

# Imputed Liability for Supervising Prosecutors:

## Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct

Geoffrey S. Corn<sup>†</sup> & Adam M. Gershowitz<sup>‡</sup>

### INTRODUCTION

Prosecutors hold enormous power in the American criminal justice system<sup>1</sup> and are subject to numerous ethics rules that guide them in exercising that power.<sup>2</sup> These rules of ethics are taught in law school classes and reiterated in continuing legal education courses.<sup>3</sup> Yet, simply teaching junior prosecutors to comply with the rules is insufficient.<sup>4</sup> Leadership by senior supervising prosecutors is essential to help junior prosecutors avoid the pitfalls of prosecutorial misconduct.<sup>5</sup> Effective hands-on leadership by supervising prosecutors is necessary to establish a professional environment where ethical

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<sup>†</sup> Associate Professor of Law, South Texas College of Law

<sup>‡</sup> Associate Professor of Law, University of Houston Law Center

1. See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1061 (2009) [hereinafter “Gershowitz, *Prosecutorial Shaming*”].

2. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 738, 739 tbl.1 (2001) (listing thirty provisions of the Model Rules that some prosecutors “probably do violate”) [hereinafter “Zacharias, *Professional Discipline*”].

3. Stephanos Bibas, *Prosecutorial Regulations Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 997 (2009) (explaining that the process of socializing prosecutors to “do justice” begins in law school) [hereinafter “Bibas, *Prosecutorial Regulations*”].

4. See *id.* at 997-98.

5. See *id.* at 964, 1016 (“Leadership by head prosecutors could do more to create and shape office culture, values, norms, and ideals . . . . Telling a prosecutor to behave ethically and consistently is far less fruitful than creating an environment that expects, monitors, and rewards ethical, consistent behavior.”).

behavior can flourish and prosecutors can “do justice.”<sup>6</sup>

Few would dispute the importance of leadership in encouraging ethical behavior from prosecutors. However, leadership involves more than merely emphasizing certain standards of conduct for subordinates; it requires accountability.<sup>7</sup> Unfortunately, accountability is largely absent from the current professional responsibility framework.<sup>8</sup> While individual prosecutors who violate ethical limits may face sanctions,<sup>9</sup> the ethics rules provide no mechanism to impute responsibility for misconduct to supervisors who have failed to create a culture of ethical compliance.<sup>10</sup>

The lack of accountability for supervising prosecutors stands in stark contrast to another adversarial context that also involves broad individual discretion: war. Lawyers often equate the adversarial system with war, borrowing generously from military terminology. There is good reason for the analogy. Like the soldier, the prosecutor is embroiled in an intense, adversarial process. Also like the soldier, the prosecutor performs her function to achieve societal goals. And just like the soldier, the prosecutor operates in an environment that requires the exercise of broad discretion that is limited by rules of conduct even during the most intense battles. In this regard, both the

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6. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 4 (2007) (quoting the “justice is done” inscription on the U.S. Department of Justice headquarters, but noting that many prosecutors focus exclusively on winning) [hereinafter “DAVIS, *ARBITRARY JUSTICE*”]; Nedra Pickler, *Attorney General Holder Tells Prosecutors to “Do the Right Thing,”* ASSOC. PRESS, Apr. 9, 2009 (Attorney General Eric Holder expressed this principle in a speech to newly hired U.S. Attorneys. “Your job as assistant U.S. Attorneys is not to convict people . . . . Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored.”).

7. See THE JUSTICE PROJECT, *IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW* 2 (2009), available at <http://www.thejusticeproject.org/wp-content/uploads/pr-improving-prosecutorial-accountability1.pdf> (“In all aspects of the criminal justice system, there is a dangerous and pervasive lack of prosecutorial accountability.”).

8. See DAVIS, *ARBITRARY JUSTICE*, *supra* note 6, at 16; Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 68 (“Even when the appellate court reverses a conviction on grounds of prosecutorial misconduct, the prosecutor who engaged in the misconduct generally escapes any repercussions.”).

9. The possibility of sanction is remote, however, because individual prosecutors are rarely disciplined. See 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.”).

10. Rachel Reiland, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want To Take a Closer Look at Model Rules 5.1, 5.2, and 5.3*, 14 GEO. J. LEGAL ETHICS 1151, 1152-53 (2001) (citing MODEL RULES OF PROF'L CONDUCT R. 5.1 (2001)) (Model Rule of Professional Conduct 5.1 provides for supervising lawyers to be accountable only if the superior orders or ratifies the conduct of if she “knows of the conduct and fails to take ‘reasonable remedial action’ at a time the consequences of that action can be ‘avoided or mitigated.’” While this may initially sound sweeping, Rule 5.1 “is seldom read, enforced, or mentioned in disciplinary proceedings. Although intended to impose an affirmative duty to supervise the work of subordinates[,] . . . Rule 5.1 avoids the imposition of vicarious liability for the actions of other attorneys.”).

soldier and prosecutor must embrace the fundamental tenet that how we fight is as important as why we fight and that the ends do not always justify the means.

Yet, while the similarities between the prosecutor and the soldier are great, there is a key difference. In the realm of war, it has long been understood that the most significant influence on subordinate conduct is the atmosphere toward compliance with codes of conduct created by the superior.<sup>11</sup> Because of this, the doctrine of command responsibility emerged to ensure that commanders risk personal criminal responsibility for failing to establish an environment of compliance.<sup>12</sup> The doctrine of command responsibility imposes criminal responsibility on military commanders, not only for the misconduct of subordinates ordered by the commander, but also for misconduct the commander should have known would occur.<sup>13</sup> The “should have known” standard subjects commanders to criminal responsibility when their own failure to inculcate an appreciation of the significance of compliance produces subordinate misconduct.<sup>14</sup> The law thereby creates an incentive for commanders to provide meaningful training, to promptly respond to indications of subordinate deviation from legal standards, and to maintain “situational awareness” of subordinate conduct.<sup>15</sup>

The time has come to apply the lessons of the battlefield to the criminal justice process. Accordingly, this article proposes that state rules committees adopt a rule of imputed ethical responsibility for supervisory prosecutors. Like the doctrine of command responsibility, this rule would impose vicarious liability for the ethical violations of subordinates when evidence establishes that a supervisor should have known such a violation was likely to occur. The purpose of the rule is not to spark a witch hunt every time an ethical violation occurs. Instead, as with the law of war, the purpose is to incentivize supervisory prosecutors to embrace their responsibility to develop a culture of ethical compliance within their organizations.

Part I of this article briefly discusses the enormous power held by prosecutors and explains how prosecutors often engage in both purposeful and, more often, inadvertent misconduct. Part II reviews the numerous efforts to cabin prosecutorial misconduct and explains why they have failed. In Part III, we begin to lay out our framework for an alternate proposal that looks to the law of war as a guide for reducing prosecutorial misconduct. Specifically, Part III explores the analogy between the prosecutor and the warrior. Part IV then describes the doctrine of command responsibility that exists in the law of war, in which supervisors are held responsible for the misconduct of their subordinates that they knew or should have known would occur. Finally, Part

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11. *See infra* notes 181-86 and accompanying text.

12. *See infra* notes 148-54 and accompanying text.

13. *See infra* notes 155-61 and accompanying text.

14. *See infra* note 165 and accompanying text.

15. *See infra* notes 163-64 and accompanying text.

V applies the doctrine of command responsibility to supervising prosecutors and responds to anticipated criticisms.

## I. ENORMOUS PROSECUTORIAL POWER LEADS TO MISCONDUCT

### A. Prosecutors Hold Enormous Power From Start to Finish

Prosecutors are the most powerful actors in the criminal justice system.<sup>16</sup> That power stems from prosecutors' enormous discretion.<sup>17</sup> As scholars have long recognized, criminal codes are extremely expansive because legislatures regularly add more offenses to the code but rarely remove crimes from the books.<sup>18</sup> The result is that prosecutors have a large menu of crimes from which to choose in bringing charges.<sup>19</sup> While prosecutors' charging decisions may be bound by strong internal regulations in some offices,<sup>20</sup> they are almost completely unregulated by external authorities. The Supreme Court has been very clear that it will not interfere with prosecutors' charging decisions,<sup>21</sup> and it

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16. For a thorough discussion of that power, see DAVIS, *ARBITRARY JUSTICE*, *supra* note 6.

17. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 NYU L. REV. 911, 932-34 (2006) (describing the wide range of options prosecutors can use to further their interests); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2553-56 (2004) (describing prosecutors' power and incentives).

18. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 585-86 (2009) ("Criminal codes here do not solve the problem of uncontrolled use of state power by a government official. They embody that problem."); Bibas, *Prosecutorial Regulations*, *supra* note 3, at 966 ("[L]egislatures broaden criminal liability, pass overlapping statutes, and raise punishments to give prosecutors extra plea-bargaining chips."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-33 (2001) (describing how legislators' incentive to be tough on crime produces additions to the criminal code); *but see* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007) (challenging conventional wisdom and pointing to legislatures that are narrowing or repealing certain criminal statutes).

19. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 629-30 (2005) ("Federal law enforcers decide whom to send up the river, then select the appropriate [federal statutes] from the menu in order to induce a guilty plea with the desired sentence.").

20. While our instinct is to dismiss rules that cannot be enforced by external entities, Professors Wright and Miller have persuasively argued that such rules can be effective. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008) (arguing that internal regulations are ignored by most scholars and that such regulations can succeed at providing greater predictability and consistency than external regulations); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1031-34 (2005) (discussing benefits of internal guidelines in New Jersey); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 62-66 (2002) (discussing the New Orleans District Attorney's Office screening policies for charges). Professor Stephanos Bibas has provided another important voice on the value of internal regulations. Bibas, *Prosecutorial Regulations*, *supra* note 3; Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441 (2009) [hereinafter "Bibas, *Rewarding Prosecutors*"].

21. JOSEPH F. LAWLESS, *PROSECUTORIAL MISCONDUCT* § 3.01 (3rd ed. 2003) ("The decision to charge is virtually unfettered by any significant judicial restraint.").

has made claims of selective prosecution almost impossible to assert.<sup>22</sup> Indeed, even rules of professional ethics have little to say about prosecutors' broad charging discretion.<sup>23</sup> Moreover, the standard to bring charges is quite low. Under the Model Rules of Professional Conduct, prosecutors need only believe that they have probable cause that the defendant committed the crime.<sup>24</sup> Put simply, if prosecutors decide that an individual should be put in the crosshairs of the criminal justice system, there is little to stop them.

Beyond their initial charging power, prosecutors also have the power to plea bargain with defense attorneys.<sup>25</sup> This authority is particularly important in jurisdictions with determinate sentencing schemes because prosecutors can agree to guilty pleas with full knowledge of what sentence is likely to be imposed.<sup>26</sup> Prosecutors can charge bargain, add, or subtract offenses in order to reach the prison sentence they desire.<sup>27</sup> This effectively transfers judges' and juries' sentencing power to prosecutors.<sup>28</sup> Even in states with indeterminate sentencing schemes, prosecutors have tremendous power to fix a particular a sentence through plea bargaining.<sup>29</sup> Because dockets are congested and judges are busy, prosecutors' sentencing deals are usually accepted by judges.<sup>30</sup> Moreover, as every criminal defendant knows, refusing to plea

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22. *United States v. Armstrong*, 517 U.S. 456 (1996); William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in *CRIMINAL PROCEDURE STORIES* 369 (Carol Steiker ed. 2006) (describing a claim of selective prosecution as "more than difficult—it's impossible").

23. For instance, there is no specific Model Rule governing prosecutors' conduct before grand juries. When such a rule was proposed, the prosecutors' lobby defeated it. *See infra* notes 192-93 and accompanying text.

24. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2003). This rule is the subject of vigorous debate. For an argument that prosecutors should have to be morally certain that defendants are factually and legally guilty before charging a defendant, see Bennett Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 *FORDHAM URB. L.J.* 513, 522-24 (1993). For an endorsement of a lower standard, in which prosecutors need not personally believe the defendant guilty, but only believe that the jury could fairly find as such, see H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard*, 71 *MICH. L. REV.* 1145, 1155-59 (1973).

25. *See generally* DAVIS, *ARBITRARY JUSTICE*, *supra* note 6, at 43-59.

26. As Professor Albert Alschuler recognized over thirty years ago, fixed sentencing systems give enormous (and, in his view, undue) power to prosecutors. Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of "Fixed" and "Presumptive" Sentencing*, 126 *U. PA. L. REV.* 550, 565-76 (1978).

27. *See id.* at 567 ("Under a fixed-sentencing regime, bargaining about the charge would be bargaining about the sentence. A nonjudicial officer would determine the exact outcome of every guilty plea case, and every defendant who secured an offer from a prosecutor in the plea bargaining process would be informed of the precise sentence that would result from his conviction at trial and also of the precise lesser sentence that would result from his conviction by plea.").

28. *See* Jeffrey A. Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 *CAL. L. REV.* 1471, 1506 (1993) ("[B]ecause the guidelines constrain the discretion of the judge, they render prosecutorial discretion much more significant.").

29. *See infra* notes 30-33 and accompanying text.

30. Wright, *supra* note 18, at 587 ("The caseload would become overwhelming if judges

bargain carries a trial penalty whereby prosecutors seek (and frequently attain) longer sentences for defendants who gamble on trial and lose.<sup>31</sup> Prosecutors also have authority to demand that the defendant plead guilty within a short period of time<sup>32</sup> or lose the option of accepting the offer.<sup>33</sup>

In addition, prosecutors have enormous power during the discovery process. Prosecutors are obligated to turn over evidence to the defendant that is both favorable and material.<sup>34</sup> Yet, judges do not oversee such discovery unless a dispute is brought to their attention.<sup>35</sup> Prosecutors are therefore on their own in determining what evidence should be turned over. This is a crucial responsibility, and no easy task, given that prosecutors often do not know what strategy the defense team will employ at trial, and therefore what evidence will be material.<sup>36</sup>

As trial draws closer, prosecutors continue to wield vast power. If a key witness is an accomplice or otherwise facing criminal liability, prosecutors can strike deals and even grant immunity from prosecution, a power not held by any other actor in the system.<sup>37</sup> Prosecutors also have greater access to witnesses who are not in legal trouble. They can call on police and investigators to locate such witnesses, resources that most indigent defense lawyers lack.<sup>38</sup> Once located, witnesses are often much more willing to

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balked regularly at proposals to remove a case from the trial docket.”); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1065 (1976) (observing plea bargaining in large cities and reporting that judges accepted almost all of the Government's sentencing recommendations).

31. See Jeffrey T. Limer & Mindy S. Bradley, *Variations in Trial Penalties Among Serious Offenders*, 44 CRIMINOLOGY 631, 650-52 (2006) (finding that Pennsylvania defendants who went to trial received sentences 57% longer than those who plead guilty).

32. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470-71 (2004) (discussing prosecutors' incentives to limit their workloads by disposing of cases through plea bargaining before substantial amounts of work have to be done) [hereinafter “Bibas, *Plea Bargaining*”].

33. See Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 425 (2008) (“Even when plea bargaining takes on a more adversarial character, there tends to be massive power imbalances between prosecutors and defendants. In light of such considerations as transaction costs and judicially imposed trial penalties, few defendants are willing to go to trial.”).

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

35. Violations of the so-called “*Brady* doctrine” are typically uncovered post-trial. See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 661 (2002) (explaining that “*Brady* is not a discovery doctrine but instead a means of remedying police and prosecutorial misconduct or, in certain cases, unintentional but highly prejudicial non-disclosures”).

36. See Alafair S. Burke, *Improving Prosecutorial Decisionmaking: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006) (“Because *Brady*'s materiality standard turns on a comparison of the supposedly exculpatory evidence and the rest of the trial record, applying the standard prior to trial requires that prosecutors engage in a bizarre kind of anticipatory hindsight review.”); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 471 (2001).

37. See DAVIS, *ARBITRARY JUSTICE*, *supra* note 6, at 52-56.

38. See Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 97 (2007).

cooperate with prosecutors than with defense lawyers.<sup>39</sup> Prosecutors are then in a position to sculpt witnesses' testimony (within the boundaries of ethics rules, of course)<sup>40</sup> in a way that will improve their persuasiveness on the witness stand.<sup>41</sup>

Once the day of trial arrives, prosecutors continue to have powerful advantages. The prosecutor will often present the case to the same judge they appear in front of every day of the week.<sup>42</sup> The prosecutor will likely have a good sense of which arguments are persuasive to that judge. If the prosecutor is lucky, she may have formed a good relationship with that judge and may benefit if the judge (perhaps subconsciously) leans her way on close legal rulings regarding admission of evidence and jury instructions.<sup>43</sup> Finally, prosecutors likely receive an added boost by being able to stand in front of the jury and say that they represent the United States or the state.

In sum, from the moment of charging until the end of closing statements, prosecutors wield enormous and unmatched power both inside and outside the courtroom.

### *B. Misconduct Lies Around Every Corner*

With enormous power comes enormous responsibility. As we explain below, prosecutors face so many competing demands for their time and attention that mistakes and misconduct are inevitable. For instance, prosecutors may exercise peremptory strikes unlawfully, fail to turn over evidence required

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39. During the trial of Ken Lay and Jeff Skilling stemming from the collapse of Enron, the defendants complained that prosecutors intimidated numerous witnesses into silence by listing nearly one hundred individuals as unindicted co-conspirators. See Mary Flood, *The Enron Trial: Only Two Defendants, But Many Accused: Government Will Cite Nearly 100 Unindicted Co-Conspirators*, HOUS. CHRON., Jan. 27, 2006, at A1 (explaining that an unindicted co-conspirator "actually helps prosecutors" because "[i]n some cases, people learn they have been named as unindicted co-conspirators and could be scared into silence, especially when they have something to say that could help a defendant").

40. Unfortunately, a survey of judges, public defenders, and state's attorneys found that "fifteen percent of respondents believe that prosecutors 'encourage' police perjury" by steering police testimony. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 110 (1992). Equally unfortunate is that there is likely considerable additional police perjury that is committed without prosecutors' encouragement. See, e.g., Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994). While prosecutors do not induce most police perjury, its prevalence certainly adds to the power imbalance in the criminal justice system.

41. As Professor Bennett Gershman has explained, "there is nothing wrong with a prosecutor assisting a witness to give testimony truthfully and effectively." Bennett L. Gershman, *Witness Coaching By Prosecutors*, 23 CARDOZO L. REV. 829, 855 (2002) (recognizing the potential for misconduct in witness coaching and providing a protocol for ethical witness preparation).

42. Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between The Judge and the Prosecutor*, 79 NEB. L. REV. 251, 269 (2000) ("[P]rosecutors appear daily in front of the same judge.").

43. See *id.* at 270 (noting the sense of "collaboration" and "team spirit" between a judge and "her prosecutor" and arguing that "[e]ven the most conscientious judge may begin to form a bond with a prosecutor who she privately sees routinely in her chambers").

by constitutional or statutory discovery rules, or make impermissible statements in closing arguments. Most prosecutors do not set out to commit misconduct, but do so inadvertently.

First and most importantly, newly hired prosecutors have a tremendous amount to learn.<sup>44</sup> On the legal side, junior prosecutors must become familiar with the ins and outs of the criminal code (something rarely taught in law schools)<sup>45</sup> as well as numerous federal and state constitutional rules of criminal procedure, which are always changing.<sup>46</sup> On the trial advocacy front, prosecutors must learn techniques for direct and cross-examination, opening statements, closing arguments, and favorable jury selection. Then prosecutors must learn which plea bargain offers are appropriate for dozens of different types of crimes.<sup>47</sup> They also must learn the informal office protocol for dealing with defense lawyers and judges. On top of this, many district attorneys' offices are terribly overburdened, forcing prosecutors to handle excessive caseloads.<sup>48</sup> In short, junior prosecutors have an overwhelming amount to do and learn in a limited amount of time.

The truly committed prosecutors allow the job to consume their lives, working nights and weekends for no additional pay.<sup>49</sup> These assistant district attorneys spend their free time not only working on their cases, but learning various other background items: the criminal code, the criminal procedure rules, how to act in difficult ethical situations, and a host of other things.<sup>50</sup> We

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44. Anecdotally, consider the remark of one well-regarded prosecutor turned professor that "as a practicing prosecutor for nearly five years, she was unaware of any discovery obligations beyond those articulated in *Brady* and the local rules of criminal procedure." Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 498 n.98 (2009).

45. See Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 796-97 (2002) (explaining how most criminal procedure classes and textbooks focus on Supreme Court decisions and federal constitutional law).

46. For instance, during a random Tuesday in April, the Supreme Court dramatically changed the scope of the search incident to arrest doctrine in its decision in *Arizona v. Gant*. 129 S. Ct. 1710 (2009). Prosecutors who had been relying on the bright line rule announced in *New York v. Belton* almost thirty years ago were forced to re-assess suppression motions and respond to defense attorneys who began invoking the case almost instantly. 453 U.S. 454 (1981).

47. See Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 335 (2007) ("Field studies demonstrate the existence of well-established 'going rates' for different categories of offense and offender. Thus, experienced lawyers are already accustomed to sorting out cases based on a limited number of variables . . .").

48. *Santobello v. New York*, 404 U.S. 257, 260 (1971) (noting "an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices"); Corinna Barrett Lain, *Accuracy Where it Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 43, 43 n.200 (2002) (explaining that prosecutors will dismiss weak cases because they are "already overburdened" and "overtaxed").

49. See, e.g., GARY DELSOHN, *THE PROSECUTORS: KIDNAP, RAPE, JUSTICE: ONE YEAR BEHIND THE SCENES IN A BIG CITY DA'S OFFICE* (2003) (chronicling prosecutors and cases in the Sacramento County District Attorney's Office).

50. See, e.g., STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* 81-82 (2005) (describing a junior prosecutor working late

would hope that these truly committed prosecutors are the least likely to engage in prosecutorial misconduct.<sup>51</sup> Regardless of whether that is true, the real problem is that the ultra-committed, in-it-for-the-long-haul prosecutors are the exception, not the rule. Many junior prosecutors intend to work as assistant district attorneys for a few years right after law school before transitioning into private employment.<sup>52</sup> While these transitory prosecutors have no incentive to commit misconduct,<sup>53</sup> they also may lack the motivation to spend their few hours of free time proactively immersing themselves in the multitude of legal and ethical questions they will face during the few years they serve as assistant district attorneys. Moreover, because many district attorney's offices reward trial victories,<sup>54</sup> junior prosecutors have an incentive to spend their time honing their litigation skills rather than thinking through abstract ethical quandaries.<sup>55</sup>

The result of these enormous burdens and time pressures is prosecutorial misconduct. Misconduct runs the gamut from failing to turn over favorable evidence, to striking jurors based on impermissible criteria, to making improper jury argument, to list just a few examples.<sup>56</sup> Misconduct does not usually occur because prosecutors are evil, overly results oriented,<sup>57</sup> or intentionally

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into the night on his closing argument).

51. Professor Alafair Burke and others have raised the question of whether much prosecutorial misconduct may be more attributable to cognitive bias than intentional malfeasance. Burke, *supra* note 44, at 492-98 (discussing why ethical prosecutors may fail to properly disclose evidence); see also Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006) (focusing on prosecutors acting in good faith and how their loyalties affect them); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 138-48 (2004) (discussing how office culture, training, and interaction with victims and police contributes to a conviction psychology that promotes resistance to post-conviction claims of innocence). Career prosecutors are certainly not immune from (and may actually be more susceptible to) cognitive bias.

52. See Gerald Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2149 (1998) ("Some are career civil servants, who join a prosecutor's office shortly after admission to the bar, and remain in that role essentially for the rest of their career. Others, who might also join the staff at a very young age, are more transient, seeking a few years of excitement, public service, or intense trial experience before pursuing private sector opportunities as criminal defense lawyers or civil litigators."). In the federal system, tenures are longer, up to eight years on average. See Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in the United States Attorney's Offices: The Rose of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 282 (2004).

53. To the contrary, transitory prosecutors have a motive to avoid blatant misconduct that could adversely affect their future career prospects. See Gershowitz, *Prosecutorial Shaming*, *supra* note 1, at 1094-95.

54. See Medwed, *supra* note 51, at 134-37 (explaining how office culture can place substantial importance on higher conviction rates for career advancement).

55. For a discussion of the myriad incentives facing line prosecutors, see Bibas, *Plea Bargaining*, *supra* note 32, at 2470-76.

56. For meticulous discussions of the different types of misconduct, see BENNETT L. GERSHMAN, *TRIAL ERROR AND MISCONDUCT* ch. 2 (2007); LAWLESS, *supra* note 21, at § 3.01.

57. But see Zacharias, *Professional Discipline*, *supra* note 2, at 757 n.123 ("[O]ffending prosecutors typically engage in misconduct not for reasons of personal gain but because they are seeking to convict defendants they honestly believe should be convicted.").

seeking to cheat.<sup>58</sup> Misconduct often happens inadvertently because there is too much for prosecutors to know and insufficient ethics training to avoid misconduct.<sup>59</sup>

At the outset, it is important to recognize that much misconduct is likely never uncovered because most defendants plead guilty and waive their appellate rights.<sup>60</sup> Yet, despite the difficulties of discovering misconduct, media outlets have documented widespread violations. In a recent study, the Center for Public Integrity identified more than 2,000 cases in which prosecutorial misconduct played a role in dismissed charges or reversed convictions or sentences.<sup>61</sup> Focusing on homicide cases nationwide, the *Chicago Tribune* found almost 400 cases in which courts threw out charges because prosecutors failed to turn over exculpatory evidence or knowingly used false evidence.<sup>62</sup> The authors of the *Tribune* study believed that those reversals accounted for “only a fraction of how often prosecutors commit such deception—which is by design hidden and can take extraordinary efforts to uncover.”<sup>63</sup>

Put simply, although the vast majority of prosecutors may have no desire to violate constitutional, statutory, or ethical rules, prosecutorial misconduct is

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58. In 1999, the *Chicago Tribune* published an excellent exposé on misconduct in the Cook County District Attorney’s Office and detailed how many prosecutors have had cases reversed for misconduct but subsequently received promotion. See Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1 [hereinafter “Armstrong & Possley, *The Verdict: Dishonor*”]. One of the prosecutors subsequently wrote a compelling letter to the editor explaining that while one of her cases had been reversed for failure to disclose evidence, any error was due to “inadvertence” and not a “deliberate suppression of evidence.” See Virginia L. Ferrera, *Former Prosecutor Disputes Report*, CHI. TRIB., Feb. 9, 1999, at N14.

59. See Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 767-69 (1999) (discussing the lack of ethics training provided by prosecutor’s offices); see also Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 63 (2005) (“[A]ssistant prosecutors generally have less training and experience prosecuting criminal cases. Consequently, assistants are, for the most part, less familiar with state and federal constitutional strictures applicable to law enforcement, and more susceptible to inadvertent constitutional violations.”); *Jamison v. Collins*, 100 F. Supp. 2d 647, 673 (S.D. Ohio 2000) (granting writ of habeas corpus in capital case because prosecutors failed to turn over exculpatory evidence and noting that the two lead prosecutors stated in their depositions that “they received no training from the Hamilton County Prosecutor’s Office as to what constituted exculpatory evidence”).

60. See DAVIS, *ARBITRARY JUSTICE*, *supra* note 6, at 127 (“Of course, there is no opportunity to challenge any misconduct in the over 95% of all criminal cases which result in a guilty plea, since defendants give up most of their appellate rights when they plead guilty.”).

61. See THE CENTER FOR PUBLIC INTEGRITY, *HARMFUL ERROR: INVESTIGATING AMERICA’S LOCAL PROSECUTORS 2* (2003).

62. Armstrong & Possley, *The Verdict: Dishonor*, *supra* note 58. The study examined court records and disciplinary records relating to homicide cases across the country and found 381 instances since 1963 in which convictions were thrown out because of prosecutorial misconduct.

63. *Id.*; see also Bill Moushey, *Out of Control: Legal Rules Have Changed, Allowing Federal Agents, Prosecutors to Bypass Basic Rights*, PITT. POST-GAZETTE, Nov. 22, 1998, at A1 (reviewing and describing numerous cases of prosecutorial misconduct).

pervasive.

## II. REASONS WHY PROSECUTORIAL MISCONDUCT CONTINUES TO OCCUR

It is not controversial to assert that prosecutorial misconduct is common. The difficult question is why measures designed to address misconduct have not succeeded. As we explain below, the traditional remedies that should deter government actors are lacking or not enforced with respect to prosecutors.

### A. *The Absence of Criminal Liability for Prosecutors*

The most serious potential repercussion for prosecutorial misconduct is criminal sanctions. However, assistant district attorneys are almost never criminally prosecuted for their misconduct.<sup>64</sup> Given that much misconduct is inadvertent, it would be difficult to prove the necessary mens rea to hold prosecutors criminally responsible.<sup>65</sup>

Even if proof of intentional misconduct were available, the responsibility for bringing misbehaving prosecutors to justice would lie in the hands of their brethren—other prosecutors. Given the convincing research that lawyers rarely turn in their peers,<sup>66</sup> it seems likely that most criminal charges of prosecutorial misconduct would be dismissed or otherwise made to disappear quietly by the district attorneys who handle the cases.<sup>67</sup> Not surprisingly, the *Chicago Tribune* found that out of nearly 400 homicide convictions reversed for using false evidence or withholding exculpatory evidence, only two prosecutors were ever criminally charged and in both cases the indictments were dismissed.<sup>68</sup>

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64. See 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 (2006) (explaining that sanctions are “seldom employed”). Professor Moore proposes that federal civil rights and obstruction of justice statutes be used to charge prosecutors who engage in intentional misconduct. *Id.* at 826-47.

65. See Dunahoe, *supra* note 59, at 83-84 (exploring the possibility of criminal charges against prosecutors under federal civil rights statutes but noting the difficulty with doing so because 18 U.S.C. § 242 requires “willful” misconduct) (citing 18 U.S.C. § 242 (2000)).

66. See Ryan Williams, Comment, *Reputation and the Rules: An Argument for a Balancing Approach Under Rule 8.3 of the Model Rules of Professional Conduct*, 68 LA. L. REV. 931, 932 (2008) (“It will come as no surprise that lawyers prefer not to report the misconduct of their peers.”); Gerald E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 538 (noting “the disappointing experience of mandatory informing”).

67. See Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, at N1 (explaining how in a study of 381 homicide convictions that were reversed over thirty-six years because prosecutors used false evidence or withheld exculpatory evidence “not a single prosecutor in those cases was ever brought to trial for the misconduct” and that “[o]nly two of those cases even resulted in charges being filed and, in both instances, the indictments were dismissed”).

68. *Id.* In fact, the Tribune reporters could only find six cases nationwide during the last century where prosecutors were criminally charged for using false evidence or hiding favorable evidence.

*B. The Absence of Civil Liability for Prosecutors*

A second mechanism for reigning in misconduct, civil liability, has been equally unsuccessful. Courts have cloaked prosecutors in absolute immunity for actions taken as advocates for the state.<sup>69</sup> Thus, even if prosecutors knowingly suborn perjury or purposefully violate discovery rules, they are immune from civil liability.<sup>70</sup> When prosecutors participate in improper investigative procedures (for instance, illegal wiretapping, or directing the police to pursue non-meritorious investigations) they receive qualified immunity.<sup>71</sup> While less protective than absolute immunity, qualified immunity still provides prosecutors with nearly complete protection from civil liability.<sup>72</sup> Even in the rare instance where damages are assessed, the government typically indemnifies state actors who are sued for actions taken during the course of their employment.<sup>73</sup>

In sum, prosecutors are almost never forced to pay a single dollar for intentional misconduct, and they certainly are not required to pay damages for inadvertent misconduct. With no prospect of suffering personal financial harm, civil liability cannot deter prosecutors.<sup>74</sup>

*C. State Ethics Codes and Boards Fail to Respond to Prosecutorial Misconduct*

Misbehaving prosecutors face only marginally greater risk from state ethics boards. As Professor Bruce Green has explained, there are numerous institutions and bodies of law that regulate prosecutors' behavior.<sup>75</sup> Yet, state ethics codes are incomplete and often so vague as to be unhelpful. They do not

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69. See *Imbler v. Pachtman*, 424 U.S. 409 (1976). For criticism of the granting of absolute immunity, see Johns, *supra* note 8, at 55 (arguing that "absolute immunity is not needed to prevent frivolous litigation or to protect the political process").

70. For examples of these and other types of misconduct receiving absolute immunity, see Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 *FORDHAM L. REV.* 3441, 3457-61 (1999).

71. *Id.* at 3461-63.

72. See *id.* at 3463 ("As a result of absolute and qualified immunities, a paucity of civil suits against prosecutors reach a full trial on the merits.").

73. See John Calvin Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 *VA. L. REV.* 47, 50, 50 n.16 (1998) (discussing indemnification of state officials in general, with police officers as a particular example).

74. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. CHI. L. REV.* 345, 345 (2000) (arguing that government actors respond to political incentives, not financial incentives, and that "[i]f the goal of making government pay compensation is to achieve optimal deterrence with respect to constitutionally problematic conduct, the results are likely to be disappointing and perhaps even perverse").

75. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 *ST. THOMAS L. REV.* 69, 72 (1995) (explaining how prosecutors are governed by the Federal Rules of Criminal Procedure, statutes, constitutional due process, professional responsibility codes, ad hoc rules imposed by federal courts, and internal guidelines).

address common scenarios that prosecutors face everyday.<sup>76</sup> For instance, must prosecutors intervene when defendants are represented by incompetent defense lawyers? Are there limits to how prosecutors can prepare witnesses and what rewards witnesses can be given for their cooperation?<sup>77</sup>

And even when prosecutors commit a clear violation—for instance, withholding exculpatory evidence<sup>78</sup>—ethics boards rarely impose discipline.<sup>79</sup> The simple fact is that while many criminal convictions are reversed for prosecutorial misconduct, the offending prosecutors are rarely disciplined by state ethics boards.<sup>80</sup>

There are a number of reasons why discipline is rarely imposed. First, many cases of misconduct are not reported to the boards. Defense attorneys often decline to report prosecutorial misconduct because it would jeopardize their plea bargaining relationship with that prosecutor and her colleagues.<sup>81</sup> For less explicable reasons, appellate judges who reverse convictions for misconduct also rarely report the case to the bar.<sup>82</sup> There is no indication that disciplinary bodies have followed scholars' suggestions that they monitor appellate opinions where prosecutorial misconduct is identified or media stories where it is reported.<sup>83</sup>

Second, even those cases that are reported often go nowhere. This is because ethics bodies are overwhelmed with cases and understaffed.<sup>84</sup> Also,

76. See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1583-87, 1596 (describing failed efforts to amend Model Rule 3.8, which governs prosecutorial behavior, and stating that “with regard to prosecutorial ethics, the Commission decided to err on the side of conservatism, rather than comprehensiveness” and that “[t]he existing provisions of Model Rule 3.8 . . . impose relatively little restraint on prosecutors and leave much troublesome conduct unaddressed”) [hereinafter “Green, *Prosecutorial Ethics as Usual*”]; Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 616 (1999) (“[T]he rules barely scratch the surface.”) [hereinafter “Green, *Seek Justice*”].

77. See Green, *Seek Justice*, *supra* note 76, at 619-22 (raising these and other vexing questions). As Professor Green also explains, however, some of the gaps have been filled by (albeit unenforceable) guidelines adopted by individual prosecutor’s offices (such as the U.S. Attorney’s Manual) and bar associations. *Id.* at 617.

78. Withholding exculpatory evidence is likely the most commonly alleged type of prosecutorial misconduct. DAVIS, *ARBITRARY JUSTICE*, *supra* note 6, at 131 (“*Brady* violations are among the most common forms of prosecutorial misconduct.”).

79. Rosen, *supra* note 9, at 697; Zacharias, *Professional Discipline*, *supra* note 2, at 744-45 (studying all reported cases of prosecutorial discipline and finding about one hundred cases, though “many of the cases are old, making the number of reported cases far from staggering in light of the many prosecutors and criminal cases that exist”).

80. See Rosen, *supra* note 9, at 697.

81. Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 292 (2007).

82. *Id.* (“[I]t is unclear why more judges do not refer offending prosecutors to bar counsel, especially when these judges have made a finding of misconduct.”); see also Zacharias, *Professional Discipline*, *supra* note 2, at 750 (explaining that judges are in a good position to report misconduct).

83. See Zacharias, *Professional Discipline*, *supra* note 2, at 774; Rosen, *supra* note 9, at 735-36.

84. See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial*

state ethics boards are geared toward civil cases where identifiable clients are the wronged party, rather than criminal cases, where general concepts of justice or disfavored criminals are the victim.<sup>85</sup>

In short, as former prosecutor Peter Henning has summarized, “the professional disciplinary system has proved inadequate in addressing prosecutorial misconduct.”<sup>86</sup>

*D. The Prospect of Courts Reversing Defendants’ Convictions Fails to Deter Misconduct*

Another possible deterrent to prosecutorial misconduct is the prospect of having criminal defendants’ convictions reversed on appeal. Given that prosecutors often become very emotionally involved in their cases and want to see the guilty removed from the streets and punished, the prospect of reversal would seem to be a promising deterrent. Yet, many prosecutors appear not to even think about the prospect of reversal on appeal when they are in the heat of trial. Perhaps this is because appeals are typically handled by other lawyers,<sup>87</sup> either from another division of the county prosecutor’s office or by a lawyer from the state attorney general’s office.<sup>88</sup>

Further, as a purely strategic matter, the appellate system actually creates an incentive for prosecutors to behave less ethically. Under the harmless error doctrine, the vast majority of criminal cases are affirmed, even if constitutional error occurred.<sup>89</sup> For this reason, many prosecutor’s offices have affirmance rates in excess of ninety percent on appeal.<sup>90</sup> As Professor Bennett Gershman

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*Discretion and Conduct With Financial Incentives*, 64 *FORDHAM L. REV.* 851, 901 (1995) (discussing need for disciplinary bodies to have more money and staff, and explaining that at the federal level the Office of Professional Responsibility “would require a very substantial increase in staff just to have a fighting chance”).

85. See Zacharias, *Professional Discipline*, *supra* note 2, at 758 (“The absence of individual clients also reduces the likelihood of professional discipline. When prosecutors stray, the regulators no doubt perceive a lesser need to institute discipline in order to protect individuals.”).

86. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 *WASH. U.L.Q.* 713, 829 (1999) (citing numerous authorities who have reached the same conclusion).

87. See Dunahoe, *supra* note 59, at 92 (“[C]onviction reversals offer the most roundabout method for impacting the professional gain incentive of the transitory prosecutor . . . . The costs of reversal are generally not experienced by the prosecutor (or even the agency) responsible for the misconduct.”); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 *SW. L.J.* 965, 976 (1984).

88. See Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty*, 63 *VAND. L. REV.* (forthcoming Mar. 2010) (“Because county prosecutors reap political benefits from being tough on crime but do not typically have to pay for expensive appeals, they have an incentive to seek the death penalty in marginal cases that may be hard to defend on appeal.”).

89. See Henning, *supra* note 86, at 721-22 (“[A] finding of misconduct usually does not trigger relief unless the prosecutor’s acts undermined the fairness of the proceeding or confidence in the jury’s verdict.”).

90. For instance, the Stark County Prosecuting Attorney’s Office in Ohio advertises on its website that it has “an overall affirmance rate of approximately 95%.” Stark County Prosecuting

has explained, the harmless error doctrine has “unleash[ed] prosecutors from the restraining threat of appellate reversal.”<sup>91</sup> This is not to suggest that prosecutors purposefully commit misconduct simply because they will be protected by the harmless error doctrine. However, it would seem intuitive that the doctrine minimizes any deterrent effect on prosecutorial behavior.

*E. Judicial Shaming of Misbehaving Prosecutors Is Too Rare To Be Effective*

While individual prosecutors might not fear reversal of their cases, they likely would be more concerned if judges identified them by name in written appellate opinions and criticized their misconduct. Unfortunately, this promising approach to deterring misconduct has also failed because it is extremely rare for judges to publicly shame prosecutors.<sup>92</sup>

Courts go to great lengths to refer to “the State” or “the prosecutors” rather than name the particular lawyers involved. For instance, when the Supreme Court reversed a recent death penalty sentence because prosecutors had “persisted in hiding [the key witness’] informant status and misleadingly represented that [they] had complied in full with [their] *Brady* disclosure obligations” the Court never named the prosecutors.<sup>93</sup> Instead, the Supreme Court referred dozens of times to “the State” or “the prosecution.”<sup>94</sup>

Judges are so reluctant to name misbehaving prosecutors that they will often redact their names from portions of the trial transcript that are quoted in the appellate opinion. For example, in one federal prosecution the judge learned mid-case that the Assistant United States Attorney had purposefully misidentified the name of a witness so that the defense could not learn of the witness’s criminal record.<sup>95</sup> The judge ordered a mistrial, took the unusual step of barring a subsequent prosecution, and described the prosecutor’s conduct as

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Attorney: Criminal Division-Appellate Section, [http://www.co.stark.oh.us/internet/home.DisplayPage?v\\_page=prosecutor\\_AppellateDivision](http://www.co.stark.oh.us/internet/home.DisplayPage?v_page=prosecutor_AppellateDivision) (last visited Nov. 16, 2009).

91. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 427 (1992); see also Carissa Hessick, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution*, 47 S.D. L. REV. 255, 263 (2002) (“A prosecutor with a strong case takes only a small risk in suborning perjury because, under the harmless error rule, the court may decline to grant a new trial, in spite of the perjured testimony, where evidence of a defendant’s guilt is overwhelming.”).

92. See Gershowitz, *Prosecutorial Shaming*, *supra* note 1, at 1075-84 (studying reversals in death penalty cases, and finding that prosecutors were rarely mentioned by name and that judges often redacted prosecutors’ names from quoted portions of the trial transcript); Medwed, *supra* note 51, at 172-73 (“Indeed, few convictions are overturned by virtue of prosecutorial misconduct and, in the rare incidences of reversal, the appellate court opinions invariably neglect to identify the prosecutor by name.”); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2126 (2000) (“[E]ven in the face of egregious behavior, orders announcing these reversals rarely single out anyone by name to bear the blame . . .”).

93. See *Banks v. Dretke*, 540 U.S. 668, 693 (2004).

94. See *id.* at 674-706.

95. *United States v. Sterba*, 22 F. Supp. 2d 1333, 1335-39 (M.D. Fla. 1998).

“patent[ly] disingenuous.”<sup>96</sup> In the original draft of the opinion,<sup>97</sup> the judge repeatedly named the prosecutor—AUSA Karen Cox—but evidently changed his mind shortly thereafter. A superseding opinion redacted the prosecutor’s name from the opinion and replaced more than three-dozen references to her with “AUSA.”<sup>98</sup> This same prosecutor went on to commit other acts of misconduct before eventually resigning from the U.S. Attorney’s office.<sup>99</sup>

While scholars have implored judges to regularly name misbehaving prosecutors in their opinions, it is unlikely to occur with greater frequency. Some appellate judges are former prosecutors and may identify with those they should be shaming.<sup>100</sup> Just as lawyers are reluctant to report the misconduct of their peers,<sup>101</sup> so too may judges be reluctant to shame prosecutors who are doing the very challenging job that many judges previously held. Additionally, even for judges who were not prosecutors, compassion may inhibit them from ruining the career of a prosecutor by publicly castigating him over what they believe to be an isolated incident.<sup>102</sup>

In sum, like criminal sanctions, civil liability, and bar discipline, judicial shaming holds little hope of deterring prosecutorial misconduct.

*F. In-House Discipline by Prosecutor’s Offices Is Too Sporadic To Be a Reliable Check on Misconduct*

Little has been written about internal discipline in prosecutor’s offices.<sup>103</sup> The conventional wisdom is that district attorneys’ offices rarely impose in-house punishment when misconduct is discovered.<sup>104</sup> Indeed, there are

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96. *Id.* at 1338.

97. See *United States v. Sterba*, No. 97-441-CR-T-23E, 1998 WL 547020 (M.D. Fla. Aug. 13, 1998).

98. *Sterba*, 22 F. Supp. 2d at 1334-38.

99. For more detail, see Gershowitz, *Prosecutorial Shaming*, *supra* note 1, at 1071-73; Barry Tarlow, *State Bar Discipline: An Essential Remedy for Prosecutorial Misconduct*, 25 CHAMPION 56, 58 (2001).

100. See Meares, *supra* note 84, at 912.

101. Model Rule of Professional Conduct 8.3 requires any attorney to report another attorney’s professional misconduct when that misconduct raises a “substantial question” as to the other attorney’s fitness to practice law. Model Rules of Prof’l Conduct R. 8.3 (2003). Although it is difficult to measure, compliance with this rule is perceived to be very low. Williams, *supra* note 66, at 932; Lynch, *supra* note 66, at 538.

102. Gershowitz, *Prosecutorial Shaming*, *supra* note 1, at 1086-87. Of course, the danger is that the prosecutor’s misconduct is not an isolated incident and that the prosecutor had not been castigated in judicial opinions for prior misconduct because each judge mistakenly believed the prosecutor had committed an aberrant mistake that did not justify dragging their name through the mud. See *id.* at 1073-74.

103. Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 43 (2009) (“Little is known about district and county attorney offices’ and state attorney general offices’ internal processes for disciplining prosecutors.”) [hereinafter “Zacharias & Green, *Duty to Avoid Wrongful Convictions*”].

104. See Zacharias, *Professional Discipline*, *supra* note 2, at 770-71 (discussing reasons why

numerous instances of prosecutors committing serious misconduct without being disciplined. For instance, the California Supreme Court reversed Shawn Hill's death sentence, in part because prosecutor Rosalie Morton had engaged in "constant and outrageous misconduct," including mischaracterizing the evidence and the law.<sup>105</sup> Despite this misconduct and the fact that Morton had engaged in similar misbehavior in three prior cases,<sup>106</sup> the Los Angeles County District Attorney's office resisted firing her.<sup>107</sup> Or consider the case of Delma Banks,<sup>108</sup> in which the United States Supreme Court reversed Banks' death sentence because the prosecutor withheld exculpatory evidence and scripted the testimony of the key witness.<sup>109</sup> Yet, despite being castigated by the Supreme Court, the prosecutor kept his job.<sup>110</sup>

A *Chicago Tribune* study found that of 381 homicide convictions that were reversed because the prosecution withheld evidence or used false testimony, only three of the involved prosecutors received serious discipline.<sup>111</sup> Officials at the Cook County State's Attorney's office could not identify a single case in the last two decades in which a prosecutor was fired for trial misconduct.<sup>112</sup> Indeed, a number of prosecutors who were rebuked by appellate courts were subsequently promoted and placed in positions to supervise and train junior prosecutors.<sup>113</sup>

Unfortunately, we cannot assume that district attorneys' offices are regularly disciplining prosecutors behind closed doors because it is unlikely that serious in-house discipline of prosecutors would fly under the radar. If prosecutors who commit serious misconduct received severe punishments, such as termination or suspension, it is quite likely that the media would find out and report on it.<sup>114</sup> Yet, such stories are rare.<sup>115</sup>

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internal discipline is often unlikely).

105. *People v. Hill*, 952 P.2d 673, 698-99 (Cal. 1998).

106. *Id.* at 699-700.

107. See Ryan Patrick Alford, Note, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479, 489 (2006).

108. *Banks v. Dretke*, 540 U.S. 668, 679-82 (2004).

109. *Id.* at 684-86.

110. *The Phases and Faces of the Duke Lacrosse Controversy: A Conversation*, 19 SETON HALL J. SPORTS & ENT. L. 181, 200 (2009) (comments of Professor Angela Davis).

111. See Armstrong & Possley, *The Verdict: Dishonor*, *supra* note 58. One was fired (though he was later reinstated) and two were suspended.

112. See Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at N1.

113. See Ken Armstrong & Maurice Possley, *Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, at N1 (noting that prosecutors "tapped to put a stop to unfair trial practices included some of the very folks who had resorted to such tactics themselves").

114. In all large cities, (and probably many medium-sized cities) newspapers and television stations have reporters whose entire beat is to cover the courthouse. For an in-depth treatment of the media's incentives to cover crime and the criminal justice system, see Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 421-36 (2006).

The extent of lesser discipline is harder to assess. It is quite possible that prosecutor's offices impose quieter sanctions on misbehaving prosecutors, such as docking their pay, moving them to less desirable posts, or pushing them to resign rather than be fired. Because such discipline is done behind closed doors, and those disciplined rarely publicize it, it is impossible to say how commonly it occurs. The extent of quiet discipline likely varies widely by office. Moreover, even where such quieter discipline does occur, it serves virtually no pedagogical or cultural value because other prosecutors—particularly junior prosecutors—are likely unaware of it.<sup>116</sup> The muted in-house response to misbehavior may convey the message that misconduct is not taken seriously.

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In sum, there is little external or internal pressure on prosecutors to avoid misconduct. They are extremely unlikely to face criminal charges, civil liability, bar discipline, reversal of their convictions, judicial shaming, or serious in-house discipline. More creative proposals set forth by scholars have likewise failed to foster change.<sup>117</sup> Accordingly, we suggest a more dramatic incentive drawn from the law of war: the prospect of imputed liability.

### III. THE ANALOGY BETWEEN THE PROSECUTOR AND THE WARRIOR

Analogizing the prosecutor with the soldier is logical and valuable in

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115. There are, of course, some examples. See, e.g., Brett Barroquerre, *Prosecutor Resigns After Controversial Plea Deal*, ASSOC. PRESS, June 11, 2009 (explaining how a prosecutor failed to disclose a cooperation agreement with a key witness in a death penalty case and quoting District Attorney as saying that if she had not resigned she would have been fired).

116. See Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 424 (advocating transparent discipline for minor misconduct because enforcing internal discipline “would go a long way toward addressing the issue of prosecutorial misconduct”).

117. Scholars have proposed thoughtful alternative ways to deal with prosecutorial misconduct, yet none have been successfully implemented. See DAVIS, ARBITRARY JUSTICE, *supra* note 6, at 179-89 (advocating prosecutorial review boards, changes to ethics rules, and other approaches); Sonja Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509 (2009) (proposing sentence reductions as a more effective deterrent); Bibas, *Rewarding Prosecutors*, *supra* note 20, at 448-51 (advocating a rating system in which victims, defendants, judges, defense counsel, and police evaluate prosecutors); Gershowitz, *Prosecutorial Shaming*, *supra* note 1, at 1095-1105 (advocating that independent third parties publicly shame prosecutors whose cases are reversed for misconduct); Kelly Gier, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191, 205 (2006) (proposing bar disciplinary committees be required to review judicial decisions and institute disciplinary proceedings in egregious cases); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463-64 (2001) (advocating a prosecutorial review board to handle specific complaints, and to conduct random reviews or routine cases); Meares, *supra* note 84, at 901-02 (proposing financial rewards for ethical conduct); Erica M. Landsberg, Comment, *Policing Attorneys: Exclusion of Unethically Obtained Evidence*, 53 U. CHI. L. REV. 1399, 1403-04 (1986) (explaining that one way to more rigorously enforce the rules of professional responsibility is to “provide more money for disciplinary agencies” but recognizing that it might be “politically unpalatable”).

exposing why the concept of command responsibility could substantially enhance the probability of ethical prosecutorial behavior. While the stakes involved in trial and warfare are undoubtedly distinguishable, both endeavors share certain characteristics. The most obvious is that they are both defined in terms of an adversarial contest. Trial, like war, involves two opponents seeking to prevail in their efforts to dominate a “battlefield.” For the soldier,<sup>118</sup> the battlefield is literal; for the prosecutor, metaphorical. Nonetheless, the adversarial contest thrusts both the soldier and the prosecutor into an environment where there is constant temptation to allow the ends to justify the means. The most significant and revealing aspect of the warrior/prosecutor analogy is that submitting to this temptation is antithetical to both war and trial.

Warfare, like trial, is not defined by an ends justify the means paradigm, but instead by absolute limitations on permissible conduct.<sup>119</sup> These limitations, established by the laws of war,<sup>120</sup> trace their origins back to the

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118. The term “soldier” or “warrior” will be used throughout this article as a generic reference to a member of a professional military organization. Although a “soldier” is generally understood to refer to a member of the Army, as used throughout this article it is intended to include members of all branches of the military (marine, sailor, airman, coast guardsman). One thing all these service-members have in common is that as members of the profession of arms they are all warriors.

119. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 15–18 (2d ed. 2000) (collecting various viewpoints regarding limitations on permissible war conduct and concluding that “the principles of humanitarian law are to apply in any conflict”) [hereinafter “GREEN, LAW OF ARMED CONFLICT”]; see also YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 16–19 (2004) (“[T]he right of belligerents to choose methods or means of warfare is not unlimited.”) (internal quotations deleted); see also JUDGE ADVOCATE GEN. LEGAL CTR. AND SCH., *LAW OF WAR WORKSHOP DESKBOOK*, C-6 (2006), available at <https://www.jagcnet.army.mil/JAGCNETPortals/Internet/DocLibs/tjaglcscdoelib.nsf> (follow “Law of War Workshop Deskbook” hyperlink) (discussing “the essential framework of authority for use of force” and “proportionality” as a limitation on the use of military force) [hereinafter *LAW OF WAR DESKBOOK*].

120. The term “laws of war” or “law of war” will be used throughout this article to refer to the law governing the conduct of belligerents engaged in armed conflict. This term, while less in favor than humanitarian law, is the term used in official Department of Defense doctrine. See U.S. Dep’t of Defense, Dir. 2311.01E, DoD Law of War Program, § 3 (May 9, 2006), available at [http://www.fas.org/irp/doddir/dod/d2311\\_01e.pdf](http://www.fas.org/irp/doddir/dod/d2311_01e.pdf). Adam Roberts has explained the advantage of this characterization in lieu of the more popular “humanitarian” law label:

In this Article, I have used the term “laws of war” referring to those streams of international law, especially the various Hague and Geneva Conventions, intended to apply in armed conflicts. To some, the term “laws of war” is old-fashioned. However, its continued use has merits. It accurately reflects the well-established Latin phrase for the subject of this inquiry, *jus in bello*, and it is brief and easily understood. It has two modern equivalents, both of which are longer. One of these, the “law applicable in armed conflicts” is unexceptionable, but adds little. The other, “international humanitarian law” (IHL), often with the suffix “applicable in armed conflicts”, [sic] has become the accepted term in most diplomatic and U.N. frameworks. *However, it has the defect that it seems to suggest that humanitarianism rather than professional standards is the main foundation on which the law is built, and thus invites a degree of criticism from academics, warriors and others who subscribe to a realist view of international relations.*

Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6

very inception of organized warfare.<sup>121</sup> Significantly, although the rules of war have evolved to a juridical status, they reflect the reasoned judgment of the warrior class itself.<sup>122</sup> The limitations imposed on warriors are based on the recognition by military leaders that war without limits is antithetical to the concept of disciplined military operations.<sup>123</sup>

More importantly, these leaders understood that at a strategic level, the ends invariably define the means, and therefore unleashing the destructive force of war with no limits undermines the strategic impetus for war itself: the restoration of peace.<sup>124</sup> As history has proven time and again, such an unrestrained application of combat power is at least as likely to increase the determination of enemy forces as it is to lead to a general capitulation.<sup>125</sup> It is also likely to stiffen the resolve of the civilian population to continue to support the war effort.<sup>126</sup>

Over time, the pragmatic constraints imposed on warriors by their leaders evolved into international custom and later into international conventions.<sup>127</sup>

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DUKE J. COMP. & INT'L. L. 11, 3 (1995) (emphasis added).

121. See LESLIE C. GREEN, LAW OF ARMED CONFLICT, *supra* note 119, at 1–3 (tracing the development of organized warfare via early modern writers on the law of armed conflict); see also LAW OF WAR DESKBOOK, *supra* note 119, at A-1 (“The law of war has evolved to its present content over millennia based on the actions and beliefs of states.”)

122. See Scott R. Morris, *The Law of War: Rules for Warriors by Warriors*, 1997 ARMY LAW. 4.

123. See GREEN, LAW OF ARMED CONFLICT, *supra* note 119, at 20 (“[I]t has been recognised since earliest times that some restraints should be observed during armed conflict.”).

124. See U.S. Dep’t of Army, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 9 (1956), available at <http://www.enlisted.info/field-manuals/fm-27-10-the-law-of-land-warfare.shtml> (“The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by: [p]rotecting both combatants and noncombatants from unnecessary suffering; [s]afeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and [f]acilitating the restoration of peace.”) (outline formatting omitted) [hereinafter “LAW OF LAND WARFARE FIELD MANUAL”].

125. Perhaps the most notorious example from U.S. history of this effect is the denial of quarter by Mexican General Santa Anna when his forces overwhelmed the defenders of the Alamo. The resulting rallying cry remains a prominent aspect of U.S. history to this day. STEPHEN L. HARDIN, THE ALAMO 1836: SANTA ANNA’S TEXAS CAMPAIGN 49-52 (Praeger 2004) (2001). Another example is the determined defense mounted in 1944 by British and Indian forces resisting a major Japanese offensive at the battle of Kohima in India. Kohima is regarded by many historians as decisive in the defeat of the Japanese Imperial Army in Southeast Asia. The determination of the defending forces to resist the invasion was in large measure the product of widespread knowledge of the brutal way the Japanese treated prisoners of war. DAVID LEE, UP CLOSE AND PERSONAL: THE REALITY OF CLOSE-QUARTER FIGHTING IN WORLD WAR II 198-202 (2006).

126. For example, it is generally accepted that German wartime production actually increased during the most intense phases of the Allied strategic bombing campaign, an effect often attributed to an increase in determination among the civilian population suffering from the widespread effects of this bombing campaign. STEWART HALSEY ROSS, STRATEGIC BOMBING BY THE UNITED STATES IN WORLD WAR II: THE MYTHS AND THE FACTS 198-203 (2003).

127. See, e.g., GREEN, LAW OF ARMED CONFLICT, *supra* note 119, at 33 (discussing the Hague Law and its precursors); see also DINSTEIN, *supra* note 119, at 5–12 (identifying several

While the scope of regulation has become ever more comprehensive, the underlying rationale has remained constant: to ensure that the means used to accomplish wartime objectives do not become so excessive that they nullify the benefit of battlefield success.

These limitations are imposed on warriors because it is at the proverbial “tip of the spear,” where the temptation to allow the ends to justify the means becomes most pervasive. It is at this point where the individual faces the greatest risk that the line between a legitimate purpose for use of power and an illegitimate use of such power to fulfill a personal agenda will be blurred. The common manifestation of this blurring occurs when the individual warrior decides that prevailing against an opponent at his or her micro level is such an imperative that it trumps the institutional constraints imposed on the use of power. For the soldier, this might result in the torture of a prisoner or detainee in order to get information necessary to extricate himself or his forces from immediate danger; for the prosecutor, this might result in the suppression of discoverable evidence in order to prevent an opponent from effectively impeaching a key government witness. These pressures are natural and inevitable in an adversarial contest regulated by absolute limitations on warrior conduct.

An even more dangerous manifestation of this blurring of objectives is when power is used to gratify the illegitimate desire for revenge or retribution. For the soldier, the intensity of mortal combat and the reality that captured (and thus protected) opponents will often be viewed as individually or collectively responsible for the suffering of comrades creates a real risk of norm violation. For the prosecutor, the intensity of the battle might not be as profound, but it would be disingenuous to suggest that prosecutors are immune from the temptation to use their power to gratify personal agendas related to animosity towards an opponent. In this regard, rules of warrior conduct serve the critical function of preventing the individual warrior from distorting the legitimate purpose for waging war, as well as protecting the soldier from the morally corrosive effects resulting from an abuse of power.<sup>128</sup>

The warrior, like the prosecutor, is simply the agent of a client. The

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sources for the development of the law of international armed conflict).

128. As emphasized by Telford Taylor, the Chief U.S. Nuremberg prosecutor:

[An] even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge. Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers.

TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 40–41 (Bantam Books 1971) (1970).

warrior fights for the state; the prosecutor seeks justice on behalf of society. It is therefore essential that the conduct of the warrior serve the interests of that client. Because of the nature of the adversarial contest, history has proven that rules of warrior conduct are essential to prevent the soldier from substituting the desire for personal revenge for the legitimate purpose of participating in warfare; achieving a state objective.

It is axiomatic that the prosecutor, like the warrior, must operate within a normative framework. For the prosecutor, the framework is derived from the equally axiomatic premise that the prosecutor's ultimate responsibility is to do justice, and not simply convict defendants. As former Attorney General (and future Associate Justice of the Supreme Court) Robert Jackson emphasized at a conference for U.S. Attorneys, "[a]lthough the government technically loses its case, it has really won if justice has been done."<sup>129</sup>

Like the soldier, the prosecutor's regulatory framework has evolved from the reasoned judgments of members of the regulated profession.<sup>130</sup> Furthermore, like the laws of war, this framework reflects the belief by the profession that the benefit of imposing restrictions on the conduct of prosecutors outweighs the cost of such restraint.<sup>131</sup> Thus, both professions operate pursuant to a largely self-imposed professional code of conduct, and although these codes bear differing characteristics, the essence of each is remarkably similar.

The similarity does not, however, end with the recognition of the value of operational constraint, but extends to the challenge these respective codes seek to address. Warriors and prosecutors alike confront an inherent friction produced by the inevitable reality that any regulatory framework will, at certain points of application, be either overbroad or under-inclusive. Codes of conduct often reflect conclusive presumptions that can never be totally consistent with operational reality. This over-breadth and under-inclusiveness is a price that operatives in both professions pay for regulatory certainty. The consequence is that individual operatives inevitably will confront clashes between their innate sense of what is the "right thing to do" at their immediate consequence level and what their operative code requires in order to ensure decisions at that level do not compromise broader strategic objectives.

This dynamic is illustrated by two comparable ethical dilemmas. Imagine a soldier captures an enemy soldier. Once that enemy is subdued, the law of war imposes a bright-line rule of humane treatment and prohibits abusing the

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129. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940).

130. MODEL RULES OF PROF'L CONDUCT pmbl. para. 12 (2003) ("The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct . . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.").

131. *Id.*

captive.<sup>132</sup> Not even the principle of military necessity may be invoked to trump this constraint.<sup>133</sup> The conclusive presumption that it is never necessary to harm a captured enemy is in most cases consistent with operational logic, and built on the historically validated premise that the limited short-term gain derived from abusing such individuals will eventually be offset by long-term strategic loss. However, it is conceivable that in an extreme situation the capturing soldier might believe that the presumption that the prisoner should be treated humanely has been pragmatically rebutted. For example, imagine that friendly forces are caught in a minefield, suffering substantial casualties, and that the prisoner knows the location of the mines. From the perspective of the capturing soldier, it would seem logical and justified to do whatever is necessary to obtain this information from the prisoner. However, the law does not permit abuse of the prisoner, even if respect for the absolute prohibition against cruel treatment results in further sacrifice of friendly forces. Thus, the soldier is required to make micro-level sacrifices to advance the macro-level interests of the state and the armed forces that act on its behalf.

Prosecutors routinely confront analogous ethical challenges. Imagine a prosecutor trying a child sexual assault case. The key evidence in the trial is forensic testing reports establishing that DNA from semen recovered in a rape trauma examination matches that of the defendant. Imagine that the prosecutor becomes aware of some irregularities in the testing protocol that are not reflected in the forensic reports. It is clear that both constitutional and ethical rules require the prosecutor to disclose this potentially exculpatory evidence to the defense.<sup>134</sup> But what if the prosecutor is convinced the defendant is in fact guilty (perhaps a confession by the defendant was suppressed because of a *Miranda* violation), and also convinced that disclosure of this evidence will create a high probability of acquittal? The prosecutor will be confronted with a direct conflict between his perception of what justice for the victim demands (conviction and punishment of a confessed sexual predator) and what her professional code demands. Like the soldier, the prosecutor is expected to sacrifice success at the micro-level of the trial in order to preserve the macro-

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132. Geneva Convention Relative to the Treatment of Prisoners of War art. 13, August 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135.

133. Military necessity allows only those actions not otherwise prohibited by the law of war. LAW OF LAND WARFARE FIELD MANUAL, *supra* note 124, at 9 (“The law of war places limits on the exercise of a belligerent’s power . . . and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry. The prohibitory effect of the law of war is not minimized by “military necessity” which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.”).

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

level credibility of the justice system.

Another interesting analogy between the soldier and the prosecutor further illustrates the difficulty of maneuvering through this ethically challenging landscape. In both professions, it is common that the constraints imposed by the professional code will not be reciprocally respected by the opponent in the struggle. For the soldier, lack of reciprocity is endemic to the increasingly common reality of asymmetrical warfare, in which opponents seek to exploit the U.S. military's compliance with rules of conduct to achieve a tactical advantage and offset American operational dominance.<sup>135</sup> A classic example is al Qaeda's treatment of captured U.S. personnel. While U.S. soldiers must treat al Qaeda operatives humanely if captured,<sup>136</sup> it is a virtual certainty that no reciprocal treatment will be afforded to U.S. personnel captured by al Qaeda. Instead, they can expect the exact opposite and will likely be summarily executed.<sup>137</sup>

For the prosecutor, the lack of reciprocity is not simply de facto, but is actually a de jure component of the regulatory framework. Because the prosecutor represents society as a minister of justice, her ultimate ethical obligation is to do justice, which includes the obligation to ensure the interests of the defendant are protected in the criminal adjudication process.<sup>138</sup> In contrast, the defense counsel bears no responsibility to see that justice—at least in the sense of an accurate adjudication of guilt or innocence—is done. Instead, the defense attorney is obligated to zealously represent the interest of the defendant.<sup>139</sup> This obligation places the interest of achieving the most beneficial outcome for the defendant above any interest in exposing the truth. Thus, the prosecutor operates pursuant to unilateral obligations with no

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135. In the context of warfare, "asymmetry is acting, organizing, and thinking differently than opponents in order to maximize one's own advantages, exploit an opponent's weaknesses, attain the initiative, or gain greater freedom of action." STEVEN METZ & DOUGLAS V. JOHNSON II, ASYMMETRY AND U.S. MILITARY STRATEGY: DEFINITION, BACKGROUND, AND STRATEGIC CONCEPTS 5 (2001), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB223.pdf>.

136. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (requiring that detainees "be tried by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples") (internal quotations omitted); see also Memorandum from Gordon England, Deputy Sec'y of Def., on Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense, (July 7, 2006) available at <http://www.fas.org/sgp/othergov/dod/geneva070606.pdf> (ordering review of DoD practices and regulations to ensure compliance with international legal obligations).

137. See, e.g., Bruce Riedel, *Al Qaeda Strikes Back*, FOREIGN AFF., May-June 2007, at 24 (discussing al Qaeda's strategy and brutal tactics).

138. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2003) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

139. See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause.").

expectation of reciprocal concession by an opponent.<sup>140</sup>

The combination of the intense pressure to achieve results, a code of conduct built upon presumptions that can never be completely consistent with “operational” reality, and the lack of “enemy” reciprocity, often challenges even the most ethically grounded “combatants.” This leads to another commonality between the prosecutor and the soldier: the profound impact of role models on the ethical development of inexperienced professionals. Trial, like war, is an endeavor that can never truly be replicated in training. Thus, whether it is a soldier on an exercise or a law student in a trial advocacy course, it is virtually impossible to replicate the ethical pressures associated with actual war or trial. As a result, the influence of more experienced members of their “units” cannot be understated. The new soldier and prosecutor alike look to veterans of the process to gauge how to navigate the daily challenges they confront.

All of these similarities lead to a crucial conclusion: genuine commitment to the code of prosecutorial ethics is in large measure contingent on the culture in which inexperienced prosecutors form their individual ethical foundations. This, in turn, highlights the significance of effective leadership. Leaders possess an unrivaled capacity to define operational culture, and to ensure that new members of the unit are inculcated with an understanding of the black letter rules of professional conduct, and, more importantly, an appreciation of the logic upon which these rules rest. Only such understanding can offset the temptation to engage in gamesmanship, interpretive avoidance, or even willful non-compliance. In short, the prosecutor, like the soldier, will only truly embrace her code of conduct when she understands that compliance serves her self-interest because the rules advance the ultimate prosecutorial objective: justice.<sup>141</sup>

Education is the first step in this process. Both the military and legal professions require instruction in their respective codes of conduct. However, it is unrealistic to expect the newly minted lawyer or soldier to appreciate the importance of ethical rules without genuine understanding of both the context in which they apply and the interests that they advance. Teaching the rules as abstract guidelines creates a risk that they will be understood primarily as a source of sanction, which leads to a mentality that any behavior that does not violate the outer limit of permissible conduct defined by these rules is appropriate. This problematic mentality rests upon a distorted understanding of

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140. There are minor exceptions to this framework. *See, e.g.,* *Williams v. Florida*, 399 U.S. 78 (1970) (upholding statute requiring defendant to provide notice of alibi he intends to offer at trial). Such exceptions gather attention for the very reason that they are such a departure from the basic framework imposing unilateral obligations on prosecutors.

141. *See* MODEL RULES OF PROF'L CONDUCT pmb1. para. 16 (2003) (noting that the Model Rules do not “exhaust the moral and ethical considerations that should inform a lawyer” but instead “simply provide a framework for the ethical practice of law.”).

the purpose of operational codes of conduct. For the legal profession, ethical rules are intended to encourage ethical behavior at all times, and not merely to establish a disincentive for transgressing the outer limits of acceptable conduct. Thus, this professional code is intended to influence an internalized commitment to professional and ethical *conduct*, and not merely define the consequence of rule violation. Unless this is embraced, it is possible that any set of rules will subtly invite a pattern of conduct that deliberately pushes upon the boundaries defined by the rules. Accordingly, the efficacy of these rules is contingent on developing a genuine appreciation that the rules provide a macro benefit to the lawyer, the client, and the profession.<sup>142</sup>

Developing a culture that embraces both the short and long-term value of ethical conduct is the true *sine qua non* of cultivating genuine commitment to the obligations imposed by the rules.<sup>143</sup> This effect cannot be achieved by an emphasis on sanctions for non-compliance. Instead, non-compliance and the accordant sanction must be regarded as an aberration. As the preamble to the American Bar Association (“ABA”) Model Rules of Professional Conduct recognizes, sanction should not be the primary mechanism for achieving compliance:

Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.<sup>144</sup>

The analogy between the laws of war and the lawyer’s ethical code is also illustrated here, for the same logic provides the foundation for ensuring compliance in both contexts. The ultimate challenge for leaders is to cultivate commitment, not only to the black letter rules, but to the principles they

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142. This is reflected in the Preamble to the ABA Model Rules:

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service . . .

Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

MODEL RULES OF PROF’L CONDUCT pmbl. para. 7, para. 9 (2003).

143. See Bibas, *Prosecutorial Regulations*, *supra* note 3, at 1000 (“Young attorneys, impressionable and eager to emulate their superiors, take their cues from this rhetorical leadership. In short, rhetoric from the top matters.”)

144. MODEL RULES OF PROF’L CONDUCT pmbl. para. 16 (2003).

manifest. It is also here where the experience of the battlefield provides insight into how to best achieve this goal: impose liability on the leader for subordinate violations of the rules resulting from the failure to develop a culture of compliance. On the battlefield, this is accomplished through the doctrine of command responsibility.<sup>145</sup>

#### IV. THE DOCTRINE OF COMMAND RESPONSIBILITY AND THE LINK TO SUBORDINATE COMPLIANCE

As we explain below, the military doctrine of command responsibility makes supervising commanders responsible for subordinate misconduct that they knew or should have known would occur. In this part, we detail the development of the command responsibility doctrine and its ability to incentivize supervisors to properly train subordinates. Before advocating an expansive doctrine of imputed liability though, it is necessary to briefly take a step back and explain how current ethics rules provide for much more limited supervisory liability for prosecutors.

##### A. *The Model Rules Provide for Very Limited Supervisory Liability*

Model Rule of Professional Conduct 5.1 establishes a limited degree of supervisory responsibility for the conduct of subordinate lawyers:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.<sup>146</sup>

This rule is intended to oblige supervisory lawyers to address ethical violations that come to their attention. Accordingly, it creates a sanction-based disincentive to ignore a subordinate's rule violations by subjecting the supervisor to liability if he becomes aware of the violation and fails to intervene. But there is really nothing radical about this rule. Rule 5.1(c)(1) is nothing more than a version of accomplice responsibility—where ordering or ratifying misconduct makes the supervisor directly responsible for the

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145. See GREEN, *LAW OF ARMED CONFLICT*, *supra* note 119, at 303–07 (defining command responsibility and discussing potential legal defenses); see also DINSTEIN, *supra* note 119, at 238–54; *LAW OF WAR DESKBOOK*, *supra* note 119, at J-18 (“Commanders may be held liable for the criminal acts of their subordinates even if the commander did not personally participate in the underlying offenses if certain criteria are met.”).

146. MODEL RULES OF PROF'L CONDUCT R. 5.1 (2003).

violation. Nor does 5.1(c)(2) extend supervisor responsibility beyond traditional accomplice principles, for it imposes liability based on a failure to remedy a subordinate's ethical misconduct once the supervisor is placed on notice of her behavior on the assumption that omission at this point indicates complicity.<sup>147</sup> This rule is almost entirely reactive. Nothing in 5.1(c) addresses the ethical culture in which the subordinate operates. This, however, is the key to ensuring a proactive approach to compliance, a recognition that is today the cornerstone of the compliance mechanisms of the law of war.

*B. The Development of the Doctrine of Command Responsibility*

In October 1944, the United States launched a campaign to retake the Philippine Islands from the Japanese forces that had occupied that country since 1941. The commander of the Imperial Japanese Forces in the Philippines was General Tomoyuki Yamashita. Fortunately for the U.S. forces, by this point in the war, the outcome of the campaign was not in doubt. Nonetheless, Yamashita fought a delaying action that allowed him to hold out with a fifth of his original forces until the final capitulation of Japan.<sup>148</sup>

Soon after his surrender, Yamashita was charged with violations of the international laws of war and tried before a military commission.<sup>149</sup> The allegation was that Yamashita was responsible for the death of more than 25,000 Philippine civilians.<sup>150</sup> Most of these casualties had occurred during the battle for Manila. Ironically, Manila had been fortified contrary to Yamashita's orders.<sup>151</sup> Nonetheless, the battle for Manila involved brutal urban warfare, and as the situation of Japanese troops became untenable, many of them resorted to unjustified brutality directed against the civilian population.<sup>152</sup>

Yamashita was convicted quickly and sentenced to hang. The military lawyers representing him challenged the legitimacy of the process and the charges through a writ of habeas corpus. In 1946, the United States Supreme Court issued its opinion in *In re Yamashita*,<sup>153</sup> a decision that became the foundation for what is the modern doctrine of command responsibility.<sup>154</sup> The

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147. See WAYNE R. LAFAVE, CRIMINAL LAW § 13.2(d) (4th ed. 2003) (discussing willful blindness as a basis for accomplice liability).

148. A. FRANK REEL, THE CASE OF GENERAL YAMASHITA 23-24 (1949).

149. *Id.*, at 12.

150. *In re Yamashita*, 327 U.S. 1, 14 (1946).

151. *Id.* at 33 (Murphy, J. dissenting).

152. *Id.* (Murphy, J. dissenting).

153. *Id.* at 1.

154. See DINSTEIN, *supra* note 119, at 239 (describing the Yamashita decision as "seminal"); LAW OF WAR DESKBOOK, *supra* note 119, at J-19; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 86, June 8, 1977, 1125 U.N.T.S. 3 ("The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was

central challenge raised by the defense was that there was no basis to hold General Yamashita responsible for the misconduct of his subordinates that he did not order, or even know, was taking place.<sup>155</sup> Such a theory of vicarious liability was, according to the defense, an unprecedented extension of criminal responsibility. This was no mere allegation of dereliction of a commander's duty. Instead, Yamashita had been charged and convicted for the murders committed by subordinates he could not know were occurring.<sup>156</sup> As the Court noted:

The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, *and whether he may be charged with personal responsibility for his failure to take such measures when violations result.* That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.<sup>157</sup>

The Supreme Court rejected Yamashita's challenge. It held that a military commander bears a unique obligation to ensure that subordinates comply with the laws and customs of war.<sup>158</sup> Satisfying this obligation required more than merely avoiding direct complicity in violations; it required an affirmative effort

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going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.") [hereinafter "Additional Protocol I"]; Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90 ("A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, . . . as a result of his or her failure to exercise control properly over such forces, where: [t]hat military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and [t]hat military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."); Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT'L L. & POL. 797, 816-39 (2002); Major James D. Levine II, *The Doctrine of Command Responsibility and Its Application to Superior Civilian Leadership: Does the International Criminal Court Have the Correct Standard?*, 193 MIL. L. REV. 52 (2007).

155. *Yamashita*, 327 U.S. at 28 (Murphy, J. dissenting) ("[Yamashita] was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.").

156. *Id.* (Murphy, J. dissenting).

157. *Id.* at 14-15 (emphasis added).

158. *Id.* at 25 ("It thus appears that the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with violation of the law of war, and that the commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command.").

to ensure that subordinate conduct comported with these obligations. If evidence established that a commander failed to discharge his duty to prevent subordinate violations, thereby allowing a culture of noncompliance to evolve, the commander could be held liable for subordinate misconduct.<sup>159</sup>

In his dissenting opinion, Justice Murphy emphasized the essence of the charge against Yamashita:

[R]ead against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: . . . . Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread, we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops.<sup>160</sup>

This indeed was the theory of criminal responsibility imposed upon Yamashita. The “should have known” theory of command responsibility for the misconduct of subordinates took root in the international community, and it is today a foundational pillar of the law of war.<sup>161</sup>

To be clear, ignorance alone is not sufficient to impute liability to a commander under this doctrine. Instead, liability is based on the failure of the commander to take remedial measures when the commander is aware of a risk that misconduct will occur.<sup>162</sup> Pursuant to this doctrine, evidence that a

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159. *Id.* at 17 (“It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.”).

160. *Id.* at 34–35 (Murphy, J. dissenting).

161. See Leslie. C. Green, *Command Responsibility in International Humanitarian Law*, 5 *TRANSNAT’L L. & CONTEMP. PROBS.* 319, 371 (1995); see also INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1011-16 (Yves Sandoz et al. eds., 1987) [hereinafter “COMMENTARY ON THE ADDITIONAL PROTOCOLS”].

162. See GREEN, *LAW OF ARMED CONFLICT*, *supra* note 119, at 303 (“A commander . . . is also liable if, knowing or having information from which he should have concluded that a subordinate was going to commit such a crime, he failed to prevent it [] and if, being aware of such commission, fails to initiate disciplinary or penal action.”); see also DINSTEIN, *supra* note 119, at 238 (suggesting that a commander may be responsible for an “act of omission”); INT’L COMM. OF THE RED CROSS, *supra* note 161, at 1010 (“Yet, responsibility for a breach consisting of a failure to act can only be established if the person failed to act when he had a duty to do so. The text of this paragraph should certainly be understood in this way since it prescribes Contracting Parties or Parties to the conflict to deal with any ‘failure to act when under a duty to do so[.]’ This concept includes lack of due diligence having regard to the circumstances and amounting to a violation of the requirements indicated above.”); Victor Hansen, *What’s Good for the Goose Is Good for the Gander: Lessons From Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility for Its Own*, 42 *GONZ. L. REV.* 335, 348 (2006-07) (“[T]he commander’s liability is derived from his relationship to his subordinates and the link between his act or omission and the crimes committed by his subordinates. If a derivative relationship can be

commander ignored indicators that a reasonable counterpart would have understood were red flags, indicating that subordinate non-compliance was likely, would be sufficient to impute liability for that misconduct back to the commander.<sup>163</sup> Accordingly, commanders have a powerful incentive to ensure that subordinates are well trained and committed to compliance with the law. The commander is also compelled to ensure that indications of a breakdown in the culture of compliance produce a prompt and effective command response.<sup>164</sup>

The doctrine of command responsibility is therefore premised on the assumed existence of a causal link between a commander's failure to discharge her duty to ensure subordinates comply with the law and subsequent violations by the same or other subordinates.<sup>165</sup> However, what is most significant about the doctrine is that it transforms liability for dereliction of duty into liability for actual subordinate misconduct.<sup>166</sup> In the context of criminal responsibility, this is a profound transformation, for it elevates a relatively minor offense (dereliction)<sup>167</sup> to potentially carry even capital liability. This imputed liability for subordinate misconduct is the most important legal compliance mechanism on the battlefield, for it creates a direct incentive for commanders to effectively execute their oversight responsibility.<sup>168</sup>

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established, the criminal liability of the subordinate can be imputed onto the commander.”).

163. GREEN, *LAW OF ARMED CONFLICT*, *supra* note 119, at 303; DINSTEIN, *supra* note 119, at 240 (noting that evidence of subordinate non-compliance from subordinate reports, and even from reputable media outlets, could be sufficient to impute knowledge and thus liability to a commander for failure to take corrective action).

164. *See, e.g.*, *LAW OF WAR DESKBOOK*, *supra* note 119, at J-22 (“The commander is responsible if he ordered the commission of the crime, has actual knowledge, or *should have knowledge*, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the *necessary and reasonable* steps to insure compliance with the law of war or to punish violators thereof.”).

165. *See, e.g.*, *COMMENTARY ON THE ADDITIONAL PROTOCOLS*, *supra* note 161, at 1011-16; *see also* Hansen, *supra* note 162, at 348 (discussing the requirement of a causal link between the commander's “act or omission and the crimes committed by his subordinates” under the doctrine of command responsibility).

166. Hansen, *supra* note 162, at 373 (“A commander is not simply guilty of dereliction of duty or some lesser offense, he is guilty of the actual war crimes and can be punished accordingly.”).

167. 10 U.S.C. § 892 (2006). This provision of the Uniform Code of Military Justice prohibits both willful and negligent dereliction of duty. The maximum punishment for a willful dereliction is six months confinement; the maximum punishment for a negligent dereliction is three months confinement. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* ¶ 16.e.(3) (2008) (establishing the maximum confinement authorized for a conviction of willful or negligent dereliction of duty).

168. *See* GREEN, *LAW OF ARMED CONFLICT*, *supra* note 119, at 303-04; *see also* Hansen, *supra* note 162, at 371 (highlighting the incentive under command responsibility for commanders “to establish systems that will ensure law of war compliance and then provide command oversight of those systems”).

*C. Why Imputed Responsibility Ensures Subordinate Compliance*

The doctrine of command responsibility plays an increasingly important role in enhancing compliance with the Law of Armed Conflict (“LOAC”) by armed forces. This is not primarily because of routine prosecutions based on the doctrine. Instead, it is because the doctrine provides an incentive for leaders to inculcate warriors with a commitment to the law, and to establish what is referred to within the U.S. armed forces as a “positive command climate.”<sup>169</sup> While it is impossible to quantify the strength of the causal connection between this doctrine and the increased emphasis on LOAC education, training, and compliance, it is hard to dispute the significance of such a connection. In the U.S. military, all leaders are taught that they may ultimately be held accountable for the dereliction of their subordinates. Perhaps more importantly, they are also taught that their professional and personal credibility will, in large measure, turn on the professionalism of the forces they lead. Accordingly, discharging this “command responsibility” is the ultimate bellwether of competence.

The ethical rules applicable to supervisory prosecutors lack any analogue to the military’s doctrine of imputed liability.<sup>170</sup> The current ethical rules limit responsibility of supervisors for subordinate ethical misconduct to only those violations that the supervisor either ordered or was aware of and failed to prevent.<sup>171</sup> This limited scope of liability is insufficient to create the same type of direct incentive for ensuring a culture of ethical compliance that is created by the “should have known” prong of the command responsibility doctrine. The experience of the battlefield superior-subordinate relationship bears this out. It is precisely because the role of the front-line prosecutor is so analogous to that of the front-line warrior that proper “operational culture” is the most effective mechanism for ensuring these warriors do not submit to the “ends justify the means” temptation.

#### V. APPLYING THE DOCTRINE OF COMMAND RESPONSIBILITY TO PROSECUTOR’S OFFICES

As we outlined above, the doctrine of command responsibility should be applied to civilian prosecutors holding supervisory positions. Accordingly, we call for the organs responsible for establishing ethical standards for the regulation of attorney conduct within their respective states to adopt a command responsibility-based standard of liability for supervisory prosecutors. While the exact language of such a rule is debatable,<sup>172</sup> we believe the more

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169. See generally DEP’T OF THE ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP COMPETENT, CONFIDENT, AND AGILE (2006) available at <http://www.fas.org/irp/doddir/army/fm-6-22.pdf>.

170. See MODEL RULES OF PROF’L CONDUCT R. 3.8 (2003).

171. MODEL RULES OF PROF’L CONDUCT R 5.1(c) (2003).

172. We are in agreement with Professors Zacharias and Green that “when code drafters

fruitful endeavor is to endorse the overriding principle and then offer an explanation of how it could be applied on a day-to-day basis to district attorneys' offices. In Section A, we discuss who can be held responsible and under what circumstances. In Section B, we describe the ways in which supervisory prosecutors would need to change their office's operational environment in order to avoid imputed liability, and why these changes would significantly reduce instances of prosecutorial misconduct. Finally, in Section C, we lay out some anticipated criticisms of our proposal and offer preliminary responses.

#### *A. Imputing Liability: The Who and When*

At the outset, we concede that applying the doctrine of command responsibility on a day-to-day basis in actual district attorneys' offices is not a simple task. After all, every district attorney's office is organized differently—they run the gamut from tiny offices with a handful of employees to enormous operations with hundreds of lawyers. We believe the best approach is to impose responsibility that closely tracks each office's existing organizational chart. In the vast majority of cases, we would impose imputed responsibility only on the immediate supervisors of misbehaving prosecutors. In a smaller number of extremely serious or high profile cases—the very cases that the elected district attorney or high level supervising prosecutors in large offices should be aware of—we advocate imputed responsibility for both immediate superiors as well as the upper echelons of the office. As we explain below, we believe such an approach will create a number of positive incentives to minimize misconduct.

By way of example, let us explain how the doctrine of command responsibility would apply in a large<sup>173</sup> and well-organized district attorney's office.<sup>174</sup> A large district attorney's office often has hundreds of prosecutors,

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reduce broad principles of fairness and reasonableness to specific actions prosecutors must undertake or avoid, prosecutors are likely to develop rule-centered mindsets . . . with prosecutors interpreting the rules literally and viewing the codes as requiring nothing more than the specified behavior." Zacharias & Green, *Duty to Avoid Wrongful Convictions*, *supra* note 103, at 25; see also Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Pragmatism of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 262 (1993) ("A highly specific professional requirement . . . risks stultifying lawyers' independent evaluation of appropriate responses . . .").

173. The vast majority of district attorneys' offices nationwide are located in smaller cities. See Steven W. Perry, *Prosecutors In State Courts, 2005*, BUREAU OF JUSTICE STATISTICS BULLETIN, July 2006, at 1, 10, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf> (noting that 1,744 of the 2,344 state prosecutor's offices are in jurisdictions with under 100,000 people). We see no difference in how the doctrine of command responsibility should apply to such offices. If there is only one supervising attorney, she should be responsible for creating a culture of ethical compliance for all subordinate prosecutors. When those line prosecutors commit misconduct, the sole supervisor should also be held liable if she knew or should have known that misconduct would occur.

174. We have based our description loosely on the structure of large district attorney's offices

the bulk of whom are assigned to dozens of felony, misdemeanor, and specialty courts. In a typical felony court, multiple junior prosecutors handle the bulk of the court's cases and are supervised by a chief prosecutor who, *inter alia*, monitors their plea bargain offers, sits in on trials, and answers questions. In turn, the chief prosecutor of an individual court reports to a division chief, for instance the chief of the felony division or the misdemeanor division. The division chief, who is overseeing numerous courts, could not possibly be aware of the specifics of most of the cases within her division but should be familiar with high-profile cases and the most serious cases where trial is imminent or ongoing.<sup>175</sup> The division chief may, in turn, report to another unelected prosecutor, often the head of the trial bureau or possibly the first assistant district attorney. Such high ranking officials would have little day-to-day knowledge of the thousands of cases winding their way through the office, but they should have a good sense of whether their immediate subordinates—the division chiefs—are providing proper guidance. Finally, the elected District Attorney sits at the top of the organizational chart and is immediately responsible for supervising not just the trial lawyers, but also other departments such as the appellate or consumer fraud divisions.

With a clear organizational structure in place, it is relatively easy to apply the doctrine of command responsibility. In a typical case—a robbery prosecution, for instance—the chief prosecutor supervising a particular felony court should be responsible for the actions of her subordinate. If the junior prosecutor fails to turn over exculpatory evidence to the defense, or strikes a series of prospective jurors based on race, we would ask whether the supervising prosecutor of the court knew or should have known about the misconduct. If the answer is yes, that supervising prosecutor should be held responsible under the state's ethics rules, even though she did not personally commit the misconduct.

Ordinarily, the discipline of the rogue prosecutor and his immediate supervisor would be the end of the matter. We would not expect the upper echelons of a large district attorney's office to be aware of such day-to-day misbehavior, and it would make little sense to hold senior prosecutors liable for unforeseeable rogue misconduct of individual actors far down the chain of command. Yet, there are at least three ways in which the upper management should also be held responsible under the command responsibility doctrine.

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in Harris County, Texas, Cook County, Illinois, and Dallas County, Texas. See Office of District Attorney, Harris County, *Contacts*, <http://app.dao.hctx.net/OurOffice/Contacts.aspx>, (last visited Nov. 16, 2009); Office of District Attorney, Harris County, *About the Cook County State's Attorney's Office*, [http://www.statesattorney.org/about\\_the\\_office.htm](http://www.statesattorney.org/about_the_office.htm) (last visited Nov. 16, 2009); Dallas County District Attorney's Office, *Leadership*, <http://www.dallasda.com/about-leadership.html> (last visited Nov. 16, 2009).

175. See Bibas, *Prosecutorial Regulations*, *supra* note 3, at 1006 (explaining that death penalty cases and other "significant but less momentous decisions may require review by the head prosecutor or a designated supervisor or committee").

First, if the case were sufficiently high profile or important enough for the division chief or elected district attorney to have some hands-on activity, she could be liable if she should have known about the misconduct. Second, and more importantly, upper management could be held responsible if they knew or should have known that junior prosecutors had not been appropriately trained to avoid the misconduct. If the elected district attorney or her high-level deputies never instituted training for employees on the requirements of the *Brady* doctrine or the impropriety of race-based peremptory strikes, then those high-level employees should have known that misconduct could occur. Put differently, the failure of senior management to provide continuing ethics and misconduct training could (and in many cases, should) leave them liable under the doctrine of command responsibility.<sup>176</sup>

Third, if the high-ranking prosecutors in the office—including the elected district attorney—created a “win at all costs” atmosphere by placing too high of a premium on conviction rates, liability for misconduct should be imputed to them as well. There are a number of ways state ethics boards could discover such a toxic atmosphere. For instance, senior prosecutors could be circulating win/loss percentages or promoting prosecutors based exclusively on trial victories. Senior prosecutors would or should know that misconduct would occur in such an environment and consequently could be held liable.

The importance of following the organizational chart cannot be underestimated. If an elected district attorney fails to institute a clear chain of command, that elected district attorney should be considered the immediate supervisor of all prosecutors in the office. If the immediate supervisor should have known of misconduct, the elected district attorney should be held responsible. The elected district attorney should not be permitted the defense that the office has too many cases for her to be responsible for direct supervisory responsibility of all of them. Nor should she be able to claim that responsibility actually belonged to someone else who was informally charged with supervising junior prosecutors, even though that position was not specified on the organizational chart. If the elected district attorney fails to create a clear chain of command, she should face the prospect of imputed liability in all cases. This bright-line rule will encourage prosecutors to create a chain of command. In turn, those who are officially placed in positions of responsibility will have a clearer incentive to supervise their charges in order to avoid supervisory liability.

It is important to note that this “chain of command” focused application of the doctrine mirrors its application in the military.<sup>177</sup> It is simply impossible to

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176. *See id.* at 1009 (explaining that senior prosecutors can combat a “notches-on-the-belt conviction mentality” by using “[t]raining exercises . . . that underscore[e] common causes of wrongful convictions and appropriate criteria for leniency”).

177. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 161, at 1013 (“This is not a purely theoretical concept covering any superior in a line of command, but we are concerned only

establish a formula for how high up the chain of command liability can be legitimately imputed. The factual predicates for such imputation mandate case-by-case assessment. All we suggest is that the same presumptions that apply to military commanders apply to supervisory prosecutors. A commander who is attenuated from actual mission execution, but who ensures subordinates are properly trained and is reasonably engaged in the events taking place in his unit, is justifiably permitted to presume that subordinates are executing their duties in accordance with the law. The expectations of an immediate commander are quite different. At that level, their situational awareness is obviously substantially increased, and therefore it is appropriate to assume that they are aware of the day-to-day activities of their subordinates, with the responsibility to cure the mistakes that this awareness entails.

However, even a second or third level commander could be liable under this doctrine when his actions or omissions create an environment that effectively rebuts the presumption that subordinates will execute their duties in accordance with the law.<sup>178</sup> For example, a general who is routinely dismissive regarding obligations owed to captured enemy soldiers or civilians, or who ignores reports of misconduct by subordinates, is compromising the presumption that his unit will conduct itself in accordance with the law. The same would hold true for the District Attorney of a large office who makes public statements that are dismissive of ethical obligations and ignores minor ethical violations committed by front-line trial attorneys. In both cases, investigation might well establish that these supervisors should have known that more serious violations were inevitable and could, therefore, be held accountable when those violations occur.

### *B. Imputing Liability: Why It Would Change Prosecutor Behavior*

The doctrine of command responsibility reveals that when the center of gravity for legal compliance is leadership, leaders must be held accountable when their failure is causally connected to subordinate misconduct. Adopting

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with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. The direct link, which must exist between the superior and the subordinate, clearly follows from the duty to act laid down in paragraph 1. Furthermore, only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach.”).

178. The International Committee of the Red Cross Commentary on the Additional Protocols identifies the three factors that justify imposition of liability on a superior for failing to act:

Under the terms of this provision three conditions must be fulfilled if a superior is to be responsible for an omission relating to an offence committed or about to be committed by a subordinate:

- a) the superior concerned must be the superior of that subordinate (“his superiors”);
- b) he knew, or had information which should have enabled him to conclude that a breach was being committed or was going to be committed;
- c) he did not take the measures within his power to prevent it.

COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 161, at 1012-13.

an analogous doctrine to impute prosecutorial misconduct to the prosecutor's supervisor will incentivize effective supervision of subordinates well beyond that produced by the current rule. It will provide a powerful incentive for establishing a culture of commitment to ethical standards, the first<sup>179</sup> step in preventing such violations.<sup>180</sup>

There is, of course, no guarantee that creating such a culture will prevent all ethical violations. However, like the battlefield commander, the supervisory prosecutor who takes steps to establish such a culture will immunize herself from imputed liability for the violations that do occur. This immunity is justified by the simple reality that by taking such measures, the supervisor mitigates the risk such violations will in fact occur.<sup>181</sup>

What procedures would be sufficient to create a culture of compliance and immunize supervisory prosecutors from liability? Again, drawing from the battlefield doctrine of command responsibility, two key components become apparent. The first is training—a concept that requires more than mere instruction. Supervisory prosecutors, like their battlefield counterparts, must ensure that all subordinates are effectively trained in the obligations that guide the execution of their responsibilities. Specially focused professional development programs for new and experienced prosecutors that emphasize the use of practical exercises to develop problem-solving judgment will enhance the ability to resolve actual ethical dilemmas.<sup>182</sup> This model of development is central to the development of proficiency in the armed forces, where it is clearly understood that classroom instruction is merely the first step in preparing to confront battlefield challenges. This instruction is necessarily complemented by situational training exercises that replicate, as realistically as possible, the anticipated challenges of the battlefield. Ethical training must follow the same methodology.<sup>183</sup>

The second component is ensuring prompt and credible disciplinary

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179. Professor Michael Cassidy suggests that one even earlier starting point for creating a culture of professionalism is to focus more on “the virtues of courage, honesty, fairness, and prudence” during the entry-level hiring process. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to “Seek Justice”*, 82 NOTRE DAME L. REV. 635, 694 (2006).

180. On the value of using internal cultures and incentives to improve prosecutorial behavior, see Bibas, *Prosecutorial Regulations*, *supra* note 3, at 1007-15 (discussing training, pay structure incentives, and different hiring and retention policies).

181. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 161, at 1021-23.

182. See THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW, *supra* note 7, at 15 (“A key reform aimed at preventing prosecutorial misconduct and abuse of power is improved training and education.”). This is also the position of the American Bar Association. See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-2.6 (3d ed. 1993) (“Continuing education programs for prosecutors should be substantially expanded and public funds should be provided to enable prosecutors to attend such programs.”).

183. See DEP'T OF THE ARMY, FIELD MANUAL 7-0, TRAINING THE FORCE 1-4 to 1-11 (2002), available at <http://www.army.mil/features/FM7/FM%207-0.PDF>.

responses to even the most minor ethical transgressions.<sup>184</sup> Nothing will increase the potential for future violations more than the perception that leadership condones or ignores violations. This perception distorts the cost/benefit expectation subordinates will apply to situations in which they are tempted to violate ethical obligations. In contrast, when leaders act promptly and effectively in response to subordinate violations, it creates general deterrence preventing others from making similar flawed decisions. This does not mean that responses must be draconian. A key obligation of leaders in all contexts is the exercise of sound judgment when dealing with subordinate mistakes. Nothing is more likely to produce violations of the rules than an expectation of tacit supervisory endorsement of an “ends justify the means” approach to mission execution.<sup>185</sup>

Adopting a command responsibility theory of imputed liability in the prosecutor’s rules of ethics would provide a tangible incentive to ensure subordinates are effectively trained in their responsibilities, and that all violations are promptly and credibly addressed. These two components of effective leadership would substantially reduce the likelihood of ethical violations by subordinates. Supervisors could also shield themselves from imputed liability for acts of subordinate misconduct by implementing these components of effective leadership. Effective training and credible responses to past acts of ethical misconduct would establish the inference that the supervisor could have expected compliance, and not violation.<sup>186</sup>

Ultimately, holding supervisory prosecutors accountable for subordinate ethical violations they knew or should have known would occur synchronizes responsibility with the power to prevent such violations. When properly applied, this doctrine holds supervisors accountable only when a causal connection is established between ineffective discharge of supervisory responsibility and acts of subordinate ethical misconduct.<sup>187</sup> What is far more significant, however, is that in so doing, imputed liability incentivizes responsible and effective prosecutorial supervision and the creation of a culture

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184. Unfortunately, quite the opposite seems to be true. See Adam Liptak, *Prosecutor Becomes Prosecuted*, N.Y. TIMES, June 24, 2007, at 4 (quoting University of Michigan Law School Professor Sam Gross as saying that “I don’t know of a single case of discipline against a prosecutor who engaged in misconduct that produced [a] wrongful conviction and death sentence, and many of the cases involve serious misconduct.”).

185. See Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 506 (2004) (discussing pervasive problem of supervisors tolerating the police misconduct and stating that “a law enforcement organization that tolerates repeated, notorious instances of the worst kinds of brutality—even by a minority of police officers—effectively signals to its employees that a certain level of violence is acceptable despite formal policies to the contrary”).

186. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 161, at 1021-23.

187. See Hansen, *supra* note 162, at 348 (discussing the necessity of a causal link between the superior’s failure to create a culture of compliance and the subordinate misconduct in order to impute liability to the superior).

of ethical compliance.

### *C. Objections to Imputed Liability*

We must acknowledge that our proposal faces at least three significant obstacles: political opposition, lack of resources, and the prospect of over-detering prosecutors and making them excessively cautious. We address each in turn.

#### *1. Political Hostility to Imputed Liability*

First, imputed liability for supervisory prosecutors would be a significant change from the current ethics rules governing prosecutors. Prosecutorial organizations, which constitute a powerful interest group, would surely oppose it.<sup>188</sup> As scholars such as Bill Stuntz<sup>189</sup> and Stephanos Bibas<sup>190</sup> have observed, legislators tend not to antagonize prosecutors because they prefer to be seen as prosecutors' allies in the fight against unpopular criminal defendants.<sup>191</sup>

Our proposal, however, does not require action by legislatures but, instead, state rules committees or, at minimum, a Model Rules Committee of the ABA. Yet, these audiences are problematic as well. As Professors John Burkoff<sup>192</sup> and Bruce Green<sup>193</sup> have recounted, even relatively modest changes to the Model Rules governing prosecutors have met with vigorous opposition from prosecutorial organizations. If, for example, modest<sup>194</sup> efforts to extend prosecutors' ethics obligations with respect to grand juries have failed in the past,<sup>195</sup> there is good reason to believe a rule of imputed liability would face even greater opposition.

Nevertheless, countervailing forces may be building that would support

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188. Stuntz, *supra* note 18, at 529 (“[F]or most of criminal law, the effect of private interest groups is small: the most important interest groups are usually other government actors, chiefly police and prosecutors.”).

189. *See id.* at 534-35.

190. *See* Bibas, *Prosecutorial Regulations*, *supra* note 3, at 968 (“[L]egislatures lack the interest and incentive to check prosecutors vigorously; they would rather be seen as prosecutors' allies in the fight on crime.”).

191. *But see* Brown, *supra* note 18, at 225 (arguing that the “ratchet of crime legislation turns both ways”).

192. *See* John M. Burkoff, *Prosecutorial Ethics: The Duty Not “To Strike Foul Blows,”* 53 U. PITT. L. REV. 271, 274-76 (1982) (recounting the “firestorm of protest” from prosecutors' groups and the Department of Justice regarding the attempted revision of the American Bar Association's Prosecution Function Standards).

193. *See* Green, *Prosecutorial Ethics as Usual*, *supra* note 76, at 1581-87 (discussing the Ethics 2000 Commission).

194. We do not mean to suggest that prosecutorial manipulation of the grand jury process is unimportant. For a discussion of the conventional criticisms of prosecutorial abuse of the grand jury process, *see* Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C.L. REV. 1, 4-6 (1999).

195. *See* Green, *Prosecutorial Ethics as Usual*, *supra* note 76, at 1581 (recounting failed effort to require prosecutors to disclose exculpatory evidence to grand juries).

significant change in the rules governing prosecutors. In recent years, there have been a number of high-profile instances of prosecutorial misconduct. At the state level, the Duke lacrosse case has attracted enormous attention<sup>196</sup> and has spurred calls for reform on a host of criminal justice issues.<sup>197</sup> At the federal level, the spectacular failure of the prosecution against Senator Ted Stevens—in which Department of Justice prosecutors repeatedly withheld exculpatory evidence<sup>198</sup>—has likewise sparked outrage, and even led the federal judge overseeing the case to take the rare step of ordering an investigation of the prosecutors for possible contempt and obstruction of justice charges.<sup>199</sup> Further investigation spurred by the Stevens case led Attorney General Holder to ask the Ninth Circuit to release two convicted Alaska lawmakers because federal prosecutors had failed to disclose exculpatory evidence in their cases as well.<sup>200</sup> These cases and others<sup>201</sup> may create a groundswell for more ethics regulation.

Notably, the victims of misconduct in all of these cases were high-profile politicians or the children of middle-class white families. While that does not make their suffering worse than that of the typical victims of prosecutorial misconduct—poor, young, black men<sup>202</sup>—it does make it more likely that reform will be forthcoming. While legislators typically have little interest in protecting the rights of criminal defendants, they are sometimes moved to impose limits on prosecutors after they have personally been put in the crosshairs of the criminal justice system.<sup>203</sup> For instance, shortly after

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196. For a thorough recounting of the case, see STUART TAYLOR, JR. & KC JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE CASE* (2007); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 *FORDHAM L. REV.* 1337 (2007).

197. See, e.g., Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 *DUKE L.J.* 131 (2007) (proposing enhanced superseder power for governors and attorneys general to remove misbehaving prosecutors).

198. Neil A. Lewis & David Johnston, *Dismayed Lawyers Lay Out Reasons for Collapse of the Stevens Conviction*, *N.Y. TIMES*, Apr. 7, 2009, at A20.

199. Nedra Pickler & Matt Apuzzo, *With Shoe on the Other Foot, Once-Disgraced Stevens Dances: Judge Dismisses Conviction, Names a Prosecutor to Probe Prosecutors*, *HOUS. CHRON.*, Apr. 8, 2009, at A8.

200. *Holder Asks That Jailed Alaska Lawmakers Be Freed*, *ASSOC. PRESS*, June 4, 2009.

201. See, e.g., Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors*, 76 *FORDHAM L. REV.* 1453, 1489 (2007) (discussing former federal prosecutor who lied to a tribunal, withheld evidence, and made thousands of dollars of improper payments to witnesses, friends of witnesses, and police officers).

202. See *The Phases and Faces of the Duke Lacrosse Controversy: A Conversation*, *supra* note 110, at 201 (2009) (quoting Professor Angela Davis as explaining that “most of the people who are victims [of prosecutorial misconduct] . . . are poor people who are disproportionately poor, black, and Latino and who don’t get relief at all”).

203. As Professor Craig Lerner has colorfully put it, “if a conservative is a liberal who’s been mugged, then a liberal would seem to be a conservative who’s been indicted.” Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 *U. ILL. L. REV.* 599, 603-04, 604 n.26 (2004) (attributing the quote to Alan Dershowitz).

Representative Joseph McDade was charged and acquitted of trading campaign contributions for government contracts, Congress passed the Citizen Protection Act (commonly known as the McDade Amendment) which subjects federal prosecutors to state ethics rules.<sup>204</sup> Proposals for regulation of federal prosecutors had been debated among academics, courts and bar associations for over a decade prior to introduction of McDade's amendment. All it took was McDade's maneuvering in Congress to have the rule enacted within two years of his acquittal.<sup>205</sup> While numerous scholars question the wisdom of the McDade Amendment,<sup>206</sup> it does demonstrate how maligned reform measures can be transformed into law when the stars align.

The Duke lacrosse case may also provoke further regulation of prosecutors because the case resonated so deeply with the public.<sup>207</sup> In dismissing the charges against the players, North Carolina Attorney General Roy Cooper went so far as to call for new legislation that would give the North Carolina Supreme Court greater authority to remove prosecutors.<sup>208</sup> The colossal failure of the case has also led to the consideration of new legislation and ethics rules in New York and California designed to reign in prosecutors' power.<sup>209</sup> This is not surprising because, as Marc Mauer has observed, "the conclusion that crime policy has shifted toward a 'get tough' strategy needs to be tempered with the recognition that when the perceived offenders are white and/or middle class, policymakers appear to be more receptive to rational policy considerations."<sup>210</sup>

In the end, while we concede that there are strong forces that would oppose a new rule of imputed liability, it is certainly within the realm of possibility.

## 2. *Can the Proposal Work Without Additional Funding for Disciplinary*

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204. 28 U.S.C. § 530B(a) (2006).

205. The backstory is well told by Professor Lerner. See Lerner, *supra* note 203, at 650-55.

206. For a few of the many criticisms, see *id.* at 655-56 (describing how it has hindered murder and terrorism investigations); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002) (rejecting McDade Amendment's preference for state ethics rules and advocating the adoption of uniform federal ethics rules); Note, *Federal Prosecutors, State Ethics, and the McDade Amendment*, 113 HARV. L. REV. 2080 (2000) (predicting that the Amendment will hinder federal law enforcement).

207. See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 257 (2008) (describing the Duke lacrosse case as a "national spectacle"). In the area of criminal law, voters are more concerned with outcomes and symbolic stands than with particular rules. Stuntz, *supra* note 18, at 530.

208. Duff Wilson & David Barstow, *Duke Prosecutor Throws Out Case Against Players*, N.Y. TIMES, Apr. 12, 2007, at A1.

209. See Patrick Jonsson, *Legacy of Duke Case: A Rein on Prosecutors?*, CHRISTIAN SCI. MONITOR, Sept. 14, 2007, at 3.

210. Marc Mauer, *Why Are Tough on Crime Policies So Popular*, 11 STAN. L. & POL'Y REV. 9, 16 (1999).

*Boards?*

Assuming a rule of imputed liability for supervising prosecutors was adopted, we must also acknowledge a second obstacle: lack of funds and staff to enforce the new rule. As we explained in Part II.C, bar disciplinary bodies are understaffed and overworked.<sup>211</sup> A new rule of ethical conduct that imposes liability on an additional class of lawyers would add to the burden on disciplinary boards. To be fully effective, our proposal would require additional funding to enforce the new rule. The under-funded state of disciplinary bodies<sup>212</sup> is evidence that legislatures will not be particularly willing to serve up more funding.<sup>213</sup>

Yet, even if legislatures fail to provide additional funding, it is possible that a doctrine of imputed liability could still be beneficial. If judges or other lawyers referred cases of imputed liability to disciplinary boards, the boards might be more willing to pay attention to criminal law matters. At present, disciplinary boards rarely turn their attention to cases involving individual prosecutors. Arguably, it would be harder for ethics boards to ignore misconduct claims that involve supervisory attorneys rather than just isolated line prosecutors.<sup>214</sup> Indeed, if a misconduct claim implicated a high-ranking supervisor in a large district attorney's office—for instance, the Cook County State's Attorney's Office, which has a history of scandal<sup>215</sup>—bar counsel might be moved to spend more time on the case knowing that the senior prosecutor supervises dozens or even hundreds of lawyers.<sup>216</sup>

Moreover, even if disciplinary boards remain unable to keep up, there still may be a benefit in having supervisors' names referred to the boards. If other actors in the criminal justice system become aware that supervising prosecutors

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211. See Meares *supra* note 84, at 901.

212. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*, 44 VAND. L. REV. 45, 106-07 (1991) (recognizing fiscal constraints that preclude bar disciplinary committees from actively policing generalized "do justice" provisions of the ethics code); Landsberg, *supra* note 117, at 1403-04 (arguing for additional funding but recognizing the political obstacles).

213. See Gershowitz, *Prosecutorial Shaming*, *supra* note 1, at 1096.

214. This argument is undercut by scholars' observation that disciplinary boards tend to focus on solo and small firm practitioners, rather than large law firms, which, like prosecutor's offices, have numerous supervising lawyers. See Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 FORDHAM L. REV. 847, 847-48 (1999) (noting that solo and small-firm lawyers receive "substantially more discipline than their big firm colleagues"); Zacharias, *Professional Discipline*, *supra* note 2, at 756 ("Historically, regulatory authorities have imposed discipline primarily on solo or small-firm practitioners . . .").

215. Ken Armstrong & Maurice Possley, *The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at N1. ("[A]bout once a month, on average, for the past two decades, a conviction has been set aside in Cook County because of a judicial finding of improper conduct by prosecutors.").

216. The Cook County State's Attorney's Office employs more than 900 prosecutors. See Cook County State's Attorney's Office, <http://www.statesattorney.org/> (last visited Nov. 15, 2009).

have been reported for misconduct,<sup>217</sup> it may serve to impact those supervisors' reputations, even if the boards never impose any discipline.<sup>218</sup> Defense lawyers who interact with those prosecutors may be more wary, and judges might be less deferential to them.<sup>219</sup>

Being reported to the Board (and perhaps becoming the subject of courthouse gossip) may also serve to motivate ethical senior prosecutors who truly intended to do the right thing but failed to vigorously police their subordinates. Just as a driver may reduce his speed after being pulled over by an officer and given a warning, the reporting of senior prosecutors to the bar may spur them to more closely supervise their subordinates.

In sum, while we concede that our proposal would be more effective with additional funding for disciplinary boards, we believe it could be fruitful even in the absence of such funds.

### *3. The Danger of Over-Detering Prosecutors*

A third objection to a rule of imputed liability is that it could over-deter supervising prosecutors and lead them to instruct subordinates to be too cautious. As a result, guilty defendants might go free and the balance of the adversarial system would tilt too heavily toward the defendant.<sup>220</sup>

We recognize this as a valid concern but are not persuaded by it. While we hope supervisory prosecutors would be concerned about a rule of imputed liability (otherwise our proposal would be pointless), there seems to be little reason for them to be over-concerned. Supervising prosecutors are typically experienced and knowledgeable attorneys who are in a position to provide sufficient training to subordinates. By providing adequate supervision and training, senior prosecutors would effectively immunize themselves from a claim that they should have known that their subordinates would commit misconduct. Thus, supervising prosecutors who zealously adhere to ethical norms will have little to fear from a rule of imputed liability.

Moreover, prosecutors do not operate in a vacuum where all they consider is the ethics rules. Prosecutors are driven by a personal desire to put the guilty in prison and a professional desire to advance their careers by winning cases.<sup>221</sup> Thus, while we certainly want supervising prosecutors to take notice of the

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217. See Gershowitz, *Prosecutorial Shaming*, *supra* note 1, at 1101 (discussing scuttlebutt around the courthouse).

218. See Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 180 (2008) (explaining that lawyers and judges "will respond differently to settlement offers and statements made in negotiations, depending on their opponents' reputations for candor and taking reasonable positions).

219. See Gershowitz, *Prosecutorial Shaming*, *supra* note 1, at 1102.

220. Cf. Zacharias & Green, *Duty to Avoid Wrongful Convictions*, *supra* note 103, at 39-41 (considering whether a vague competence standard holding prosecutors responsible for wrongful convictions would over-deter).

221. *Id.* at 41.

imputed liability rule and take steps to comply with it, we are extremely doubtful that such a rule would over-deter them.<sup>222</sup>

Indeed, the same over-deterrence objection does not hold true with respect to the doctrine of command responsibility in the military. Very few commanders since 1945 have been held criminally responsible under the “should have known” standard of command responsibility. It is the *potential* for imputed liability that incentivizes effective leadership and responsible command, irrespective of the record of application. All commanders know that if subordinates commit violations, their performance will likely be subject to scrutiny. More importantly, they also know that *if* they execute their responsibilities effectively, and take the simple steps of training their subordinates and promptly and effectively responding to reports of misconduct, they will be insulated from imputed liability. We expect the same outcome among supervisory prosecutors.

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In sum, while there are serious obstacles to our proposal, we believe the proposal is not only plausible, but worthwhile. At present, there is little pressure beyond the individual prosecutor’s own personal code of ethics to prevent them from committing misconduct. A proposal that calls on supervisors and leaders to step forward and take responsibility for rooting out misconduct by their subordinates is a positive step forward, even if it is a long-term approach.

### CONCLUSION

The role and power of prosecutors in the American criminal justice system closely resembles that of soldiers on the battlefield. When it comes to the battlefield, the law of war has long recognized that hands-on leadership by supervisors is essential to helping soldiers to avoid misconduct. For that reason, the doctrine of command responsibility encourages supervisors to create an ethical environment by imputing liability to supervisors for misconduct that they knew or should have known would occur. A similar approach should be adopted in the American criminal justice system to reduce the pervasive problem of prosecutorial misconduct. State ethics codes should be revised to make supervising prosecutors vicariously responsible for the misconduct of their subordinates that they knew or should have known would occur. Such an approach will incentivize senior prosecutors to more closely monitor, train, and lead junior prosecutors. In turn, prosecutorial misconduct can be dramatically reduced.

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222. For the same reasons, we agree with Professors Zacharias and Green that more aggressive ethics rules will be unlikely to motivate supervisors to participate in cover-ups of subordinate misconduct. *Id.* at 41-42.