense of proportionality, consider the targets' relative culpability, and emphasize the goal of protecting the public from lawyers who are likely to engage in future misconduct.¹⁸⁷ Typically, disciplinary agencies are most concerned with intentional rule breaking, dishonesty, or breach of trust;¹⁸⁸ these are most likely to harm clients and reflect potentially recurring characteristics. For similar reasons, the regulators tend to target lawyers who engage in repeated acts of misconduct.¹⁸⁹

Under these criteria, a prosecutor's single instance of incompetence may seem relatively insignificant despite the harm it can occasion. An overzealous prosecutor may not have willfully disregarded ethics requirements or exhibited a natural propensity to ignore his role. The prosecutor often will not have been on notice of the disciplinary court's expectations, making the

¹⁸⁶ See Zacharias, *Professional Discipline*, *supra* note 11, at 756 ("Disciplinary authorities . . . must determine how to allocate those [limited] resources so as to punish misconduct most effectively, deter future misconduct by the miscreant lawyer, protect the lawyer's clients, deter misconduct by other lawyers, maintain the image of the bar, and preserve the trust of potential clients.").

¹⁸⁷ See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, R. 1.1, 1.2, 3.0, 4.44, 4.54 (1986) (amended 1992); Leslie C. Levin, *The Emperor's New Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 32 (1998).

¹⁸⁸ See Zacharias, *Professional Discipline*, *supra* note 11, at 757 ("[D]isciplinary authorities tend to focus on intentional misconduct by lawyers whose actions are self-serving or governed by greed.").

¹⁸⁹ See Levin, *supra* note 187, at 53-54 (arguing against the practice of relying on a target's history of prior disciplinary misconduct in determining whether to proceed with discipline or impose sanctions).

prosecutor's approach more excusable.¹⁹⁰ Supervisors and internal procedures may have even instructed him that the conduct in question was legitimate or desirable.

That a prosecutor did not commit an obvious or intentional wrong, of course, is not an automatic defense to disciplinary charges. Private lawyers have been sanctioned for conduct in the gray zone and for conduct encouraged by supervisors.¹⁹¹ Nonetheless, a lawyer's good faith in light of uncertain standards ordinarily is a factor that regulators take into account in allocating disciplinary resources.¹⁹²

The *Goldstein* case just decided by the Supreme Court illustrates the varying levels of culpability that can be ascribed to prosecutorial behavior.¹⁹³ If the trial prosecutor knew that his chief witness received rewards for serving as an informant in the past, the prosecutor was clearly obliged to disclose that fact¹⁹⁴ and correct the witness's false testimony.¹⁹⁵ Under this Article's proposal, if the prosecutor did not know but negligently failed to seek this information, the prosecutor might be subject to discipline under the competence rule.¹⁹⁶ Goldstein's civil rights complaint, however, suggested that the fault resided primarily in the institutional practices of the prosecutors' office – namely, the failure to establish mechanisms that would reveal when witnesses have previously served as informants.¹⁹⁷ If Goldstein's allegation is correct, it seems unfair to regard the line prosecutor as blameworthy. Neither ethics rules nor discovery law imposed a clear duty to inquire into the witness's background. Disciplinary regulators might reasonably conclude that junior prosecutors should be able to rely on their offices' supervision, training, and institutional practices where no contrary legal requirements are apparent.

¹⁹⁰ This Article has previously noted the benefits of its proposal in enabling disciplinary tribunals to elaborate on prosecutors' obligations when the rules otherwise fail to do so. *See supra* text accompanying note 110.

¹⁹¹ *See, e.g., Daniels v. Alander*, 844 A.2d 182, 184, 191 (Conn. 2004) (sanctioning an attorney for failing to correct his partner's misstatements to the court).

¹⁹² At the very least, a lawyer's good faith may justify truncated proceedings and a private admonishment.

¹⁹³ *See supra* text accompanying notes 1-5.

¹⁹⁴ *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2008) (prohibiting lawyers from unlawfully concealing "material having potential evidentiary value"); *id.* R. 3.8(d) (requiring prosecutors 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").

¹⁹⁵ *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1), (3) (requiring lawyers to correct false testimony).

¹⁹⁶ For example, the prosecutor arguably acted incompetently if he knew that the informant's sentence had been reduced and failed to inquire why.

¹⁹⁷ *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1172 (9th Cir. 2007), *rev'd sub nom. Van de Kamp v. Goldstein*, No. 07-854 (U.S. Jan. 26, 2009).

Violations may also be difficult and costly to prove. Private attorneys' incompetence can often be established through pre-existing evidence. For example, a civil litigator's failure to file a pleading or raise a particular legal question will be evident from the trial record. In contrast, questionable prosecutorial conduct typically is less obvious because the reasonableness of the prosecutor's acts or omissions may depend on what the prosecutor knew. In addition, much of the relevant conduct will have occurred behind the scenes and been unrecorded. Disciplinary agencies investigating prosecutorial conduct cannot expect enthusiastic cooperation from the prosecutor's office, which usually has sole control over the information the regulators seek.¹⁹⁸

2. Empirical Uncertainties: Would the Proposal Work if Instituted?

Disciplinary regulators might doubt that enforcing the competence rule would achieve its theoretical benefits. The likely effectiveness of enforcement is at root an empirical issue that can only be resolved by conducting an experiment. Given the uncertainty, disciplinary agencies may see no reason to commit resources to implementing the proposal.

For instance, regulators might question whether prosecutors are frequently negligent, at least in the sense of producing false convictions. Prosecutors, especially those in large offices, are often well trained and supervised. The legal system provides checks against wrongful convictions, including an extremely high burden of proof. No empirical studies demonstrate that prosecutorial incompetence is prevalent; the evidence of erroneous convictions produced by prosecutors tends to be anecdotal. Regulators who believe intuitively that prosecutorial negligence rarely contributes to false convictions can plausibly conclude that the proposed remedy would do little to protect the innocent.

Moreover, even if regulators assume that prosecutors sometimes contribute to wrongful outcomes, that does not mean prosecutors need more guidance. Many prosecutors' offices have internal rules that go beyond the ethics requirements or provide prophylactic protections against the misbehavior this Article addresses. Some offices, for example, offer relatively open discovery.¹⁹⁹ Others regulate when prosecutors may grant immunity to witnesses.²⁰⁰ If prosecutorial self-regulation already generates "competence,"

¹⁹⁸ This contrasts with disciplinary proceedings against private attorneys. Private attorneys' disgruntled clients are typically the source of complaints and will assist disciplinary investigators by waiving confidentiality and providing documents and eye-witness testimony regarding their attorneys' acts.

¹⁹⁹ *E.g.*, Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 593 ("[S]urveys of federal prosecutors have shown that a significant percentage of them report having an 'open file' policy." (citing H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1107 (1991))).

²⁰⁰ *E.g.*, U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-23.140 (1997).

in the sense that term is used here, the proposed disciplinary remedy might be unnecessary.

Empirical issues such as these, which call into question the usefulness or viability of the disciplinary remedy, are equally applicable to most forms of external regulation of prosecutors. They suggest that whenever regulatory authorities refrain from routinely targeting prosecutors, the regulators may be acting consciously rather than because of resource-allocation concerns or neglect. The regulators may simply conclude that the prosecutorial conduct that commentators bemoan is not as prevalent as the commentators believe or they may assume that internal remedies are adequate to provide standards and deterrence.

3. Political Considerations

Political considerations may increase disciplinary agencies' reluctance to enforce the competence rule against prosecutors. By filing charges, an agency commits itself to doing battle with a powerful institution. In many jurisdictions, the chief prosecutor is politically influential. Even lower-level prosecutors sometimes are visible and have contacts in the media. The regulatory attorneys in charge of disciplinary agencies may realistically fear that well-funded prosecution offices that can mobilize support will challenge their enforcement policies in the supervisory courts or in the press. Proceeding aggressively against prosecutors may risk the regulators' credibility or employment, and will in any event enmesh the office in public and private political battles.²⁰¹

In the contest over enforcement of rules like the competence provision, prosecutors control many of the popular arguments. Consider just a few of the public appeals prosecutors might make: "we do not represent the defendant"; "we must be free to act as zealous advocates in the adversary process"; "it is defense counsel's job, not ours, to protect against wrongful convictions"; "the reasonable-doubt standard and other procedural advantages already protect against wrongful convictions"; "prosecutors should not be singled out for discipline by liberal regulators"; and "the competence rule puts too much power in the hands of regulators who do not understand prosecutions, will interfere with investigations, and may ultimately cause prosecutors to refrain

²⁰¹ As an example of how seriously prosecutors' offices, as institutions, respond to disciplinary enforcement policies, consider the Justice Department's multi-year campaign to foreclose enforcement proceedings based on rules prohibiting contacts with represented persons and subpoenaing of attorneys. See generally Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 924-25 (1992) (discussing the no-contacts controversy); Zacharias, *Who Can Best Regulate*, *supra* note 173, at 431-46 (analyzing the Department of Justice's efforts to prevent the implementation of, or preempt, ethic rules governing federal prosecutors); Ryan E. Mick, Note, *The Federal Prosecutors Ethics Act: Solution or Revolution?*, 86 IOWA L. REV. 1251, 1255-62 (2001) (describing the events and controversy surrounding the refusal of Department of Justice to abide by states' no-contact rules).

from legitimate conduct.” Given the public’s and the media’s tough-on-crime orientation and general respect for prosecutors, these arguments may be accepted at face value. Rebutting them will, in any event, consume considerable time and effort.

There is unlikely to be significant countervailing pressure on disciplinary agencies to avoid capitulating, save in exceptional cases like *Nifong*. In the non-prosecutorial context, incompetent lawyers’ clients sometimes push disciplinary agencies to institute and maintain proceedings. The regulators legitimately respond because one function of discipline is to preserve the public’s trust and confidence in lawyers and professional regulation. Prosecutors, however, will not ordinarily be the subject of complaints from their client (i.e., the state). Disciplinary agencies may not regard criminal defendants as a constituency they need to please or reassure.²⁰²

4. Options

The theoretical benefits of disciplining prosecutors who risk false convictions compete against disciplinary regulators’ considerable incentives to forgo or limit inquiries into prosecutorial incompetence. Whether convicted defendants would treat disciplinary complaints as a viable option for addressing prosecutorial negligence will depend on a number of factors, including: (1) when complaints are considered timely (i.e., before or after judicial findings); (2) whether a disciplinary proceeding can be used as a tool to obtain otherwise confidential information or to challenge a conviction; and (3) whether disciplinary agencies develop threshold requirements which complainants must satisfy before the agencies will institute investigations. Because most defendants feel aggrieved by their prosecutions, the easier pursuing a complaint becomes, the greater the risk of a stream of complaints that would overburden disciplinary agencies and the responding prosecutors.

Faced with routine complaints and significant institutional incentives to forgo prosecutorial discipline, disciplinary agencies might respond in a variety of ways. They could investigate all complaints, arguably wasting time and resources for too little substantive return. More likely, however, the regulators will find a way to confine enforcement of the competence rule. They might come to ignore the valid as well as the invalid complaint. Alternatively, they might implement procedures, such as those suggested above, that limit filings or investigations.

Such limitations would largely preserve the status quo, in which disciplinary agencies bring too few actions against prosecutors. Defendants have no

²⁰² The reality is that disciplinary prosecutors may identify with criminal prosecutors. Both sets of lawyers represent the public in bringing enforcement actions against individuals who transgress public laws – criminal laws in one case, disciplinary rules in the other. The psychological implication of enforcing the competence rule strictly against prosecutors is that disciplinary agencies should enforce the rule strictly against themselves, or else face charges of hypocrisy.

financial reasons to complain to disciplinary authorities. Defense lawyers prefer to avoid making enemies of prosecutors with whom they must deal in the future. If, in addition, procedures are instituted that prevent disciplinary claims from benefiting defendants in the criminal process, the natural complainants will have no incentive to bring prosecutorial incompetence to the discipliners' attention. The main alternative source for complaints – courts and proactive investigation by the bar – has proven ineffective under the current regime.²⁰³

These observations apply equally to all external prosecutorial discipline. To the extent that qualified third parties, such as judges and defense counsel, are unwilling to forward complaints regarding prosecutorial misconduct, disciplinary agencies face a Hobson's choice. They can make it easy and attractive for criminal defendants to institute disciplinary cases, but this approach will generate frivolous claims and tax the agencies' resources. Alternatively, they can introduce artificial limitations on filings.

In theory, internal regulation by prosecutors' offices would not suffer from the same failings. Criminal defendants have no strategic incentive to file meritless complaints with the prosecutor's office itself. It is conceivable that an internal process trusted by prosecutors themselves might more readily attract legitimate complaints from supervisors or colleagues within the office, judges, and defense counsel. For internal discipline to provide a meaningful alternative, however, it must be far more transparent than under current regimes. Prosecution offices would need to persuade aggrieved parties, potential complainants, and the observing public that their internal oversight is trustworthy, effective, and targeted to appropriate goals.

CONCLUSION: INHERENT LIMITATIONS ON PROSECUTORIAL DISCIPLINE

The perception that prosecutors are under-regulated leads many commentators to recommend more rigorous implementation of ethics rules that target prosecutors. This Article has demonstrated that the problem of false convictions implicates aspects of prosecutors' professional conduct that might plausibly be regulated by the legal ethics codes. The codes have traditionally focused on promoting the reliability of adjudication and defining the lawyer's role in pursuing client objectives. When prosecutors increase the risk of false convictions, both concerns are implicated. Ordinarily, a lawyer's zealous effort to prevail at trial can be assumed to promote the client's objectives, but that is not necessarily true for the prosecutor's client – the "people" or the state. This client's objectives include avoiding punishment of, and exonerating, the innocent.

²⁰³ See CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON REPORTING MISCONDUCT 3-5 (2007), available at <http://www.ccfaj.org/tr-pros-official.html> (analyzing the failure of judges to report prosecutorial misconduct to the bar); Zacharias, *Professional Discipline*, *supra* note 11, at 771-78 (urging more proactive disciplinary investigations).

The Article also has illustrated that current ethics rules, as enforced, do not adequately address prosecutorial behavior that risks faulty convictions. But its analysis of the options reveals much about the difficulty of developing regulatory responses to prosecutorial misconduct. The analysis suggests that there are inherent limitations on what ethics rules and the disciplinary process can accomplish.

Two possible approaches exist for invigorating discipline against prosecutors who are catalysts for erroneous convictions. First, ethics regulators could address discrete aspects of prosecutorial conduct through new rules, the expansion of existing specific rules, and more rigorous enforcement. But it is difficult to draft specific rules capturing all risky prosecutorial conduct that, in hindsight, should be deemed improper. Bright-line rules invite the complaint that the drafters have implemented requirements more suited to legislation or procedure rules than ethics provisions, which typically apply to all lawyers and have an obvious “ethical” dimension.²⁰⁴ Specific rules also tend to be either under- or over-inclusive.

As an alternative, this Article has proposed employing a general provision, the competence rule, which disciplinary agencies in theory could interpret in a fact-sensitive manner to avoid sanctioning legitimate prosecutorial conduct. The rule provides a basis on which the regulators could pursue the core goal of encouraging prosecutors to seek just results. But this Article’s analysis reveals that a host of reasonable objections – ranging from the theoretical, to the practical, to the political – can be raised in opposition to the enterprise. Employing the competence rule against prosecutors, like most other widespread approaches to prosecutorial discipline, may lead to unpredictable results and chill legitimate prosecutorial behavior. The analysis ultimately casts doubt not only on the feasibility of vigorous enforcement of the competence rule but also, more generally, on the viability of professional discipline as the principle mechanism for regulating the prosecution corps.²⁰⁵

The bottom line is that ethics codes and disciplinary enforcement might legitimately regulate much of the conduct currently left to prosecutorial discretion, but professional regulation probably always will be incomplete. This disappointing conclusion does not rest on any assumptions about the regulators’ lack of will or even the shortage of resources, but rather is a consequence of inherent limitations of rule making and discipline. Standing

²⁰⁴ See Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1332-33 (2003) (examining the argument that rules applicable only to prosecutors “are too likely to reflect substantive judgments about the criminal process that are within Congress’s exclusive jurisdiction”); see also Green & Zacharias, *Regulating Federal Prosecutors’ Ethics*, *supra* note 88, at 390-405 (analyzing the allocation of authority to regulate federal prosecutors, as between states, federal courts, and prosecutorial agencies themselves).

²⁰⁵ Cf. Mosteller, *Duke Lacrosse Case*, *supra* note 49, at 1371-72 (reaching a similar conclusion based on an examination of the “do justice” standard).

alone, the disciplinary process will never adequately hold errant prosecutors accountable for their role in bringing about wrongful convictions.

These conclusions belie the Supreme Court's suggestion in *Imbler* that professional regulation serves as an effective alternative to the civil liability regime. Although enforcement can be enhanced, discipline will never come close to playing the lead role in constraining prosecutorial misconduct that the Court assigns to it. This may mean that the Court should rethink its prosecutorial immunity doctrines which it extended in the *Goldstein* case. More importantly, however, it suggests that more attention must be paid to alternative mechanisms for guiding and controlling prosecutorial behavior.²⁰⁶ These may encompass formal law adopted by legislatures or informal approaches, including more robust internal or self-regulation.

²⁰⁶ See, e.g., Bibas, *supra* note 104 (manuscript at 143) (arguing for a greater focus on "institutional design" and stating that "[t]elling a prosecutor to behave ethically and consistently is far less fruitful than creating an environment that expects, monitors, and rewards ethical, consistent behavior"); Meares, *supra* note 60, at 852-53 (suggesting creating financial incentives for prosecutorial behavior); Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 808-10 (2006) (arguing for criminal prosecution of willful prosecutorial misconduct); Thomas, *supra* note 83, at 44-45 (recommending that prosecutors and defense attorneys be drawn from the same pool of specialists); Sonja Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct* 1-3 (Univ. of Md. Legal Studies, Research Paper No. 2008-31, 2008), available at <http://www.ssrn.com/abstract=1262918> (arguing that sentence reduction should be available as an option for responding to prosecutorial misconduct).