

Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct

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This article approaches prosecutorial misconduct from a pedagogical perspective by exploring the ways in which law school clinicians can teach their students how to confront the problem proactively and in-the-moment, with an eye toward reducing its rate of occurrence and blunting its corrosive effect.

Prosecutorial misconduct is a serious problem that strikes at the heart of a criminal defendant's constitutional right to a fair trial. More broadly, it has the potential to impact the integrity of the criminal justice system as a whole. Educating law school students in criminal clinics about this issue before they become prosecutors and criminal defense attorneys serves three important goals. First, such instruction can act as preventative medicine by reducing the likelihood that future prosecutors will step over the line out of ignorance of the applicable case law and court rules or out of a misplaced desire to win at all costs. Second, it enables future defense counsel to develop litigation techniques designed to prevent the problem from occurring in the first instance. Third, it can prepare defense counsel to recognize prosecutorial misconduct that proves unpreventable so that she is able to respond effectively in-the-moment rather than belatedly, after the harm has been done.

The blended learning approach that is the signature pedagogy of the clinical classroom is well-suited to addressing prosecutorial misconduct because it provides an opportunity for students to engage in a frank and

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thoughtful dissection of the legal and ethical issues that are inextricably bound up with it. The model I propose combines instruction in black letter law, ethics, and skills acquisition. It also seeks to have clinicians model the process of analyzing and responding to prosecutorial misconduct using examples from their real world experiences. The approach is geared toward enabling students to think critically about their roles and responsibilities as future prosecutors and defense attorneys as they develop a familiarity with the relevant legal and ethical rules that will govern their conduct. This kind of training, with its emphasis on the real-world implications of doctrine and the importance of questioning, and reflecting upon, what it means to be a zealous advocate, is designed to foster the development of sound professional judgment before students enter the whirlwind of practice.

INTRODUCTION

I first began thinking about prosecutorial misconduct when it arose unexpectedly in a case I tried early in my career as a deputy federal public defender. My client was charged with being a felon in possession of a firearm.¹ According to the arrest report filed by officers from the Los Angeles Police Department (“LAPD”),² my client fled after they saw him make a furtive movement toward his waistband and told him to stop. During the ensuing chase, they alleged he reached into his pants and threw a firearm into the street, where one of them retrieved it. The officers ultimately captured and arrested my client. According to the officers, the arrest was “without incident”; according to my client, the arrest came after the officers administered a thorough beating.

My client’s felon status was never in dispute; the defense at trial was that my client was innocent of the substantive act because he had not possessed the firearm in question.

Before trial, the prosecutor, a senior-level Assistant United States Attorney, turned over the LAPD’s arrest report. The report contained a

¹ United States v. Deshun Jabar Jones, CR No. 03-932-ABC.

² The charge, a violation of Title 18, § 922(g), is also a state crime in California. When I was practicing, the U.S. Attorney’s Office for the Central District of California (which includes Los Angeles County) tended to prosecute felon-in-possession cases referred by the state in which the defendant had a significant criminal record, or where the felony in question was a serious one. While the agent in charge of shepherding the case through the system was with the Bureau of Alcohol Tobacco and Firearms, the main witnesses were normally the local police officers—often from the LAPD—who made the initial arrests.

section describing a post-arrest interview at the stationhouse in which my client denied ever possessing the gun. While I was entitled to see the statement as part of pretrial discovery, the evidentiary rules forbid me from introducing it. Because my client did not testify, it was self-serving hearsay. Thus, during the trial, the jury never learned that this interview had occurred, much less what my client had said.

Several hours after my client made the exculpatory statement, a second, tape-recorded interview took place at the stationhouse, which was conducted by an internal affairs officer. I learned about this interview from my client, not the prosecutor, and I obtained the tape as the result of a subpoena (which the City Attorney's Office unsuccessfully tried to quash). This second interview occurred after my client complained that the arresting LAPD officers had beaten him. The point of the interview was to allow my client to make an official report of the beating allegations. With the prosecutor's agreement, the tape recording of this second interview with the internal affairs officer was played for the jury.

When the prosecutor stood up to give his closing argument, he used the evidence of my client's internal affairs interview in a wholly unexpected way. He told the jury that the interview was clear evidence of my client's guilt, not because he had inculpated himself, but because he had failed to avail himself of the opportunity to exculpate himself: "What [Mr. Jones] doesn't say anywhere in that interview is any denial that he had a gun. He never said, 'Hey, this is a bogus arrest. Gun? I didn't have a gun. These cops are framing me. They didn't just beat me. They are framing me.'"

At that point, I felt a swift elbow in the ribs. My supervisor, who was sitting as second-chair, whispered urgently that I had to object. I rose, and said uncertainly, "Doyle violation" indicating that the prosecutor was commenting impermissibly on my client's post-arrest silence. My objection was off-base—far from remaining silent, my client had asked to speak with the IA officer—but the judge allowed the parties to go to sidebar. When it became clear that the issue was far more complicated than it initially appeared, the judge broke off the closing arguments, told each side to research the legal issues, and called for a recess.

It was not until we reconvened outside the presence of the jury several hours later, I was able to clearly explain the problem: the prosecutor's argument implied that my client was guilty because he hadn't denied that he was guilty to the internal affairs officer. But my

client had done exactly that several hours earlier during his post-arrest interview—an interview set up for the sole purpose of discussing his guilt or innocence. Worse, the prosecutor knew it—he was the one who had provided me with my client’s exculpatory statement. To tell the jury to infer guilt from my client’s failure to deny responsibility at a second interview when the jury knew nothing of the first denial (or the first interview) was, at best, misleading, and at worst, a distortion of the truth.

The judge agreed that what had occurred was improper. When the jury came back, she explained that two interviews had taken place, noting the subject of each interview, and read into the record my client’s previously unadmitted exculpatory statement denying that he ever possessed the gun.

The case ended well: the jury hung and the charges were later dismissed for unrelated reasons. But what I remember best is the feeling I had when I heard the prosecutor ask the jury to infer my client’s guilt based on a premise the prosecutor knew to be false. I froze, unsure what to do. In the district where I practiced, objections during closing argument were generally frowned upon as bad form and off-putting to the jury. And while I knew in my gut that this case was exceptional because the prosecutor’s remarks were improper, I was too inexperienced and flustered to grasp, in the moment, why the remarks were improper or how to explain my position. I believed then, and continue to believe now, that the exposure of the prosecutor’s conduct and the judge’s remedial measures were key turning points in the case. But had my supervisor not elbowed me in the ribs, I doubt I would have objected at all, an unsettling realization that underscores the importance of educating and training future lawyers in how to respond appropriately to prosecutorial misconduct.

Ten years later, making the transition from practicing lawyer to law school clinician, I continue to wrestle with the problem, albeit from a different perspective. As a practicing lawyer, I wanted to know how to react by responding effectively to a problem that had already occurred. As a clinical law teacher, I understand the importance of teaching effective reaction, but have come to believe that it is equally—or perhaps more—important to teach effective prevention. By teaching prevention, I refer to providing students with the skills and judgment necessary to anticipate, recognize, and discover misconduct, thereby reducing the likelihood that prosecutorial misconduct will negatively affect a defendant’s rights.

Much has been written about the ways in which the legal system responds to prosecutorial misconduct after the fact: reversal of convictions and condemnation in judicial opinions, investigation and sanctions by the state bar.³ There is also a vein of scholarship focusing on the effectiveness of the internal controls within prosecutorial offices at the county, state, and federal levels.⁴

Little has been written, however, about what the legal academy can do to address the problem proactively.⁵ Yet law schools have a critical

³ Most of this writing is critical, suggesting that these mechanisms are inadequate, mainly because they are used too sparingly. *See, e.g.*, Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1062 (2009) (noting that defendants' convictions are overturned only "when the prosecutor's misdeeds are very serious and result in clear prejudice," and characterizing as "tepid" the "reaction from many judges when serious conduct comes to light"); 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, 11-12 (2009) (stating that "professional discipline has had little practical effect in constraining prosecutorial behavior that risks faulty convictions").

⁴ These range from manuals, training, and guidelines to in-house disciplinary bodies tasked with investigating claims of prosecutorial misconduct and meting out punishment where appropriate. Again, this scholarship has been critical in the main, making the same points about weak standards and under-enforcement that are leveled at the state bar associations. Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 92 (1995) (suggesting that the Department of Justice Office of Professional Responsibility may "consider its function of vindicating wrongfully accused prosecutors as more important than investigating prosecutors who have escaped judicial criticism"); *see also* John R. Emshwiller and Evan Perez, *Prosecutors Seldom Punished for Misconduct*, WALL ST. J., October 4, 2010, <http://online.wsj.com/article/SB10001424052748704847104575532340572909432.html> (reporting that Attorney General Eric Holder has begun instituting reforms to prevent prosecutorial misconduct including additional training and technology to help keep track of evidence). Recent criticism of oversight mechanisms in the Department of Justice came in the form of a memorandum to the Attorney General authored by Inspector General Glenn A. Fine. Fine wrote, "We believe that the timeliness and transparency of the Department's internal processes for addressing allegations of prosecutorial misconduct need improvement to increase public confidence in the Department's ability to address such allegations." Glenn A. Fine, *Top Management Performance Challenges in the Department of Justice – 2010*, <http://www.justice.gov/oig/challenges/2010.htm>.

⁵ I have found only two law review articles that specifically address the subject of teaching prosecutorial misconduct in a clinical setting. Both were published along with other materials from a 2004 symposium on prosecutorial externship and clinical programs hosted by the Mississippi Law Journal. Stacy Caplow, *Tacking Too Close to the*

role to play because of their unique opportunity to reach tomorrow's prosecutors and defense attorneys before they enter the whirlwind of practice.⁶ In this article, I explore the ways in which law school faculty teaching in criminal law-based clinics can thoughtfully explore the problem of prosecutorial misconduct with their students. I argue that the most effective teaching method is one that stretches over two or three classes and speaks with equal force to students who wish to become prosecutors and those students aspiring to become defense attorneys.

The goal is to engage the players on both sides before they become committed and aggressive adversaries. If tomorrow's prosecutors can better understand how to carry out their legal and ethical obligations in the crucible of high pressure litigating, they will be less likely to step over the line due to tunnel vision, inadvertence, or error. Meanwhile, future defense counsel can learn to check certain kinds of prosecutorial errors before they become problematic, as well as act as an effective antidote to unpreventable prosecutorial misconduct.

While the topic of prosecutorial misconduct is also suited to doctrinal courses such as criminal procedure, evidence, criminal law, and ethics, the integrative learning approach that is the hallmark of clinical pedagogy is best suited to teaching the topic in the manner I advocate: through a module that combines analytical reasoning, skills acquisition, and engagement in ethical issues.⁷ Examining the ways in which prosecutorial misconduct may be addressed in a clinical setting also provides an opportunity to respond to the critique that the legal academy

Wind, 74 MISS. L.J. 922, 940 (2005) (arguing for an education in prosecutorial misconduct in prosecution clinics because "this may be the last best opportunity for students to engage neutrally and without consequences in these topics"); Peter A. Joy, *Prosecution Clinics: Dealing With a Professional Role*, 74 MISS. L.J. 955, 981 (2005) (arguing that an emphasis on ethical issues such as prosecutorial misconduct in the setting of a prosecution clinic "will not only help law students shape their own professional identities as prosecutors, but also engage them in a critical exploration of the professional values of striving to promote justice, fairness, and morality, as well as striving to improve the legal profession").

⁶ This view has been expressed by others. See, e.g., James Ching, *The Innocence Project Report is Out, What Now? In Addressing Prosecutorial Misconduct, the State Bar Faces Issues of Due Process and Education, Among Others*, S.F. RECORDER, Nov. 22, 2010 (stating that "[t]he failure of ethical education is apparent," as evidenced by the fact that three California prosecutors singled out for particularly egregious acts of misconduct in the NCIP report went to elite law schools where they "presumably took criminal procedure, constitutional law, and professional ethics").

⁷ By module, I refer to a series of classes revolving around a single topic.

fails to sufficiently integrate practical skills, professionalism, and ethics into the curriculum.⁸ In this article, I argue that the topic of prosecutorial misconduct lends itself naturally to this important pedagogical goal, and I briefly lay out what an effective curriculum might look like.

Part I discusses how prosecutorial misconduct is defined and discusses its scope and severity. Part II recounts the fitful relationship between law schools and clinical education, and summarizes the ongoing debate regarding exactly what clinical courses should be imparting to future lawyers. Part II concludes by explaining why prosecutorial misconduct is a subject suited to a method of instruction that many clinical programs have embraced: an integrative approach to learning that blends legal reasoning, practical skills, and professional judgment. Part III explores the ways in which analytical reasoning, black letter law instruction, skills acquisition, and the clinician's real world experience can be integrated into classroom teaching and discussions about prosecutorial misconduct. Part IV addresses the strategic thinking and analytical assessments defense counsel must make to determine the severity of a given instance of misconduct and formulates a response that effectively addresses the legal and ethical dimensions of the problem.

⁸ Edward Rubin, *What's Wrong with Langdell's Method and What to Do About It*, 60 VAND. L. REV. 609, 650-64 (2007) (arguing for reforming the first year law school curriculum by introducing practical skills training); Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 633-34 (2004) (stating that, based on the results of a survey she conducted, "it should be obvious that law schools need to spend more time preparing students for the ethical dilemmas that they will face in practice"); Rodney J. Uphoff, James J. Clark & Edward C. Monahan, *Preparing the New Law Graduate to Practice Law: A View From the Trenches*, 65 U. CIN. L. REV. 381, 384-85, 396 (1997) (reporting, based upon surveys and interviews with recent law school graduates, that "law schools' failure to make students aware of the types of problems they will encounter and to provide them with some training in the skills and concepts to employ in order to help clients solve their problems is particularly frustrating to new graduates"); David Barnhizer, *Of Rat Time and Terminators*, 45 J. LEGAL EDUC. 49, 50 (1995) (stating that, because law school faculty feel personally threatened by the recommendations in the MacCrate Report, "the dialogue never becomes fully joined, and the legal profession and the law schools are missing the opportunity to deal with the critical problems"); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 53-54 (1992) (advocating that professors should incorporate the teaching of ethics and professional responsibility in all of their courses).

I. DEFINING THE CONTENT AND DIMENSIONS OF THE PROBLEM

Prosecutorial misconduct is a perennially fascinating and controversial subject, reignited each year by glaring headlines about the most recent high-profile case it derailed.⁹ We are all familiar with the Supreme Court's seventy-five-year-old admonition that "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones."¹⁰ Less clear for a long time was the scope and severity of the problem.¹¹

⁹ A recent example is the federal prosecution of the late former U.S. Senator Ted Stevens, who was convicted on October 7, 2008 on seven federal felony counts of making false statements, after a trial that the presiding judge described as "marred by repeated allegations of discovery violations and prosecutorial misconduct." *In re Contempt Finding* in *United States v. Stevens* at 6, Oct. 12, 2010, Misc. No. 09-273-EGS. Following his conviction, Stevens narrowly lost his bid for reelection; two years later, he died in a plane crash. Adam Clymer, *Ted Stevens, Longtime Alaska Senator, Dies* at 86, N.Y. TIMES, Aug. 10, 2010. Five months after the trial, newly appointed Attorney General, Eric Holder, filed a motion to dismiss the charges against Stevens, following a written disclosure by one of the FBI agents assigned to the case that the trial prosecutors were guilty of repeated misconduct. Neil A. Lewis, *Tables Turned On Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009. In the motion, the government admitted to violating Stevens' constitutional rights by failing to turn over evidence that impeached the credibility of a key prosecution witness. Order Dated April 7, 2009 in *United States v. Stevens*, CR No. 08-231-EGS. One week later, the trial judge granted the government's motion, vacated the conviction, and dismissed the indictment against Stevens with prejudice. *Id.* Repercussions from the botched prosecution continue. Two separate investigations into the conduct of the trial prosecutors are pending; one of the prosecutors committed suicide. Jeffrey L. Toobin, *Casualties of Justice*, THE NEW YORKER, Jan. 3, 2011. Some critics believe that the Justice Department's decision in recent months not to pursue criminal charges against several high profile political targets is because "the government's premier anticorruption agency has lost its nerve after the disastrous collapse" of the Stevens case. Charlie Savage, *Justice Dept. Is Criticized as Corruption Cases Close*, N.Y. TIMES, Dec. 21, 2010 at A19.

¹⁰ *Berger v. United States*, 295 U.S. 78, 88 (1935). Bennett L. Gershman, "Hard Strikes and Foul Blows": *Berger v. United States 75 Years After*, 42 LOY. U. CHI. L.J. 177, 179 (2010) ("*Berger's* exhortation is routinely cited by courts when they reverse a conviction resulting from a prosecutor's misconduct; by lawyers in appellate briefs as a ritualistic incantation of the law's commitment to fair criminal process and the prevention of wrongful convictions; and by academics as a reminder of the appropriate ethical standard for a prosecutor.>").

¹¹ Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007) ("Although there is no dispute that prosecutorial misconduct exists, there is considerable disagreement about whether it is a widespread problem in the criminal justice system."). Compare, e.g., Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?* 8 ST.

Two important developments in recent years have shed new light on these questions. First, the publication of widely reported in-depth studies that attempt to quantify prosecutorial misconduct;¹² second, the exposure, due to more sophisticated DNA testing, of a number of instances in which innocent people were sent to prison because of it.¹³

THOMAS L. REV. 69, 70 (1995) (“[A]rgu[ing] that critics exaggerate the prevalence and seriousness of prosecutorial misconduct.”) with Walter W. Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 966 (1985) (“Flagrant misconduct by prosecutors appears to be increasing. Unfortunately, this trend is not of recent origin.”).

¹² A 2009 study conducted by the Center for Public Integrity found that from 1970-2008, courts reversed 2,012 indictments, convictions, or sentences due to prosecutorial misconduct. The study also documented thousands of other cases in which prosecutorial misconduct was found, but did not rise to a level warranting reversal. The Center for Public Integrity,

<http://projects.publicintegrity.org/pm/default.aspx?act+sidbarsb&aid-39> (last visited Nov. 23, 2010) (hereinafter *CPI Report*). The study did not include the many cases that were resolved without reaching the appellate courts or resulting in a written opinion or, of course, the cases in which the misconduct was never discovered. *Id.* Another study conducted by the Northern California Innocence Project (NCIP), which focused solely on California, examined more than 4,000 cases from 1997-2009 addressing claims of prosecutorial misconduct. According to that study, California courts explicitly found misconduct in 707 cases, and the offending prosecutors were “almost never discipline[d].” *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, NORTHERN CALIFORNIA INNOCENCE PROJECT, SANTA CLARA SCHOOL OF LAW (2010) (hereinafter *Preventable Error*).

A third study conducted by two reporters at USA Today that focused solely on federal prosecutions found 201 documented cases of prosecutorial misconduct from 1997 to 2010. The authors concluded that these cases “have put innocent people in prison, set guilty people free and cost taxpayers millions of dollars in legal fees and sanctions.” Brad Heath and Kevin McCoy, *Prosecutors’ Conduct Can Tip Justice Scales*, USA TODAY, Sept. 23, 2010, available at http://www.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm.

¹³ See, e.g., Laurie L. Levenson, *Drawing the Ethical Line: Controversial Cases, Zealous Advocacy, and the Public Good*, 44 GA. L. REV. 1021, 1047 (2010) (“According to the Innocence Project, at least 250 defendants have been exonerated by DNA evidence. Many of the exonerations involve defendants on death row and some involve cases of prosecutorial misconduct.”); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187 n.61 (2010) (“Prosecutorial misconduct surfaces frequently in studies as a factor in wrongful convictions.”); Myrna S. Raeder, *Introduction to Wrongful Convictions Symposium*, 37 SW. L. REV. 745, 748 (2008) (“Today there is virtual agreement that the major causes of wrongful convictions are mistaken identification, faulty forensic evidence, false confessions, informant testimony, prosecutorial misconduct, ineffective assistance of counsel, or more typically, a combination of these problems.”).

The debate continues about the seriousness of the problem, but now it is joined by sobering statistics—and human faces—that expose the costs imposed on society, the accused, and the justice system generally by prosecutors whose lawyering falls outside the bounds of fair play.¹⁴

It is important, however, to put the problem in context. First, there is the issue of definition. Broadly speaking, prosecutorial misconduct occurs whenever a conviction is pursued “outside the bounds of acceptable advocacy.”¹⁵ This definition includes calculated transgressions as well as acts that are the result of tunnel vision,¹⁶ ignorance of applicable legal standards and court rules,¹⁷ or a competitive instinct run amok in the heat of battle.¹⁸ Yet the word “misconduct”

¹⁴ Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 *TEMPLE L. REV.* 887, 959 (1998):

Beyond the drain of precious resources through wasted trial proceedings and protracted post-trial proceedings in the individual cases, there is an incalculable cost in damaged integrity that may be difficult to repair . . . Separate and apart from the raw tally of identifiable misconduct in scores of cases involving experienced and often high-ranking prosecutors at the state and federal level, there is the equally troubling evisceration of fundamental protections it may represent on a less egregious but more widespread basis.

¹⁵ Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 *WASH. U. L.Q.* 713, 720 (1999).

¹⁶ An emerging body of legal scholarship in the area of social cognitive theory defines tunnel vision as an in-the-trenches mentality that causes a prosecutor’s view of her case to become so slanted that she truly believes the decisions she is making are fair and reasonable when they are in fact violating the rules of ethics and/or the defendant’s constitutional rights. Diane L. Martin, *Lessons About Justice from the Laboratory of Wrongful Convictions: Tunnel Vision, the Construction of Guilt, and Informer Evidence*, 70 *UMKC L. REV.* 847, 848 (2002); Alastair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 *WM. & MARY L. REV.* 1587, 1604-05, 1614 (2006).

¹⁷ Ellen Yaroshfsky, *Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 *TEMP. POL. & CIV. RTS. L. REV.* 343, 348 (2010) (noting that, while there is “little ‘hard’ data,” a review by the Innocence Project of the first sixty-two DNA-based exonerations found that where prosecutorial misconduct was a factor, it is often the “result of negligence and systemic challenges within prosecutor’s offices”); Bennett L. Gershman, “*Hard Strikes and Foul Blows*”: *Berger v. United States 75 Years After*, 42 *LOY. U. CHI. L. J.* 177, 189 (2010) (citing a report studying 600 cases of prosecutorial misconduct from 1926-1930 that attributed “some of the misconduct to a prosecutor’s carelessness, inadvertence, inadequate training, or the ‘excitement’ of a criminal trial, rather than any deliberate attempt to deprive a defendant of his legal rights”).

¹⁸ DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 357 (5th ed. 2009) (stating that “[a]ll too often winning—or at least not losing—can become the preeminent value”

implies a willful, unethical, or even criminal mindset.¹⁹ Because few prosecutors found to have committed misconduct are bad actors whose violations were deliberately or malevolently intended,²⁰ “misconduct” is loaded and an arguably misleading way to describe the problem.²¹

The generally accepted test for assessing the impact of prosecutorial misconduct in a particular case is objective and outcome-

for the prosecutor); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOWARD L.J. 475, 484 (2006) (“Generally, the conviction rate will constitute the basic yardstick of an office’s efficacy, and those who contribute to that rate will advance.”).

¹⁹ Black’s Law Dictionary defines “misconduct” as “[a] dereliction of duty; unlawful or improper behavior.” (9th ed. 2009). “Affirmative misconduct” is separately defined as “[a]n affirmative act of misrepresentation or concealment of a material fact; intentional wrongful behavior.” *Id.* The term misconduct, when applied to the acts of an attorney, implies “dishonesty or attempt to persuade the court or jury by using deceptive or reprehensible methods.” *Id.* Acts of negligence or carelessness are not included in either definition.

²⁰ Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 403-04 (2009) (“Misconduct does not usually occur because prosecutors are evil, overly results-oriented, or intentionally seeking to cheat. Misconduct often happens inadvertently because there is too much for prosecutors to know and insufficient ethics training to avoid misconduct.”).

²¹ Some scholars have argued that judges should make a distinction between calculated misconduct and inadvertent misconduct, referring in published opinions to acts that are unintended or negligent as “prosecutorial error” while reserving the term “prosecutorial misconduct” only for intentional and egregious behavior. *See, e.g.*, James A. Morrow & Joshua R. Larson, *Without a Doubt, a Sharp and Radical Departure: The Minnesota Supreme Court's Decision to Change Plain Error Review of Unobjected-to Prosecutorial Error in State v. Ramey*, 31 HAMLINE L. REV. 351, 396-97 (2008) (arguing that the term “prosecutorial error” should be used in most instances of improper conduct, and that the term “prosecutorial misconduct” should be retained “only for especially egregious instances of deliberate wrongdoing”). While Morrow and Larson cite to a litany of cases using terminology such as “error” or “impropriety” in place of, or synonymously with, “misconduct,” there is little authority pointing to any legal significance attached to the alternating use of terminology. *Id.* at n.293. Although some courts have adopted the “error/misconduct” dichotomy, the vast majority has not. Thus, in most jurisdictions, a prosecutor who purposefully hides exculpatory evidence and a prosecutor who fails to make exculpatory evidence available because her assistant never informed her of its existence are both branded with the stigmatizing “misconduct” moniker despite their differing levels of culpability.

oriented.²² The analysis turns on whether the prosecutor's conduct affected the fairness of the trial, rather than on the murkier and more elusive question of what was going through the prosecutor's mind as the conduct was occurring.²³

Second, there is the question of how often prosecutorial misconduct occurs. There are approximately 30,000 prosecutors working in more than two thousand jurisdictions in the United States today, and the vast majority of them appear to discharge their duties with fairness and integrity.²⁴ Prosecutorial misconduct occurs in only a fraction of cases, although it is also true that many instances go undetected or

²² One noted criminal expert on the subject of prosecutorial misconduct explains the test this way:

The typical approach by courts reviewing claims of prosecutorial misconduct is to determine (1) whether the conduct, objectively considered, violated an established rule of trial practice, and if it did, (2) whether that violation prejudiced the jury's ability to decide the case on the evidence. Under this objective standard, the courts do not consider a prosecutor's intent to violate a trial rule. Thus, if a guilty verdict that is significantly influenced, for example, by a prosecutor's asking prejudicial questions, offering inadmissible evidence, or making improper remarks to a jury is to be reversed, it will be reversed regardless of whether the prosecutor intended to strike a foul blow.

Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 124 (1998).

²³ Henning, *supra* note 15, at 723 (stating that, with the exception of *Batson* claims, the legal standard for determining whether prosecutorial misconduct has occurred is "a completely objective standard, by which courts are to infer improper intent from the conduct and statements of prosecutors, but are not to compel prosecutors to respond to any judicial inquiry into their subjective motives"). However, the qualitative distinction between good faith error and bad faith misconduct on the part of the prosecutor can be critical, for example, in determining whether the defendant is entitled to have evidence suppressed as a result of a violation of his Fourth or Fifth Amendment rights, or whether the Double Jeopardy Clause or the exercise of a court's supervisory powers may prevent re-prosecution after a mistrial. *Lee v. United States*, 432 U.S. 23, 33 (1977) ("Only in cases where the underlying error was motivated by bad faith [by the trial judge or prosecutor] or undertaken to harass or prejudice would there be any barrier to retrial.") (internal citations and quotation marks omitted); *United States v. Kojayan*, 8 F.3d 1315, 1325 (9th Cir. 1993) (vacating the judgment of conviction and remanding to the district court to determine whether to dismiss the indictment with prejudice "to make it clear that the misconduct was serious, that the government's unwillingness to own up to it was more serious still and that steps must be taken to avoid a recurrence").

²⁴ *Preventable Error*, *supra* note 12.

unreported.²⁵ Regardless of intent or relative frequency, the effect of prosecutorial misconduct is the same: a distortion of the legal process that, in some cases, results in a denial of due process. The late Professor Fred Zacharias, a noted expert in the area of prosecutorial ethics, has written that while it may not happen as a matter of routine, “a fair number (though perhaps a small percentage) of prosecutors introduce false evidence, make false statements to tribunals, withhold evidence, and obstruct access to witnesses.”²⁶

Finally, there is the issue of breadth. Prosecutorial misconduct occurs across racial, ethnic, socio-economic, and jurisdictional lines: at the state²⁷ and federal levels,²⁸ in cases involving poor defendants²⁹ and rich ones,³⁰ the high-profile³¹ and the obscure.³² In short, it is a fact of life in criminal litigation. For that reason, lawyers who represent those accused of committing crimes may confront prosecutorial misconduct whether they work for a public defender office,³³ as a solo practitioner,³⁴ or in a prominent firm specializing in white collar defense.³⁵

²⁵ *Id.* at 5 (“While the majority of California prosecutors do their jobs with integrity, the findings of the Misconduct Study demonstrate that the scope and persistence of the problem is alarming.”); Rosenthal, *supra* note 14, at 959-60 (“Given the fact that . . . most of what prosecutors do is hidden from public view, it is likely that the recent line of cases which have reached the appellate courts are but the tip of an iceberg, and that the depth of that iceberg is substantial.”).

²⁶ Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 767 (2001). As support for this assertion, Professor Zacharias referred to a line of Supreme Court and federal court cases finding prosecutors guilty of numerous types of misconduct as well as his own research of “all reported cases in which prosecutors have been disciplined for violations of professional rules by courts or state disciplinary authorities.” *Id.* at 744 & n.80.

²⁷ See, e.g., *People v. Hill*, 952 P.2d 673 (1998).

²⁸ See, e.g., *United States v. Shaygan*, 661 F. Supp.2d 1289 (S.D. Fla. 2009).

²⁹ See, e.g., *Clay v. Allen*, 242 F.3d 679 (5th Cir. 2001).

³⁰ *United States v. Triumph Capital Group, Inc.* 544 F.3d 149 (D. Conn. 2008).

³¹ James E. Coleman et al., *The Phases and Faces of the Duke Lacrosse Controversy: A Conversation*, 19 SETON HALL J. SPORTS & ENT. L. 181, 197-98 (2009).

³² *People v. Dalessandro*, 419 N.W.2d 609, 614 (Mich. App. 1988).

³³ Dhyana Levey, *Public Defender Asks Judge to Suppress Evidence from Jailhouse Calls*, CALIFORNIA LAWYER, February 2009, at 12.

³⁴ *State v. Soskinski*, 750 A.2d 779 (N.J. 2000).

³⁵ *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

II. A BRIEF HISTORY OF CLINICAL LEGAL EDUCATION AND THE EVOLUTION OF THE INTEGRATIVE APPROACH TO LEARNING IN LAW SCHOOL

Critiques of the legal academy are as old as the academy itself.³⁶ For more than a century, there has been a struggle to define the mission of law schools: adopt a vocational model designed to churn out ready-made practitioners, or aspire to a more intellectual model that will produce men and women who are primarily skilled in the arts of abstract analytical reasoning and philosophical argument?³⁷ In large part, the analytical/philosophical approach has won out.³⁸ Today, the dominant model in the vast majority of law schools is a Socratic method of instruction, also known as the case-dialogue approach, in which students learn to “think like a lawyer” by extrapolating legal principles from appellate court opinions and applying them to different factual scenarios.³⁹ The Socratic method is particularly dominant in the first year of law school, when students’ education is comprised mainly of lecture-sized, non-elective classes in core subjects such as contracts, torts, criminal law, and civil procedure. Most of these courses do not emphasize the “human” aspect of the cases under study: the actual people involved in the litigation, the ethical issues faced by their lawyers, or even

³⁶ Throughout the twentieth century, “American legal education . . . witnessed the gradual substitution of academic and proprietary law school education for the apprentice system of lawyer training, the gradual ascendancy of academic legal education over the proprietary law schools as the primary avenue for entry into the legal profession, and the gradual elevation of academic legal education from trade school to graduate professional school status.” Charles R. McManis, *The History of First Century of American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 649 (1981). The rise in clinical opportunities at American law schools, beginning in the 1960s, may signal a partial return to the more practice-centered apprenticeship approach to legal education more prevalent in the nineteenth century. *Id.* at 657-69.

³⁷ For an exhaustive history of the development of legal education in the United States from the late nineteenth century through the present, with a particular focus on the clash between casebook and clinical methods, see Margaret Martin Barry, John C. Dubin & Peter A. Joy, *Clinical Legal Education for the Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5-32 (2000-01).

³⁸ WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUNDATION, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 91-93 (2007) (hereinafter Carnegie Report) (discussing how the development of the “standard model” of law school education focused on theory and abstract reasoning as the result of a desire to “overcome the trade school stigma” that attached to other professional schools).

³⁹ *Id.* at 87, 91-93, 99.

the skills and strategy employed to bring the cases to court in the first instance.⁴⁰

Historically, the legal academy resisted changes to the case-dialogue method, even in the second and third years of law school. The prevailing view was that real-world experience was the best forum to put abstract knowledge into practice.⁴¹ Eventually, some law schools began to cede a bit of ground; beginning in the 1960s, a few started to offer more skills-based courses, including legal aid-type clinics, which were designed to serve indigent and under-served populations.⁴² Over time, those numbers increased dramatically, so that today, all of the top law schools, and many of the middle and lower tier ones, have in-house clinics.⁴³

While many students embraced the opportunity clinics provided to engage in social justice lawyering,⁴⁴ the schools themselves have complained that their efforts were unappreciated by the bar, and by recruiters and hiring committees, which devalued clinical experiences.⁴⁵ Back and forth recriminations between the schools and the legal community led to a decision by the American Bar Association in 1992 to commission a study to address whether there was a “gap” between the goals of the academy and the expectations of practitioners. This study later became a book-sized written evaluation known as the MacCrate Report.⁴⁶

The MacCrate Report took the diplomatic view that while the gap did exist, it was not the responsibility of any single institution to bridge it.⁴⁷ Rather, there was a shared responsibility between the academy and the bar to maintain a continuum of legal education.⁴⁸ Both entities were falling short by failing to identify in precise terms what it took to

⁴⁰ *Id.* at 141-49.

⁴¹ *Id.* at 91-93.

⁴² Barry, Dubin & Joy, *supra* note 37, at 12 (noting clinics did not “blossom[]” and gain a foothold in the academy until the 1960s).

⁴³ *Id.* at 31.

⁴⁴ Charles E. Ares, *Legal Education and the Problem of the Poor*, 17 J. LEGAL EDUC. 307, 310 (1965).

⁴⁵ ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 6-7 (July 1992) (hereinafter MacCrate Report).

⁴⁶ MacCrate Report.

⁴⁷ *Id.* at 8, 233-26, 299.

⁴⁸ *Id.*

produce competent lawyers. To flesh out exactly what one should expect a comprehensive legal education to provide, the MacCrate authors produced a list of skills, which are practical in nature,⁴⁹ and a list of values, which are akin to ethical guidelines.⁵⁰

Subsequent to the publication of the MacCrate Report and the inevitable criticisms that followed,⁵¹ the Carnegie Foundation for the Advancement of Teaching produced a report that summarized the history of innovations in law school pedagogies, and attempted to apply successful teaching models from other professions, such as medicine.⁵² The Carnegie Report conceptualized the ideal legal education as one that equipped students with three bodies of knowledge, broadly categorized as (1) substantive theoretical knowledge, (2) practical tradecraft skills, and (3) ethics and professional judgment.⁵³ The Report referred to these bodies of knowledge as “the three apprenticeships”—the cognitive, the practical, and the ethical⁵⁴—and faulted the academy for privileging the first type of knowledge over the second and third.

Perhaps more fundamentally, the Carnegie Report took the academy to task for compartmentalizing these different types of knowledge into separate courses, thereby depriving students of the opportunity to see where they overlap and intertwine, mutually informing and expanding upon each other.⁵⁵ True professional competence demands that attorneys be able to nimbly access and integrate knowledge from all three apprenticeships when turning their attention to resolving complex legal issues in the real world, which are

⁴⁹ The skills list includes: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving legal dilemmas. *Id.* at 138-40.

⁵⁰ The values list includes: provision of competent representation, striving to promote justice, fairness and morality, striving to improve the profession, and professional self-development. *Id.* at 140-41.

⁵¹ See, e.g., Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 PACE L. REV. 575, 576 (2003) (arguing that MacCrate gave insufficient weight and attention to the ethical values it purported to champion, and that it could not achieve its stated goals without realizing that they were antithetical to the two institutions to which it was addressed—the academy and the bar).

⁵² SULLIVAN ET AL., Carnegie Report, *supra* note 38, at 91-95.

⁵³ *Id.* at 27.

⁵⁴ *Id.* at 27.

⁵⁵ *Id.* at 29.

more tangled and ill-defined than they appear in law school casebooks. The atomized curricula of most law schools, the Carnegie Report concluded, made it difficult for students to develop this all-important skill.⁵⁶

The Carnegie Report stressed the importance of “context-based learning,” an integrated or blended approach to teaching the three apprenticeships that provides “opportunities . . . to engage in problem-solving activities in hypothetical as well as real legal contexts.”⁵⁷ The Carnegie Report noted with approval that clinics are uniquely positioned to provide context-based education because of the potential to engage with real world matters in an academic setting. Clinicians who take full advantage of this potential expose their students to different, but interrelated, areas of legal knowledge.⁵⁸ In particular, the Carnegie Report emphasized that the learning environment that clinics foster, with their focus on reflective self-assessment on the part of the student, can prove critical for developing professional judgment.⁵⁹ Careful attention on the part of clinics to this aspect of a student’s development can address the concern that the teaching of ethics is too often relegated to limited, context-free formats such as professional responsibility courses.

The topic of prosecutorial misconduct is ideally suited to Carnegie’s integrative approach. To understand the problem, it is necessary to familiarize students with certain areas of black letter criminal law; for example, the constitutional foundations for fair trial rights and the principal cases establishing prosecutorial obligations such as the duty to turn over exculpatory evidence or to prevent the introduction of false testimony. Part of that learning process involves the traditional case dialogue method of teaching, in which students learn to extrapolate fundamental principles or legal tenets and apply them to a diverse set of factual scenarios. Equally important is skills acquisition: educating students to recognize prosecutorial misconduct when it arises and to respond in the moment, particularly when that moment occurs in the fraught and dynamic circumstance of a trial. Another important skill

⁵⁶ *Id.* at 96-97.

⁵⁷ ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 143 (1st ed. 2007).

⁵⁸ SULLIVAN ET AL., Carnegie Report, *supra* note 38, at 120.

⁵⁹ *Id.* at 9; *See also* Stuckey et al., *supra* note 57, at 189-93 (describing how in-house clinical courses can “achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction”).

acquisition is the development of proactive practices—by prosecutors and defense attorneys—designed to prevent the problem from occurring in the first place. Finally, there is a complex array of ethical considerations that confront practitioners, usually defense attorneys, who must determine not only how to react in the courtroom, but also whether to take the problem beyond the confines of the particular case and bring it to the attention of the state bar or other disciplinary authority. Indeed, it is in the area of ethics that prosecutorial misconduct arguably provides its richest teaching opportunity. In short, the constellation of issues prosecutorial misconduct presents—analytical, practical, and ethical—lends itself to a course design that weaves together the three bodies of knowledge identified by the Carnegie Report as central to a complete legal education.

III. INTEGRATING REAL WORLD EXPERIENCE AND SKILLS ACQUISITION WITH ANALYTICAL REASONING AND BLACK LETTER LAW INSTRUCTION

A. Providing Context

Before delving into the constitutional theories and case law establishing the boundaries that govern prosecutorial behavior, the instructor should consider providing an overview of the adversarial process, not as it was designed to work in theory, but as it actually functions. Opening the module in this way allows the students to view the problem not simply as an abstract issue in a casebook but in its real world context.

Many students may believe that such an overview is unnecessary after a lifetime of exposure to criminal law from television or movies, or listening to the war stories of family and friends in the profession. For the small percentage of students who come to the clinic with firsthand knowledge, having interned at prosecution or public defender offices or at criminal defense firms, this approach may seem particularly remedial.

But movies, television, and the vicariously ingested experience of others distort as much as inform, as their purpose is to entertain a lay audience rather than inform a vocational one. These courtroom tales play upon stereotypes and dispense with nuance, opting instead for the quicker pulse of fiction, which crops and shapes stories to remove the ponderous, obscure, or inconvenient facts that detract from the power of the narrative's arc. And while externships and summer jobs provide

crucial real-world experience, the work focuses almost exclusively on the immediate concerns of a particular case or cases. These short-term jobs cannot, by virtue of their brevity, provide students with the “ten-thousand foot view,” a depth and breadth of knowledge that clinicians bring from their years-long experience as former practitioners in, and critical observers of, the criminal justice system.⁶⁰

Critical to providing context is dispelling the myths that misconstrue the roles of both the prosecutor and the defense attorney, replacing misunderstandings with basic knowledge about their legally defined objectives and obligations. Below, I address two central myths clinicians might raise and discuss with their students.

1. “*Flip Sides of the Same Coin*”

Popular culture tends to perpetuate the myth that the prosecutor and defense attorney are flip sides of a coin, with concomitant ethical and legal responsibilities.⁶¹ From *Law & Order* to *Legally Blonde*, the common perception is of two fiercely competitive, evenly matched individuals with the same fundamental purpose: to win, defined by the prosecution as securing a conviction, and by the defense as procuring an acquittal.

But “[t]he role of the prosecutor is clearly distinct and fundamentally different from that of lawyers who represent clients.”⁶²

⁶⁰ Nor are the doctrinal courses that most students will have taken, such as criminal law, criminal procedure, and evidence, likely to challenge these ingrained and inaccurate perceptions. Those courses are focused on black letter law and the technical aspects of its practice: *mens rea*, the construction of penal codes and criminal statutes, the content and application of the Fourth, Fifth, and Sixth Amendments, the sixteen exceptions to the federal hearsay rule. The goal of these courses is to familiarize students with the law as it exists in textbooks, case law, and statutes, not to educate them about the roles and responsibilities of those who practice it every day. Of course, professional responsibility and ethics classes do focus on roles and responsibilities played by counsel, but given the breadth of the subject matter covered in these courses, it is unlikely that prosecutorial misconduct is given more than cursory treatment, if it is given any treatment at all. It is in a clinic, if ever, where prosecutorial misconduct can be addressed thoroughly, so that students have a basic understanding of its causes and complexity.

⁶¹ Some prosecutors labor under the same misconception. FEDERAL DEFENDERS OF SAN DIEGO, INC., *DEFENDING A FEDERAL CRIMINAL CASE* 13-63 (2010 ed.) (“The government also often harbors the false belief that prosecutors and defense counsel are held to the same standards.”).

⁶² ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 145 (2007).

Unlike a defense attorney, whose sole object is to advance the interests of her client, prosecutors have no living, breathing individual for whom to advocate.⁶³ Contrary to popular belief, the prosecutor does not represent the crime victim, at least not any more directly than she represents her next-door neighbor.⁶⁴ The prosecutor's client is an impersonal monolith: the state, county, or federal government.⁶⁵ As a representative of "the people," or "the government," prosecutors have a special obligation to vindicate the ideals upon which our democracy was founded.⁶⁶ Her animating purpose is to "seek justice,"⁶⁷ which is not necessarily consistent with the goal of playing to win.⁶⁸

The "seek justice" imperative is referred to as a "higher duty," which requires the prosecutor to serve as "a minister of justice and not simply . . . an advocate."⁶⁹ In many cases, the higher duty and the competitive instinct dovetail. Where the evidence is strong and guilt is clear, the higher duty imposed upon prosecutors may equate with prosecuting the accused to the fullest extent of the law. But where the evidence is weak and the guilt of the accused is in doubt or diminished by mitigating circumstances, seeking justice may mean concessions or compromise: the dismissal of an indictment or a plea to a lesser offense.⁷⁰

⁶³ Zacharias & Green, *supra* note 3, at 16 ("[A] prosecutor's 'client' is the state (or another sovereign entity), not the victim, defendant, or any individual client.").

⁶⁴ This concept may be easier to accept in theory than in practice. Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 483 (2006) (noting that "the adversary system creates the condition through the which the prosecutor comes to think of her clients not as 'the people' in the abstract, but as the victims and the police") (citing Stanley Z. Fisher, *In Search of the Virtuous Prosecutor, A Conceptual Framework*, 15 AM. J. CRIM. LAW 197, 208-11 (1988)).

⁶⁵ *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.").

⁶⁶ *Id.*

⁶⁷ ABA STANDARDS FOR CRIMINAL JUSTICE 3-1.2(c), THE FUNCTION OF THE PROSECUTOR. While this requirement is somewhat vague, it does "tell[] prosecutors that their role includes more than seeking conviction at all costs." Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 259 (1993).

⁶⁸ Zacharias, *supra* note 26, at 695; Rhode & Luban, *supra* note 18, at 357.

⁶⁹ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt (2008); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (1980).

⁷⁰ Davis, *supra* note 62, at 13.

Nor do the prosecutors and defense attorneys play by the same rules. While defense counsel has no affirmative obligation to reveal the fault lines in her case, prosecutors are constitutionally obligated to provide defense counsel with any evidence that tends to exculpate the defendant⁷¹ or show that the prosecution's own witnesses are unworthy of belief.⁷² Put another way, the prosecutor's constitutionally enshrined higher duty to seek justice can translate into a mandate to undermine her own case.⁷³ Having students confront the stark differences in adversarial functions creates recognition that, while both sides labor under significant pressures and constraints, prosecutors must continually fight contradictory impulses. Some prosecutors may find the duty to subordinate their competitive instincts to a lofty notion of fair play difficult to reconcile with their own deeply held convictions about the defendant's guilt and the appropriate consequences for his wrongdoing.

2. "Evenly Matched Adversaries"

Another myth perpetrated in many portrayals of the criminal justice system is that prosecutors and defense attorneys are evenly matched, equally empowered adversaries.⁷⁴ Although some law students may have been disabused of this notion through a work or life experience, many continue to believe in the existence of a level playing field when they come to the clinic. In the majority of cases, however, "[a] prosecutor at the local, state, or federal level, who has at his or her disposal a large array of investigative capabilities, generally commands resources vastly superior to those available to the defense attorney, who most often represents an indigent client."⁷⁵

Of course, a prosecutor's resources are not unlimited and in some cases, she may find herself outspent 10 to 1 by a wealthy defendant with a small army of lawyers. And some public defender offices, particularly at the federal level, are sufficiently well-staffed and funded to allow them to

⁷¹ *Brady v. Maryland*, 373 U.S. 83, 87 (1960).

⁷² *United States v. Bagley*, 473 U.S. 667, 676 (1985).

⁷³ Bandes, *supra* note 64, at 483 ("The duty to act as a zealous advocate and the duty to act as a minister of justice are not contiguous: some tension between them seems inevitable.").

⁷⁴ Judith L. Maute, "In Pursuit of Justice" in *High Profile Criminal Matters*, 70 *FORDHAM L. REV.* 1745, 1746 (2002) ("It is assumed that parties are represented by counsel who are relatively equal in skill and dedication to the cause and that the parties have relatively equal resources available to devote to the case.").

⁷⁵ Zacharias, *supra* note 26, at 694-95.

match their adversaries in talent and expenditures. It is also true that many prosecutors carry staggering caseloads, creating pressure to dispose of cases in an assembly line fashion that can result in oversights or omissions that later lead to allegations of misconduct.⁷⁶

But the imbalance of power is not solely about money and resources. Even wealthy clients who can afford the nation's very best trial lawyers quickly learn the legal limits of what defense counsel can do. Prosecutors hold the trump cards, as they decide whom to charge and with what. In the vast majority of cases ending in guilty pleas, the charging decision dictates everything that follows: the terms on which plea bargaining occurs—or indeed if it occurs at all—as well as the type of sentence to recommend upon conviction.⁷⁷ This disparity in power has become more extreme in recent decades. Mandatory minimum sentencing laws enacted at the state and federal level mean the prosecutorial power to charge, rather than the judicial power to sentence, plays the most critical role in determining a defendant's fate.⁷⁸

In the small percentage of cases that do go to trial, the prosecutor holds an additional, critical advantage over her courtroom opponent: the imprimatur of integrity.⁷⁹ As a “minister of justice,” the prosecutor is viewed as inherently righteous, imbued with the power to serve the guilty their just deserts and bring a measure of peace and security to their victims. While this view of prosecutors is not universal—there are many localities in which prosecutors, and law enforcement officers are viewed

⁷⁶ Corn & Gershowitz, *supra* note 20, at 402-05 (citing the fact that “many district attorneys’ offices are terribly overburdened, forcing prosecutors to handle excessive caseloads” as one factor that contributes to prosecutorial misconduct).

⁷⁷ Lawton Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2146 (2010) (“Prosecutors wield enormous power. They possess almost unfettered discretion in certain key decisions, such as who to charge for what crime, whether to seek the death penalty, and whether to permit a plea.”).

⁷⁸ Erwin Chemerinsky, *Losing Faith: The Supreme Court and the Abandonment of the Adjudicatory Process*, 60 HASTINGS L.J. 1129, 1131-32 (2009) (stating that statutes such as the Federal Sentencing Guidelines, mandatory minimums, and California’s Three Strikes law “have transferred a tremendous amount of power from judges to prosecutors”).

⁷⁹ Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 315 (2001) (“[T]he prosecutor, in his role as representative of the government, has a unique power to affect the evaluation of the facts by the fact-finder, who inevitably views the prosecutor as a special guardian and thus a warrantor of the facts—an expert who can be trusted to use the facts responsibly.”).

with suspicion and mistrust—it is the norm. Many prosecutors build on this reputation, ascending to greater positions of authority, often as judges or elected officials. Unlike defense counsel, who most jurors regard skeptically, the prosecutor is typically cloaked in a presumption of virtue, which gives her a tremendous power that is subject to abuse.⁸⁰

B. Narrowing the Focus: Selecting Specific Types of Misconduct

Because the prosecutor's hand guides nearly every aspect of a criminal case, prosecutorial misconduct can take an almost endless variety of forms.⁸¹ Normally, a prosecutor's involvement begins at the investigatory stage and concludes at sentencing; in some offices, the same prosecutor will handle the case through the completion of the appellate process.⁸² Misconduct can occur at any point along the way: before the grand jury,⁸³ during the discovery phase,⁸⁴ the plea bargaining process,⁸⁵ trial,⁸⁶ and in briefing and arguing the case on appeal.⁸⁷

It would be impossible to have a meaningful discussion about every possible strain of prosecutorial misconduct in the type of module proposed here, which would consist of two or three classes over the course of a semester. Nor would it be particularly helpful: the purpose of teaching students about prosecutorial misconduct in a clinical setting is not to have them memorize a list of its every mutation. It is to alert them

⁸⁰ *United States v. LaPage*, 231 F.3d 488, 491 (9th Cir. 2000) (“The jury understands defense counsel’s duty of advocacy and frequently listens to defense counsel with skepticism. A prosecutor has a special duty commensurate with the prosecutor’s unique power, to ensure that defendants receive fair trials.”).

⁸¹ “Like the hydra slain by Hercules, prosecutorial misconduct has many heads.” *United States v. Williams*, 504 U.S. 36, 60 (1992) (Stevens, J., dissenting).

⁸² Jeffrey S. Edwards, *Prosecutorial Misconduct*, 30 AM. CRIM. L. REV. 1221, 1221-22 (1993) (“Because a prosecutor can be involved in a criminal case from investigation through sentencing, the areas where prosecutorial misconduct can occur are broad.”).

⁸³ *United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974) (holding that defendant’s Fifth Amendment rights are violated when a prosecutor knowingly presents perjured testimony to a grand jury).

⁸⁴ *United States v. Bagley*, 473 U.S. 667, 683-84 (1985).

⁸⁵ *Dillon v. United States*, 307 F.2d 445, 449 (9th Cir. 1962) (holding that defendant’s guilty plea was improperly induced by prosecutor’s conduct).

⁸⁶ *Marshall v. Hendricks*, 307 F.3d 36, 65 (3d Cir. 2002) (finding misconduct where prosecutor mischaracterized the testimony of defense witnesses).

⁸⁷ *United States v. Kojayan*, 8 F.3d 1315, 1320-25 (9th Cir. 1993) (detailing misconduct by prosecutor’s supervisors in briefing and arguing the case on appeal).

to the causes, common manifestations, and scope of the problem, and give them the time and space to think critically about how best to respond to it or attempt to prevent it altogether. The overarching goal is to help students develop the analytical skills and good judgment necessary to guide them as practicing lawyers when they are forced to confront the tangle of legal and ethical issues that prosecutorial misconduct presents, regardless of the specific form it takes.

The question for clinicians is which form or forms of misconduct to select as the focus for the module. I suggest selecting either: (1) the most common strains of misconduct; or (2) those that defense counsel is most likely to detect or prevent; or (3) those that are most likely to surface in the work performed by that particular clinic.⁸⁸ In some instances, of course, these choices may overlap. In this article, I focus on misconduct that is more prevalent and more likely to come to counsel's attention: failure to disclose exculpatory evidence, use of perjured testimony or false evidence, and improper argument.⁸⁹

C. Black Letter Law and Beyond: Teaching the Substantive Law of Prosecutorial Misconduct

How should clinicians structure the portion of the module that addresses the substantive law of prosecutorial misconduct? A strong lesson plan will seek to achieve several different learning goals: providing black letter law instruction, encouraging discussion about possible proactive and reactive responses by counsel, and finally, conveying the importance of the issue without leaving students feeling disillusioned, overwhelmed, and cynical.

⁸⁸ Arguably, the most effective selection technique is one that fits most precisely with the objectives of the clinic; for example, if the clinic takes juvenile cases with little pretrial motions practice, the discussion of prosecutorial misconduct might be specific to bench trials. If the clinic's focus is felony trial work, the course might cover other kinds of misconduct—such as inflammatory and improper remarks during closing arguments—that are specifically directed at the jury.

⁸⁹ *Brady* violations are among the most common types of misconduct raised in prisoner claims. Gershowitz, *supra* note 3, at 1076. The knowing use of false evidence by prosecutors and improper arguments to the jury are also well-documented examples of prosecutorial misconduct. See, e.g., Jeffrey L. Kirchmeier, Stephen R. Greenwald, Harold Reynolds & Jonathan Sussman, *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1356-64 (2009); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WISC. L. REV. 399, 402.

Black letter law instruction is necessary to familiarize students with the basic forms of, and remedies for, prosecutorial misconduct. With this foundation, students can learn to recognize prosecutorial misconduct when it arises, develop practices designed to nip it in the bud, and prepare to respond effectively and in the moment when proactive measures fail. This recognition-and-response skill set is particularly critical when the misconduct occurs in the charged atmosphere of a trial, where events unfold quickly and a failure to object and seek a curative instruction or other remedy can have outsized consequences.⁹⁰

In teaching this part of the module, clinicians should resist the temptation to adopt a pure case-dialogue approach, wherein the law is delivered as lecture and the materials are limited to excerpted appellate cases in a textbook. That is not to suggest that such assigned readings are unimportant: on the contrary, there are many excellent textbooks, treatises, and law review articles that clearly and concisely delineate the various strains of prosecutorial misconduct and applicable remedial measures. But it is important to supplement these materials with readings and exercises drawn from and informed by practitioners' experiences. Nothing illuminates an amorphous concept better than a concrete example. Not only do clinicians' real-world experiences make the topic accessible, they become a starting point for a class discussion that explores other ways in which the misconduct might have been addressed in that particular situation. What follows are some illustrations of the teaching method I propose.

1. *The Duty to Disclose Exculpatory and Impeachment Evidence*

To introduce students to the concept that the defendant has a constitutional right to review—and the prosecutor a concomitant obligation to disclose—exculpatory evidence, it makes sense to begin by assigning students the Brady/Bagley/Kyles line of Supreme Court cases.

⁹⁰ The failure to object to prosecutorial misconduct in a timely manner means that the issue is waived and reviewable on appeal only for plain error. *United States v. Bracy*, 67 F.3d 1421, 1431 (9th Cir. 1995). Defense counsel's failure to object will also mean that she will have waived the opportunity to seek remedial measures, such as a curative instruction or a mistrial. *United States v. Taylor*, 514 F.3d 1092, 1094 (10th Cir. 2008).

In *Brady v. Maryland*, the Supreme Court held that the Due Process Clause of the Federal Constitution requires prosecutors to disclose to defense counsel any “evidence material either to guilt or to punishment.”⁹¹ In *United States v. Bagley*, the Court expanded the *Brady* holding to impose the same disclosure requirement where the evidence in question tended to impeach the credibility of a prosecution witness.⁹² The Court made clear that prosecutors bore these disclosure obligations regardless of whether defense counsel had made an explicit request for the information.⁹³ To win a reversal of the conviction on a *Brady* error claim, the defendant must show that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”⁹⁴

Having established the black letter law baseline, the clinician is now faced with the challenge of bringing *Brady* errors to life. As stated above, I believe this is most effectively done through the use of a hypothetical or actual case. An instructor in an appellate clinic, for example, might begin with a fact pattern in which a client is charged with bank robbery and the key evidence against him consists of three eyewitness identifications provided by three different tellers. The prosecutor, however, has not told defense counsel that an elderly, near-sighted customer in the bank picked a different person out of the same line-up, and it is not until after the client is convicted that defense counsel discovers this information. Given the weight of the evidence against the defendant, and the arguable weakness of the customer’s identification, was the prosecutor correct in concluding that the latter’s identification was not “material,” and therefore need not be disclosed under *Brady*? Or does defense counsel have a viable, if not winning claim that her client’s due process rights were violated and that the prosecutor’s determination constitutes misconduct?

⁹¹ 373 U.S. 83, 87 (1960).

⁹² 473 U.S. 667, 677 (1985) (“Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule.”) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

⁹³ *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (stating that the Court in *Bagley* held that regardless of whether defense counsel requested it or not, “favorable evidence is material, and constitutional error results from its suppression by the government if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”).

⁹⁴ *Bagley*, 473 U.S. at 682. The Court defined “reasonable probability” to mean a “probability sufficient to undermine confidence in the outcome.” *Id.*

If the appellate clinic instructor wanted to focus the discussion on the non-disclosure of impeachment evidence, she might choose a hypothetical post-conviction drug case in which the prosecutor did not tell defense counsel that her deputy promised “to see what I could do,” for a key informant facing jail time. The prosecutor’s decision was based on her belief that because her deputy never followed through and the informant received a significant prison sentence despite his testimony against the defendant, the information was not material. Is the prosecutor correct that this information was immaterial? Or does defense counsel have a winnable argument that the prosecutor violated her disclosure obligations because the informant might have been influenced to shade his testimony after hearing the half-promise of the deputy? By using these kinds of hypotheticals, the clinician could assign teams of students to brief and argue these Brady/Bagley claims, some as prosecutors and some as defense attorneys.⁹⁵

Brady violations also make for good discussion topics in trial-based criminal clinics. At first blush, it might seem otherwise, as most prosecutorial misconduct of this type is not discovered until after trial. But there are three reasons why it makes sense to discuss Brady violations in a trial-focused clinic. First, there are proactive strategies trial counsel can employ to reduce the likelihood of such a violation occurring; second, there are steps trial counsel can take to preserve the record for appellate counsel; and finally, as a practical matter, trial lawyers need to be well-versed in Brady error law because they often write and argue their own appeals.

Carefully crafted discovery requests are crucial for developing a solid record for an appeal. The more specific the request for information and the more carefully it is tied to counsel’s theory of defense, the more difficult it will be for the prosecutor to argue on appeal that the non-disclosed evidence was immaterial or unlikely to make a difference in the ultimate outcome. To practice developing this skill, the clinician may have the students generate some sample requests or discovery motions and consider providing a few exemplars.

A pointed discovery letter or pre-trial motion also serves as a proactive measure: a prosecutor may be less inclined to hide information

⁹⁵ The examples sketched out above are just that, sketches, and not intended as fully developed hypotheticals. It is up to the individual clinician to add the detail and nuance that make for a truly challenging and thought-provoking assignment.

that is explicitly demanded of her and will more likely actively search her files for such information if prodded to do so. Even a prosecutor suffering from tunnel vision is more likely to give borderline discoverable documents a hard look before deciding that there is really nothing worth turning over. Another proactive measure is looking into the reputation of the prosecutor. What do other defense attorneys say about her? If she is known for crossing the line in her zeal to convict then it may make sense to have a polite but forceful conversation with her at the outset of the case.

For those students in the clinic who aspire to become prosecutors, this aspect of the module is an opportunity to learn about the parameters of the prosecutor's disclosure obligations as well as the normative goals that animate them.⁹⁶ Conversely, they will also have the chance to reflect upon the myriad reasons why Brady violations occur and how they can adopt practices and strategies designed to ensure against the possibility of stepping over the line themselves.

2. *The Use of False Evidence*

A prosecutor who puts on evidence that she knows to be false or who stands by silently while her witness lies violates a defendant's right to a fair trial.⁹⁷ Among the most topical and interesting examples of the use

⁹⁶ Unfortunately, as a recent Supreme Court case makes clear, this opportunity may not occur in law schools as often as it should. In *Connick v. Thompson*, the respondent, John Thompson, sued county prosecutors and the prosecutor's office in New Orleans after suffering a wrongful murder conviction and near execution. Thompson's civil suit was based in part on the trial prosecutors' multiple *Brady* violations during his criminal trial, which led to Thompson "spen[ding] eighteen years in prison, fourteen of them isolated on death row." 131 S. Ct. 1350, 1370 (2011) (Ginsburg, J., dissenting). Thompson was awarded \$14 million by a jury, a verdict that the Supreme Court reversed. *Id.* at 1365-66. In dissent, Justices Ginsburg, Breyer, Sotomayor, and Kagan documented the numerous failings of the Orleans Parish District Attorney's Office to train its prosecutors in the basic requirements of *Brady*, finding that "the evidence demonstrated that misperception and disregard of *Brady's* disclosure requirements were pervasive in Orleans Parish." *Id.* Rejecting the majority's argument that the head of the district attorney's office should have been able to rely on the "professional education and status of his staff," the dissent wrote, "On what basis can one be confident that law schools acquaint students with prosecutors' unique obligations under *Brady*? [One prosecutor] told the jury that he did not recall covering *Brady* in his criminal procedure class in law school. [Another prosecutor's] alma mater, like most other law school faculties, does not make criminal procedure a required course." *Id.* at 1385.

⁹⁷ *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Clinicians should point out that defense counsel is also prevented by law and ethics from knowingly presenting false evidence.

of false evidence come from the prosecutor's reliance on informants.⁹⁸ For these reasons, the clinician may want to design hypotheticals and class discussions around these types of cases.

The testimony of informants—or snitches, as they are known colloquially⁹⁹—presents fertile ground for this type of misconduct.¹⁰⁰ Many informants are accomplished liars with good reason to embellish their testimony. And while informants will solemnly declare on the witness stand that the prosecutor has instructed them to tell the truth, there is no doubt that the more precise the fit between that “truth” and the prosecutor's version of events, the more likely it is to be useful.¹⁰¹ This reality, combined with the fact that useful testimony is often rewarded with money or the promise of favorable treatment, provides a strong incentive to embellish, or in extreme cases, tell a story that is complete fiction.¹⁰²

The documented instances of this kind of misconduct by defense counsel are fewer, however, in part because defense counsel has no obligation to put forward any evidence at all, and often will elect not to call any witnesses. Defense counsel, however, faces a unique ethical and legal quandary in situations in which her client insists upon testifying in a manner that defense counsel knows to be false. In these instances, defense counsel's duty of loyalty and confidentiality to her client is in direct conflict with her duty of candor to the court. This issue, while fascinating, rarely arises in actual practice. RHODES & LUBAN, *supra* note 18, at 323-32 (noting rarity of the problem and citing to different commentators' perspectives on possible solutions).

⁹⁸ Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 CIN. L. REV. 645, 655 (2004) (stating that the use of informants “is on the rise,” and that “nearly every drug case involves an informant, and drug cases in turn represent a growing proportion of state and federal dockets”).

⁹⁹ Davis, *supra* note 62, at 52.

¹⁰⁰ *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993) (“By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.”).

¹⁰¹ Davis, *supra* note 62, at 55 (“A defendant may know or believe that he will get a better deal from the prosecutor if he can provide information in the form of testimony that will corroborate and strengthen the prosecutor's case against another defendant.”).

¹⁰² Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 107-08 (2006) (citing to a Northwestern University Law School study demonstrating that “45.9 percent of documented wrongful capital convictions have been traced to false informant testimony”). To be sure, perjured testimony is not the exclusive province of informants; any motivated witness can lie. So too, can a lawyer. Indeed, some of the more egregious cases in which false evidence was used to obtain a conviction involve arguments made

The remedy for a conviction obtained in a case involving the use of false evidence is reversal and a new trial. Reversal is required “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”¹⁰³ But while this standard is favorable to a defendant on appeal, the goal is to expose the false evidence before or during the trial so as to avoid a wrongly obtained conviction in the first instance. If defense counsel can identify and expose the false evidence before trial she can take steps to ensure that it is not used. If she discovers false evidence during trial, she can seek a mistrial, or, if she feels a mistrial is not in her client’s best interests, a curative instruction.

Of course, not all lies are susceptible to immediate exposure—there are some aspects of a witness’ pretrial statements or testimony that counsel may suspect are perjured but cannot affirmatively disprove. But, as with Brady violations, there are proactive steps counsel can take to reduce the likelihood of falsehoods passing undetected. Key among those is pretrial investigation.

Clinicians should take care to emphasize that the types of investigation outlined below should be employed not only by defense attorneys, but also by prosecutors. While it may seem odd to suggest that prosecutors should assume that their witnesses are untrustworthy, if those witnesses are informants or individuals with a criminal background, they may well be. Even victim witnesses with no criminal background may be providing incomplete information. A prosecutor has an ethical obligation to obtain a conviction only by lawful means as well as a strong professional incentive to come across as a competent and effective advocate. A thorough knowledge of her witnesses is critical both to ensuring that all of the appropriate pretrial disclosures are made and to ensuring that the witnesses’ credibility is not impeached on cross examination with material that the prosecutor should have uncovered on her own.

Many prosecutors rely heavily on the police or federal agents to provide background information on their witnesses.¹⁰⁴ This reliance can

by the prosecutor herself. *See, e.g.*, *United States v. Kojayan*, 8 F.3d 1315, 1318 (9th Cir. 1993) (stating that the prosecutor “was not telling the truth,” and detailing the nature and extent of his false statements during closing argument).

¹⁰³ *United States v. LaPage*, 231 F.3d 488, 491 (9th Cir. 2000) (quoting *United States v. Bagley*, 473 U.S. at 679 n.9)).

¹⁰⁴ Ellen Yaroshofsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 936 (1999).

prove problematic, particularly in the context of informants, whose handlers are usually those same law enforcement officers.¹⁰⁵ Handlers may have strong incentives not to dig too deeply into their informants' past or present activities to preserve their informants' effectiveness for future cases. Moreover, by exposing their informants, they may also be exposing themselves to criticism for turning a blind eye to their informants' shady dealings.¹⁰⁶ Given the reality of today's world, where so much useful information is available with a computer and an internet connection, a prosecutor who unquestioningly accepts police assurances that full disclosure has been provided or adopts an ostrich posture in the hope that "what I don't know can't hurt me," may be proven wrong in an explosive and embarrassing way.

It is time-consuming but worthwhile for counsel—both prosecutors and defense attorneys—to conduct their own investigation. Prosecutors can demand the informant's rap sheet from the police, and defense counsel can demand it from the prosecutor. Both attorneys can comb through court records, many of which may be available online, to verify that full disclosure of the informant's criminal history has been provided. Court records can also provide access to other cases in which the informant has provided helpful information to the state.

Prior testimony by an informant can be fertile ground for ferreting out lies and half-truths. These transcripts can be used like a yardstick against which to measure every word the informant utters in the current case. Prosecutors armed with this information are in a strong position to ensure that their witness is testifying truthfully. Ignorance can be perilous: when the current under-oath testimony contradicts the sworn testimony provided in the past, defense counsel who has done her due diligence is in a position to argue that the trial has been infected by perjury.¹⁰⁷

¹⁰⁵ Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 674-75 (2004) ("Most informants are created and managed by police officers whose highly discretionary activities evade judicial and public scrutiny.").

¹⁰⁶ *Id.* at 681-82 ("The criminal informant also teaches us that culpability for legal transgressions can be mitigated by participating in illegal conduct at the behest of the police in order to catch other transgressors, who in turn may mitigate their own liability in the same fashion. At the same time, the fact of ongoing informant criminality sends an even more troubling signal: for those who cooperate with the police, other illegal acts such as taking or dealing drugs or carrying a weapon may be excused.").

¹⁰⁷ The alternative, that the informant was lying in prior trial testimony, is equally damaging. Although it is not prosecutorial misconduct to rely on a witness who has lied

Clinicians should encourage students to brainstorm these and other ways in which counsel for both sides can look into the backgrounds of informants and other prosecution witnesses. There is the possibility of interviewing the witness' family or friends, as well as any former accomplices or co-conspirators. While this information is not as reliable as transcript testimony, it may uncover facts that the informant assumes the prosecutor, defense counsel, and his handlers do not know and are therefore safe to twist or deny. For defense counsel, a critical source of information is the client herself, who may have intimate knowledge of the key players and ideas for how to approach them.¹⁰⁸

3. *Improper Argument*

Implicit in the prosecutor's special obligation to seek justice is a prohibition on crafting arguments based on facts outside the record,¹⁰⁹ inadmissible evidence,¹¹⁰ or histrionic language designed to inflame or scare the jury so that it convicts based on emotion rather than evidence.¹¹¹ Improper argument can also consist of insults directed at the defendant,¹¹² disparaging comments about defense counsel¹¹³ and vouching for the credibility of the prosecutor's own witnesses.¹¹⁴

in the past, it is not the mark of a strong case or strong prosecutorial ethics to use someone so compromised in the pursuit of a conviction.

¹⁰⁸ Encyclopedic knowledge of the case record, including documents and other evidence that may not be introduced at trial, is also critically important. Identifying false evidence is often a comparative process; that is, the testimony or other evidence adduced at trial contradicts information in the record that counsel knows to be true. This encyclopedic knowledge is also fundamental to building the confidence required for defense counsel—particularly young and inexperienced defense counsel—to stand up in open court and object to a prosecution witness' testimony as false or at least inconsistent with known facts.

¹⁰⁹ *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974).

¹¹⁰ *United States v. Fletcher*, 322 F.3d 508, 516 (8th Cir. 2003).

¹¹¹ *Berger v. United States*, 295 U.S. 78, (1935) (characterizing the prosecutor's closing argument as "undignified and intemperate").

¹¹² *Bains v. Cambria*, 204 F.3d 964, 974 (9th Cir. 2000); *United States v. Vue*, 13 F.3d 1206, 1212-13 (8th Cir. 1994); *United States v. Doe*, 903 F.2d 16, 20 (D.C. Cir. 1990).

¹¹³ *United States v. Friedman*, 909 F.2d 705, 709-10 (2d Cir. 1990); *United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989); *United States v. Rodrigues*, 159 F.3d 439, 452 (9th Cir. 1998).

¹¹⁴ *United States v. Jackson*, 473 F.3d 660, 670 (6th Cir. 2007) ("Improper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal

The duty to refrain from this kind of impropriety extends to defense counsel: “both sides of the table share a duty to confine arguments to the jury within proper bounds.”¹¹⁵ Under what is known as the “invited response rule,” a prosecutor’s improper comments are viewed contextually.¹¹⁶ If the prosecutor’s misconduct occurred during the rebuttal portion of the closing and was provoked by defense counsel’s own improper argument, reviewing courts will generally conclude that the prosecutor was simply “righting the scale” so that reversal of the defendant’s conviction is not required.¹¹⁷

For defense counsel, the strength of the remedy turns on two factors: first, the propriety of her own remarks, and second, her ability to make a contemporaneous objection. If counsel stays within the bounds of proper advocacy and preserves the prosecutor’s error for review by objecting at the time the prosecutor’s improper argument is made, an appellate court will reverse if the misconduct interfered with the ability of the jury to assess the evidence impartially: “[T]he relevant question is whether the prosecutor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”¹¹⁸ Courts weigh multiple factors, including whether: the misconduct was invited; was truly blatant and inflammatory; the case against the defendant was otherwise solid; and the trial judge mitigated the impact of the misconduct with a curative instruction.¹¹⁹ Often, this type of misconduct is not an isolated instance. The more numerous the instances, the more likely that the cumulative effect of the errors will require reversal.¹²⁰ If

belief in the witness’s credibility[,] thereby placing the prestige of the United States Attorney behind that witness.”) (alternation in original) (citations omitted).

¹¹⁵ *United States v. Young*, 470 U.S. 1, 8-9 (1985).

¹¹⁶ *Id.* at 11-12.

¹¹⁷ *Id.* at 12-13.

¹¹⁸ *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *see also Young*, 470 U.S. at 11 (stating that reversal is required if the prosecutor’s “conduct appears likely to have affected the jury’s discharge of its duty to judge the evidence fairly”).

¹¹⁹ *Young*, 470 U.S. at 12-13; *United States v. Carpenter*, 494 F.3d 13, 23 (1st Cir. 2007); *Moore v. Morton*, 255 F.3d 95, 107 (3d Cir. 2001); *United States v. Davis*, 514 F.3d 596, 613 (6th Cir. 2008).

¹²⁰ *United States v. Conrad*, 320 F.3d 851, 856 (8th Cir. 2003); *United States v. Combs*, 379 F.3d 564, 574-76 (9th Cir. 2004); *United States v. Hands*, 184 F.3d 1322, 1334 (11th Cir. 1999).

defense counsel fails to object, however, the misconduct is reviewed under the highly deferential plain error standard.¹²¹

Unlike misconduct involving violations of the Brady rule or the use of false evidence, counsel's ability to spot and call out this type of misconduct does not depend on pretrial investigation or intimate familiarity with the record. Rather, it depends upon knowledge of the relevant case law, careful attention to the word choice of one's opponent, and the confidence necessary to make this type of objection.

In teaching this skill, the importance of real-life examples is crucial: "vouching," "disparaging," and "inflammatory argument" are abstract concepts that the clinician's actual experiences can bring instantly to life. In teaching students to recognize this type of misconduct, the clinician's task is further complicated by the fact that "[t]he line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone."¹²² It is important that students recognize this "gray zone" so that they can learn to avoid it themselves, as well as exercise caution in deciding whether an objection to "gray zone" remarks is worth making.¹²³

In-class exercises can include role-plays in which some students are assigned to give potentially objectionable closing arguments and other students are assigned the role of opposing counsel. In both roles, the students should have to identify the improper statement—if any—and make the appropriate on-the-spot objection. Following the example, the discussion can center on why—or whether—a particular statement or claim was out-of-bounds and what the prosecutor or defense counsel should do, or not do, in response. At the conclusion of the exercise, clinicians might prompt the students to discuss the importance of

¹²¹ *United States v. Frady*, 456 U.S. 152, 163 & n.14 (1982). The prosecutor's position is somewhat different. If the prosecutor fails to object to an improper argument by defense counsel and the defendant is subsequently acquitted, there is no appeal. Thus, a contemporaneous objection is the prosecutor's only remedy. Additionally, reviewing courts strongly encourage prosecutors to object and seek a curative instruction rather than use the invited response doctrine to justify responding in kind under the theory that "two wrongs don't make a right." *Young*, 470 U.S. at 13.

¹²² *Young*, 470 U.S. at 7.

¹²³ *Id.* at 13-14 (stating that "interruptions of arguments, either by an opposing counsel or a presiding judge, are matters to be approached cautiously").

managing one's emotions, as many of the comments classified as improper argument are chalked up to a momentary loss of self-control.¹²⁴

Heretofore, the curriculum design under discussion has sought to define and contextualize prosecutorial misconduct by focusing on the prosecutor's legal and ethical obligations, the different roles played by prosecutors and defense attorneys, what each can do proactively to combat misconduct, and what defense counsel can do specifically to respond to misconduct that proves unpreventable. The remainder of the article focuses on defense counsel's legal and ethical obligations in responding to prosecutorial misconduct.

IV. DEFENSE COUNSEL'S LEGAL AND ETHICAL OBLIGATIONS WHEN CONFRONTED WITH PROSECUTORIAL MISCONDUCT

Unlike the prosecutor, who is the agent of a state, county, or federal district, defense counsel is the agent of her client. In that role, she is "legally and ethically required to represent [her] client loyally and with zeal."¹²⁵ At first blush, this duty seems refreshingly simple and free of the internal contradictions that complicate the prosecutor's "higher" obligation to "seek justice."¹²⁶

But "zealous advocacy" is not defense counsel's only obligation. As an officer of the court, she also owes a duty of candor to the tribunal,¹²⁷ and, as a member of the bar, she has an obligation to comply with the ethical rules adopted by the state or district in which she practices.¹²⁸ Additionally, defense counsel has institutional concerns, which are not formal obligations but nonetheless may carry an influence stronger than any statute or official command has the power to exert. Most defense attorneys are "repeat players," returning regularly to the same courtrooms where they interact with the same judges and prosecutors.¹²⁹ In this fishbowl environment, word travels fast, and the

¹²⁴ *Dunlop v. United States*, 165 U.S. 486, 498 (1897) (noting that counsel tends to stray outside the boundaries of proper advocacy during the "heat of argument").

¹²⁵ Nathan A. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 673 (1997).

¹²⁶ *Id.*

¹²⁷ MODEL RULES OF PROF'L CONDUCT, R. 3.3 cmt. (2008).

¹²⁸ Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 16 (1967).

¹²⁹ Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1922-23 (1992) (describing prosecutors and defense attorneys as "typically repeat players who deal with each other and with the system regularly").

effectiveness of a defense attorney—whether she is part of a public defender office, a solo practitioner or a partner at a marquee firm—depends upon her reputation as much as it does upon her litigation skills.¹³⁰

A defense attorney who maintains cordial relationships with prosecutors is more likely to succeed in negotiating a reasonable offer for a client who is seeking to resolve the case without a trial than a defense attorney who is regarded with dislike and suspicion.¹³¹ Indeed, since the vast majority of cases end in guilty pleas,¹³² defense counsel's ability to negotiate and get along with a prosecutor is often the determining factor in whether her client receives a decent outcome or a poor one.¹³³ A defense attorney who is known as a muckraker, a tattletale, or a moral crusader may quickly find herself isolated, mistrusted, and despised by her adversaries, making it difficult for her to be an effective advocate for the most sympathetic defendant, never mind the run-of-the-mill miscreant.¹³⁴ If defense counsel fears that pointing an accusatory finger at a powerful prosecutor may result in a pariah-like status, she may refrain from following through on her legal and ethical obligations to object to and report prosecutorial misconduct.

¹³⁰ Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 105 (1995) (stating that whether a defendant receives a better offer than the prosecutor's "standard deal" depends on multiple considerations that include "defense counsel's ability, reputation, and relationship"); Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115, 145 (1997) ("Reputation is likely to have a significant effect on the development of cooperative relationships between prosecutors and defense counsel because criminal law is a specialty, and repeat players are frequent, despite high turnover in prosecutorial offices.").

¹³¹ Uphoff, *supra* note 130, at 92 (noting the importance of "attempting to maintain cordial relations with lawyers in the prosecutor's office" and stating that "[a]n arrogant or unnecessarily hostile attitude is unlikely to redound to the client's benefit").

¹³² Hollander-Blumoff, *supra* note 130, at 116-17.

¹³³ *Id.* at 135-47 ("Research indicates that variance among plea agreements depends on the identity of the attorneys involved, irrespective of evidence in the case, type of crime, or other circumstances. Most prosecutors and defense counsel interviewed for this Note agreed that the behavior and relationship between lawyers may affect not just the tone of their interaction but the ultimate disposition of the case.").

¹³⁴ Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 752-53 (2003).

In this section, I explore the ways in which clinicians can encourage students to think through these conflicting duties, obligations, and institutional concerns, focusing on a pedagogy that combines black letter law instruction with group discussion and skills acquisition exercises informed by real-world experience.

A. Legal Obligations

Defense counsel's duty to provide competent representation is constitutionally enshrined. The Sixth Amendment provides those accused of crimes with the right to counsel, which the Supreme Court has interpreted to mean the right to effective counsel.¹³⁵ In *Strickland v. Washington*, the Court held that this Sixth Amendment right is violated when counsel's representation falls below an objective standard of reasonableness and the defendant is prejudiced as a result.¹³⁶ Prejudice is demonstrated where the defendant can show that, but for defense counsel's deficiencies, the result of the legal proceedings might have been different.¹³⁷

Strickland's standard is a highly deferential one, which eschews the "distorting effects of hindsight."¹³⁸ The question is not whether a different attorney could have adopted a better strategy, but rather whether the strategy employed by the attorney in question was so unreasonable that it cannot be characterized as a strategy at all.¹³⁹ Strickland does not entitle a defendant to an error-free defense, but there are certain errors that weigh more heavily than others. Although every case turns on its own facts, the failure to identify and object to prosecutorial misconduct is the type of inaction that may result in a finding of ineffective assistance of counsel.¹⁴⁰

¹³⁵ *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

¹³⁶ 466 U.S. 668, 687, 690 (1984).

¹³⁷ *Id.* at 692.

¹³⁸ *Id.* at 689.

¹³⁹ *Girts v. Yanai*, 501 F.3d 743, 756-57 (6th Cir. 2007) (finding that defense counsel's failure to object to closing argument by prosecutor that improperly commented upon defendant's constitutionally protected right to silence was not sound trial strategy); *Martin v. Grosshans*, 424 F.3d 588, 591 (7th Cir. 2005) (finding that the failure to object when prosecutor, inter alia, repeatedly disparaged defense counsel was not sound trial strategy).

¹⁴⁰ *See, e.g., Freeman v. Class*, 95 F.3d 639 (8th Cir. 1996) (finding defense counsel ineffective, inter alia, for failing to object to the prosecutor's repeated reference to the defendant's invocation of his right to remain silent which allowed the jury to "equate

One instructive example is the state court prosecution of Rufus Washington for sexually abusing the nine-year-old daughter of his girlfriend, with whom he was cohabitating at the time.¹⁴¹ The girl's allegations were the only evidence against Washington, so the case boiled down to a "he-said she-said" credibility contest.¹⁴² In his closing argument, the prosecutor "extensively berated Washington's character before the jury, emphasizing that Washington did not work, beat [his girlfriend] regularly, consumed alcohol excessively, and did not make payments on [her] home."¹⁴³ He urged the jury to consider Washington's "lifestyle" in determining his guilt or innocence and argued that the crime "sure fits him."¹⁴⁴ The prosecutor also argued facts that were not in evidence, urging the jurors to find the girl believable because she had told the same story to her mother, a social service worker, and a police officer, none of whom had been permitted to testify to this inadmissible hearsay.¹⁴⁵

Defense counsel did nothing to oppose the prosecutor's misconduct. He objected only once during the cross examination of his client,¹⁴⁶ and sat silently during closing argument, allowing the prosecutor's character assault and improper use of inadmissible allegations to go uninterrupted and unremarked upon.¹⁴⁷ Washington

[the defendant's] silence with guilt"); *Flores v. Demskie*, 215 F.3d 293 (2d Cir. 2000) (holding that counsel was ineffective for waiving defendant's right, under state law, to examine the testifying witnesses pretrial statements to prosecutors); *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) (failure by defense counsel to object to prosecutor's improper references to defendant's prearrest silence was "constitutionally deficient" under *Strickland*).

¹⁴¹ *Washington v. Hofbauer*, 228 F.3d 689, 694 (6th Cir. 2000).

¹⁴² *Id.* at 707-08 ("As both parties agree, this trial was a credibility contest. There is no evidence in the record indicating Washington's guilt outside of Tamara's own allegations. Thus, outside the substance of Washington's and Tamara's testimony, nothing was more important to the case than the indicia that one story was more believable than the other.").

¹⁴³ *Id.* at 695.

¹⁴⁴ *Id.* at 695-96.

¹⁴⁵ *Id.* at 697.

¹⁴⁶ After the prosecutor accused the defendant for the second time of "smacking around" his girlfriend, defense counsel objected to the question as asked and answered. *Id.* at 696.

¹⁴⁷ *Id.* at 696-97.

was ultimately convicted of a lesser offense and sentenced to seventeen to thirty years in prison.¹⁴⁸

In granting Washington's petition for habeas relief, the federal appeals court condemned the prosecutor's tactics. It characterized his repeated attacks on Washington's character, and his appeal to the jury to convict on that basis as "plainly improper" and as rising to the level of "severe" misconduct.¹⁴⁹ The court was equally disapproving of the prosecutor's distortion of the record, which it found particularly problematic "because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty."¹⁵⁰

But the appeals court saved its strongest criticism for defense counsel, whose passivity allowed the misconduct to continue unchecked.¹⁵¹ There was, the court found, no justification for such poor lawyering: "his silence was due to incompetence and ignorance of the law rather than as part of a reasonable trial strategy."¹⁵² While "a prosecutor must be doubly careful to stay within the bounds of proper conduct" in cases involving salacious allegations and little concrete evidence, the court emphasized that it is ultimately the responsibility of defense counsel to make sure that the prosecutor "does not transgress these bounds."¹⁵³ Like negative space, defense counsel's ineffectiveness took shape in the picture he did not paint. His failure to call the prosecutor to account for the misconduct made him a tacit partner in his adversary's wrongdoing.

The Washington case teaches several important lessons. Defense counsel's inability to recognize the "severe" and "blatant" prosecutorial misconduct that was plain to the appellate court suggests that his inaction, to an extent, was fueled by ignorance. In this respect, the case hammers home the importance of teaching this "recognition skill" to law students so that they do not make the same mistake. The case also makes real the consequences of allowing prosecutorial misconduct to persist

¹⁴⁸ *Id.* at 694, 697. Washington was acquitted of first-degree criminal sexual conduct, which requires that the perpetrator penetrated the victim. The jury convicted him of second-degree criminal sexual conduct, which does not require an act of penetration. *Id.* at 697.

¹⁴⁹ *Id.* at 699-700.

¹⁵⁰ *Id.* at 700.

¹⁵¹ *Id.* at 703-09.

¹⁵² *Id.* at 703.

¹⁵³ *Id.* at 709.

unchecked.¹⁵⁴ Washington paid for his lawyer's passivity by serving a decades-long sentence in prison of which he served ten years prior to the reversal of his conviction.¹⁵⁵

When discussing the Washington case, clinicians might also ask their students to consider what role, if any, the nature of the crime might have played both in the prosecutor's misconduct and defense counsel's failure to object to it. Theoretically, all criminal defendants are entitled to the presumption of innocence and the right to a zealous defense. But do these rights rest on shakier ground when the charge is the sexual abuse of a child? In this type of case, should defense counsel be particularly sensitive to the possibility that the heinousness of the allegations will provide the motivation and justification not only for prosecutorial misconduct but also for a less than forceful response to it? The fraught subject of a client's "deservingness" is one that clinicians should press students to identify and explore.

As the Washington case illustrates, a thorough examination of defense counsel's legal obligations in the face of prosecutorial misconduct involves more than black letter law instruction on the constitutionally mandated standard of effectiveness. It also requires teaching students how to recognize prosecutorial misconduct when it arises and to reflect upon why it is critically important that they object to it, even—or perhaps especially—in cases where the charges themselves create an atmosphere that makes it difficult to do so.

B. Ethical Considerations

When teaching ethics in a clinical setting, instruction in the relevant case law and professional codes delineating what is and is not ethical behavior is only a starting point. Students must learn and understand those rules, of course, but ethical decision-making requires more: it requires judgment. It is a rare ethical dilemma that can be neatly

¹⁵⁴ Doubtless there were other factors that contributed to Washington's conviction, but the finding of the appellate court was clear: but for the errors of defense counsel—errors which consisted of failing to object to the relentless attacks on the character of the accused and the injection into jury deliberations of evidence that had never been presented at trial—the result of the proceedings might have been different. *Id.* at 705, 707-09.

¹⁵⁵ Rosenthal, *supra* note 14, at 957-58 (describing cases in which prosecutorial misconduct resulted in "lengthy incarceration, financial ruin, and in a number of instances, sentences of death").

resolved by rote application of Rule to Problem. Ethical rules are generally vague and broadly worded, while the situations calling for counsel to consult those rules are often maddeningly complex. Usually, an attorney arrives upon a solution only after transitioning back and forth between an abstract body of theoretical knowledge, the facts of the specific case, practical considerations external to the case (such as the long-term impact of a particular decision on defense counsel's institutional relationships), and finally, defense counsel's moral sense of what is just and appropriate.

1. Rules and Standards Generally

This part of the module might begin with black letter law instruction, specifically, defense counsel's ethical obligations as enumerated in the Model Code of Professional Responsibility ("Model Code"), Model Rules of Professional Conduct ("Model Rules), and the American Bar Association's Standards for Criminal Justice (ABA Standards).¹⁵⁶ The Model Code, Model Rules, and ABA Standards have no legal force of their own, but most states have adopted them in full or with minor changes.¹⁵⁷ Many of the duties set forth in the Model Rules and the Model Code apply to all lawyers,¹⁵⁸ and those specific to the

¹⁵⁶ The Model Code and the Model Rules were promulgated by the American Bar Association and have been adopted by most states. Stephen Gillers, *Regulation of Lawyers* 10-11 (8th Ed. 2009). Professor Zacharias has described the Model Code of Professional Responsibility as "an elaborate mixture of norms (i.e., "Canons"), high-minded statements regarding the American lawyer's role (i.e., "Ethical Considerations"), and rules that purport to fix appropriate conduct (i.e., "Disciplinary Rules")." Zacharias, *supra* note 67, at 223-24 & n.2. The Model Code of Professional Responsibility was adopted to provide additional guidelines regarding "the postures lawyers should take in a variety of situations." *Id.* The Criminal Justice Section of the American Bar Association developed a model set of standards for both prosecutors and defense attorneys "due to the limitations and lack of specificity in state ethical codes." Thomas F. Liotti & Christopher Zeh, *The Uneven Playing Field: Ethical Disparities Between the Prosecution and Defense Functions in Criminal Cases*, 17 *TOURO L. REV.* 467, 477-78 (2001).

¹⁵⁷ STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 10-11 (8th ed. 2009). There are some notable exceptions. Three states have yet to adopt the Model Rules, and some states, like New York, have adopted only parts of the Model Code. There are also outlier states, like California, which have rules of professional conduct that differ markedly from those promulgated by the American Bar Association. *Id.*

¹⁵⁸ *Id.* at 11 (8th ed. 2009) ("As you study the codes and rules of ethics, consider that they apply to all lawyers without regard to practice setting or nature of client.").

criminal justice system often apply both to the prosecutors and defense attorneys. While it is up to the individual instructor to select for discussion the model rule or rules that she believes will best fulfill the objectives of the course, this Article focuses on Model Rule 8.3 because it provides a particularly rich teaching opportunity in the context of teaching the topic of prosecutorial misconduct. While Model Rule 8.3 applies to all lawyers, it poses particularly thorny issues for defense counsel in the criminal context.

2. Model Rule 8.3

Model Rule 8.3 places an affirmative duty on all lawyers to report the misconduct of other lawyers. The text of the Rule reads: “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”¹⁵⁹

The comment accompanying Rule 8.3 states that “[t]he term ‘substantial’ refers to the seriousness of the possible offense.”¹⁶⁰ Counsel is cautioned to exercise “judgment” when interpreting the Rule, but the phrase “shall inform” makes clear that counsel’s reporting duty is mandatory, not discretionary. While the Rule applies to all lawyers, it poses a particularly complicated set of concerns for criminal defense attorneys, most of whom are repeat players in relatively small legal communities who depend on the good will of the very people they may be obligated to report.

The problem of prosecutorial misconduct puts the conflict between ethical obligations and institutional considerations into bold relief. Most students will not be surprised to learn that much of what qualifies as prosecutorial misconduct under the Federal Constitution is

¹⁵⁹ MODEL RULE OF PROF’L CONDUCT 8.3 (2008). Not every state has adopted Model Rule of Professional Conduct 8.3. California, for example, has no Rule 8.3 equivalent. NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 41 (3rd ed. 2004) (citing LAWS MAN. ON PROF. CONDUCT (ABA/BNA) ¶101:201. Georgia, Louisiana, and New York, have adopted variations on the rule. Ryan Williams, *Reputation and the Rules: An Argument for a Balancing Approach Under Rule 8.3 of the Model Rules of Professional Responsibility*, 68 LA. L. REV. 931, 935-38 (2008).

¹⁶⁰ MODEL RULE OF PROF’L CONDUCT 8.3 cmt. (2008).

also deemed a violation of the Model Rules.¹⁶¹ Model Rule 3.8, for example, tracks the language of *Brady* in requiring that the prosecutor “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused,” and Model Rules 3.3 and 3.4 incorporate the *Napue* ruling by prohibiting prosecutors (and defense attorneys) from making false statements in court or offering false evidence.¹⁶² A defense attorney who learns of misconduct by a prosecutor has a duty under Rule 8.3 that extends beyond the obligation to take remedial steps in the case itself.¹⁶³ Not only must defense counsel weigh whether or not to lodge an objection, obtain a curative instruction, move for dismissal, or perhaps use her knowledge to gain some other tactical advantage, she must also consider whether she is ethically obligated to report the prosecutor to the state bar association once the legal proceedings have concluded.

In opening a class discussion about defense counsel’s Rule 8.3 reporting obligation, clinical instructors might begin with the empirical fact that very few defense attorneys report prosecutors who commit misconduct to the state bar or any other disciplinary authority.¹⁶⁴ In considering why this is so, clinicians should explore with students the normative and practical arguments for and against compliance. I have outlined those arguments below. How the clinician presses her students to generate those arguments in a class discussion will depend in large part on her particular teaching techniques and the readings she assigns before that particular class. Options to consider might include small group exercises with discussion questions and a requirement that the students report back their findings and conclusions or the assignment of hypotheticals based on real cases in which multiple students are assigned

¹⁶¹ *But see* Zacharias, *supra* note 26, at 734-35 (noting that the codes do not address, inter alia, “important aspects of prosecutorial participation in improper police conduct,” or prosecutorial overreaching that involves abuse of the grand jury process or “abusing the plea bargaining and sentencing processes”).

¹⁶² There are a few important distinctions. In one respect, Rule 8.3 is more forgiving than the *Brady* rule because it punishes a prosecutor only if she knew of the existence of the withheld exculpatory material. In the *Brady* context, the prosecutor has violated a defendant’s due process rights regardless of whether the evidence was withheld intentionally. But Rule 8.3 is also more rigid in that it is not necessary that the evidence be material for its withholding to be unethical. Zacharias, *supra* note 26, at 750-52.

¹⁶³ MODEL RULE OF PROF’L CONDUCT (2008).

¹⁶⁴ Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1086 (2009).

the role of defense attorney and argue opposing interpretations of the Rule in the context of that particular case.

a. The Normative Argument in Favor of Compliance

The normative argument for compliance with Rule 8.3 takes the view that defense counsel's obligation to act as a check on prosecutorial power is not confined to the parameters of a particular case. For this argument to make sense in the reporting context, the scope of defense counsel's obligation to neutralize prosecutorial excesses must be understood as systemic rather than case-specific.¹⁶⁵ It is not enough for defense counsel to expose a prosecutor's misconduct in court to protect the rights of an actual client. She must also seek a broader remedy designed to protect future hypothetical clients—both hers and those of other defense attorneys.¹⁶⁶

Reporting the prosecutor to the state bar arguably furthers the latter goal by exposing the prosecutor to potential punishments that are beyond the power of the trial judge to impose, such as probation, suspension, or some type of remedial training. By taking action to remove or rehabilitate a bad apple, defense counsel helps to maintain public confidence in the integrity of the barrel. On the other hand, if defense counsel fails to report, she enables a rogue prosecutor to continue to commit misconduct in the future. This often results in tainted convictions, disrepute to the prosecutor's office, and possibly, the conviction of innocent people.¹⁶⁷

¹⁶⁵ Susan Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?* 14 CLINICAL L. REV. 195, 219 (2007-2008) (discussing "the relationship between the goals of getting a positive outcome in particular cases and improving the system").

¹⁶⁶ This argument draws some support from empirical evidence demonstrating that even when defense counsel succeeds in getting the court to write an opinion excoriating the prosecutor for misconduct, the prosecutor rarely suffers any type of long-term consequence. Brad Heath & Kevin McCoy, *States Can Discipline Federal Prosecutors, Rarely Do*, USA TODAY, Dec. 8, 2010 (finding only six prosecutors who had been disciplined by any state bar since 1997, the first year that states were allowed to do so); David Margolick, *Punish Demjanjuk's Prosecutors? Not Likely*, N.Y. TIMES, Nov. 19, 1993, at A1 (quoting professor Stephen Gillers as saying that "history tells us that prosecutors who are condemned in judicial opinions never suffer any blemish on their career").

¹⁶⁷ Gershowitz, *supra* note 164, at 1062 (stating that when prosecutors are not punished for their misconduct, "they will be free to commit further misdeeds" and "sully the

b. The Practical Argument in Favor of Compliance

The practical argument in favor of compliance is that “[d]efense counsel is the most logical source of reporting” given her proximity to the misconduct and her intimate familiarity with the facts and legal issues of the case.¹⁶⁸ The proximity argument assumes that defense counsel witnesses the misconduct, while the intimate familiarity argument assumes that counsel’s extensive knowledge of the case puts her in the best position both to characterize the misconduct and adjudge its seriousness. Clinicians should encourage students to test these assumptions, as they are not always, or even usually, correct.

Turning to the assumption underlying the intimate familiarity argument, for example, instructors can ask their students to think about the role of the trial judge, another potential eyewitness who, assuming she is fair-minded, experienced, and attentive, may be equally well-qualified to diagnose the problem.¹⁶⁹ When leading a discussion geared toward generating counterarguments, the instructors might begin by asking the students to consider whether it might make more sense to place the reporting burden on the trial judge, who, unlike defense counsel, is presumed to be a detached observer.¹⁷⁰ The judge’s neutral—

reputation of the entire office, leaving ethical prosecutors to labor under a cloud of misconduct”).

¹⁶⁸ Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 980 (1984) (arguing that it is eminently sensible to have defense counsel bear the burden of reporting misconduct to the bar because she will “recognize it when it occurs”); Ted Wieseman, *Arbitrary Justice? Defense Counsel’s View*, 22-WTR CRIM. JUST. 13, 17 (2008) (arguing that “prosecutors and defense attorneys are the only people who know the cases well enough—the files, the evidence, the decisions, and the exercise of discretion—to be able to identify a specific action by a prosecutor as unfair, unjust, or unethical”).

¹⁶⁹ Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 544 (2009) (“Because of their legal training and accumulated expertise over time in the profession and on the bench, judges are also particularly well-positioned to evaluate attorney conduct to determine if it falls below the profession’s ethical standards.”).

¹⁷⁰ There is also the argument that the professional discipline of a prosecutor who has been found to have committed legal misconduct should be handled internally. Generally speaking, however, internal discipline is rarely meted out. The Office of Professional Responsibility (OPR), which is charged with disciplining federal prosecutors, is perhaps the most prominent example. The OPR, which holds its proceedings in secret, is widely viewed as lacking neutrality and detachment. Bruce A. Green, *Policing Federal Prosecutors*, 8 ST. THOMAS L. REV. 69, 84-87 (1995) (“Even under the best of circumstances, defense attorneys might doubt the efficacy of internal disciplinary mechanisms to curb prosecutorial misconduct.”); Lyn M. Morton, *Seeking*

and elevated—status among the parties ensures that her report of prosecutorial misconduct will be taken seriously by the bar rather than dismissed as the complaint of a disgruntled rival.¹⁷¹ Moreover, the American Bar Association’s Standing Commission on Professional Discipline obligates judges to make these reports: “Once a reviewing court has found a prosecutor’s actions to be misconduct in the form of a disciplinary rule violation, whether or not reversal or dismissal is warranted, the court should report the conduct to the appropriate disciplinary authorities.”¹⁷²

c. The Normative Arguments Against Compliance

In discussing the normative arguments against compliance with Rule 8.3, clinicians might press their students to consider whether it is appropriate—or even plausible—to conceive of defense counsel’s overarching obligation as systemic rather than client-specific. Is defense counsel’s primary duty to her client or to the improvement of the criminal justice system as a whole?

the Elusive Remedy for Prosecutorial Misconduct, 7 GEO. J. LEGAL ETHICS 1104 (1994) (stating that the disciplinary authority within the Department of Justice “frequently acts as a shield to protect its own prosecutors”). See also Brad Heath & Kevin McCoy, *Federal Prosecutors Likely to Keep Jobs After Cases Collapse*, USA TODAY, Dec. 10, 2010 (reporting that “[t]he Justice Department often classifies as mistakes [prosecutorial misconduct] that result[s] in overturned convictions,” and that even when investigators conclude that misconduct has occurred, prosecutors “are unlikely to be fired”).

¹⁷¹ Greenbaum, *supra* note 169, at 550 (stating that a judge reporting lawyer misconduct has “more credibility” than opposing counsel because the judge “is less likely to have ‘an axe to grind’”); Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?* 7 GEO. J. LEGAL ETHICS 1083, 1089 (1994) (stating that “disciplinary agencies may be reluctant to redress complaints against prosecutors which might be motivated by resentful defendants or politically motivated in an effort to publicly discredit the office of the prosecutor”).

¹⁷² ABA Standing Committee on Professional Discipline, *Judicial Response to Lawyer Misconduct I.12* (1984). See also MODEL CODE OF JUDICIAL CONDUCT CANON 3(D)(2) (1990), which provides:

A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct . . . should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct . . . that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

In considering this question, it is important to understand the inherent risks that reporting poses to defense counsel. Unlike the trial judge, a repeat player whose power insulates her from retaliation, defense counsel is a repeat player who is beholden to the prosecutor and thus vulnerable to retaliation.¹⁷³ She depends upon the prosecutor's good will to obtain favorable deals for future clients, ninety-five percent of whom will elect to plead guilty rather than to go to trial. These "institutional" concerns weigh heavily, particularly because most criminal defense attorneys, whether they work for public defender offices, as solo practitioners, or for major law firms, have a local rather than a national practice and can therefore expect to litigate against the same cast of prosecutors. In this relatively small world, a defense attorney who is known as an informant can reasonably fear relegation to pariah status, not simply by the prosecutor whom she reported, but also by the prosecutor's office as a whole.¹⁷⁴

This argument poses a direct challenge to the view that, by strictly complying with the dictates of Rule 8.3, defense counsel will have more of a positive impact on the criminal justice system than if she limits her attack on prosecutorial abuse to the case in which it arose. Even assuming that defense counsel's reporting may succeed in removing or rehabilitating one problematic prosecutor, is the system truly improved if many future clients will be impacted negatively, and if counsel's career is irretrievably harmed as a result?

d. Practical Arguments Against Compliance

Defense counsel's dilemma over whether to comply strictly with Rule 8.3 becomes more complicated still in light of the fact that "[e]ven when referrals are made, bar authorities frequently decline to recommend

¹⁷³ This is especially true if the trial judge is appointed rather than elected and does not have to answer to voters to keep her job. But while it is conceivable that an elected judge might face an effort by a prosecutor's office to unseat her because of a decision to report one of their own for misconduct, such a scenario has never been reported to my knowledge and seems in any event to be a bit far-fetched.

¹⁷⁴ Williams, *supra* note 159, at 947 (noting that "attorneys fear the damage to their professional reputation that may result from reporting"); Cynthia L. Gendry, Comment, *An Attorney's Duty to Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603-04 (1994); David C. Olsson, *Reporting Peer Misconduct: Lip Service to Ethical Standards is Not Enough*, 31 ARIZ. L. REV. 657, 659-60 (1989).

serious punishment.”¹⁷⁵ While there are many reasons why this is so,¹⁷⁶ the most relevant for defense counsel in the reporting context is that most agencies—state and federal—will not impose discipline unless the misconduct is clearly intentional.¹⁷⁷ This practice differs sharply from that of the courts, which generally find that prosecutorial misconduct has occurred based on the impact of the violation rather than the intent behind it.¹⁷⁸ As a result of these differing standards, what constitutes prosecutorial misconduct in the courtroom may be excused as “unintentional or good-faith violations” by state and federal disciplinary agencies.¹⁷⁹

One instructive example is the difference in the way that the Constitution and the rules of ethics treat Brady violations. As discussed previously, the Supreme Court has made clear that a defendant’s due process rights are violated where material, exculpatory evidence is not made available to the defense, regardless of whether the withholding of that evidence was intentional.¹⁸⁰ Model Rule 3.8, however, which has been adopted verbatim or with minor changes by all but two states and the District of Columbia,¹⁸¹ “is silent in terms of whether a prosecutor who unintentionally makes a good faith mistake in failing to turn over

¹⁷⁵ Davis, *supra* note 62, at 130 (citing statistics from the Center for Public Integrity); Zacharias, *supra* note 26, at 754-55 (citing data to support the conclusion that “prosecutors are disciplined rarely, both in the abstract and relative to private lawyers”).

¹⁷⁶ Many state disciplinary authorities lack the money and manpower to investigate and punish allegations of prosecutorial misconduct; some agencies focus on private lawyers who unjustly enrich themselves at the expense of their clients; and some see little benefit to a parallel proceeding where the courts have already intervened. Zacharias, *supra* note 26, at 757-68.

¹⁷⁷ Zacharias & Green, *supra* note 3, at 23 (“Many provisions [of the Model Rules] regulating prosecutorial behavior either require knowing misconduct or are unclear about the applicable mens rea requirement.”); Justice Dept. Press Releases, *Attorney General Creates Professional Misconduct Review Unit*, 2011 WLNR 1078378 (Jan. 18, 2011) (announcing the establishment of a unit to review results from Office of Professional Responsibility investigations into DOJ prosecutors, but only for “those cases involving findings of intentional or reckless professional misconduct”).

¹⁷⁸ See *supra* notes 71-72.

¹⁷⁹ Zacharias & Green, *supra* note 3, at 22.

¹⁸⁰ See *supra* notes 92-94.

¹⁸¹ The two states are Alabama and California. Alabama and the District of Columbia’s amendments to Rule 3.8 foreclose the imposition of discipline for prosecutorial misconduct unless there is an element of intent. California has not adopted Rule 3.8 in any form. Hans B. Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, 42 THE PROSECUTOR 20, 21 (2008).

exculpatory material to the defense should be subject to discipline.”¹⁸² The fact that a prosecutor can be found guilty of misconduct by a judge but exculpated by the state bar for the same conduct may cause defense counsel to conclude that making a report is not only professional impolitic but also pointless, as discipline is very unlikely to occur as a result.¹⁸³

C. Reconciling Personal Morality with the Dictates of the Ethical Codes

Clinicians should also consider facilitating a discussion that addresses the ways in which counsel’s personal sense of morality might impact compliance with the reporting obligations under Model Rule 8.3. Significantly, “the [ethical] codes do not tell lawyers how to reconcile conflicts between their personal sense of ethics and the rules.”¹⁸⁴

Many students, mindful of the image of the “schoolyard tattletale” may be morally opposed to informing on others.¹⁸⁵ This belief is in line with the view expressed by the scholar Gerald Lynch, who has argued that “society’s general ambivalence toward informing is rooted in moral values that deserve more respect than the codes of professional conduct have afforded them.”¹⁸⁶ Taking Lynch’s thesis one step further, some students may argue that noncompliance is justified on the grounds that following the dictates of one’s conscience is more important than strict adherence to a deeply flawed rule. Others in the class may have the opposite reaction, specifically, that their moral code is entirely consistent with the Model Rule and thus provides an added incentive to comply with it. Still others may feel that their personal sense of right and wrong in the context of reporting should have little or nothing to do with a decision that is dictated by a professional duty.

¹⁸² *Id.* at 21-22, 25.

¹⁸³ Christina Parajon, Comment, *Discovery Audits: Model Rule 3.8(D) and the Prosecutor’s Duty to Disclose*, 119 YALE L.J. 1339, 1343 (2010) (“Research indicates that local disciplinary authorities are generally reluctant to find and sanction 3.8 violations.”).

¹⁸⁴ Zacharias, *supra* note 67, at 228.

¹⁸⁵ Gerald E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 491 (noting that “our society is deeply ambivalent toward those who report the wrongdoing of others” and that “the heroes of the legal profession tend to be those who keep secrets faithfully rather than those who blow the whistle on wrongdoers”); Williams, *supra* note 159, at 943 (“[T]he moral status of the informant is notoriously ambiguous.”).

¹⁸⁶ Lynch, *supra* note 185, at 492.

There are a myriad of other ways in which a student's personal moral code might affect her view of Rule 8.3. To stimulate discussion, the clinician may pose the following questions: Should factors like a prosecutor's youth, relative inexperience, or poor training play a role in how defense counsel reacts?¹⁸⁷ Should it matter if the misconduct is clearly intentional but had no significant effect on the outcome of the case? Should defense counsel decline to report a prosecutor who appears genuinely repentant and promises never to behave in such a way again? Should she feel particular pressure to report where it appears that the prosecutor is a "repeat offender" whom she knows to have committed misconduct (and gotten away with it) in the past? Should the type of misconduct matter? If the misconduct occurs during closing argument, for example, can it be deemed less serious because it occurred in the heat of the moment, when good judgment was momentarily trumped by emotion? Is this kind of behavior necessarily less serious than withholding evidence or coaching witnesses to lie, two types of misconduct that are more calculated?¹⁸⁸ What about situations that deal in so-called gray areas, where there is legitimate debate as to whether the prosecutor's actions crossed the line? If defense counsel is convinced that what occurred did indeed constitute misconduct, and the trial judge agreed, should she nonetheless hesitate to report because of the legal ambiguity, or trust that the bar association will sort it out?

There is no right or easy answer to any of these questions. But simply by posing them in the classroom, clinicians create a time and space for students to thrash out the issues and arrive at their own conclusions. In so doing, clinicians are helping tomorrow's attorneys develop sound professional judgment. By framing the discussion of Rule 8.3's reporting duty as a real-life dilemma rather than an abstract concept or a set of rules and standards to be memorized, clinical instructors can encourage students to apply consistent sets of internal, carefully

¹⁸⁷ Stacy Caplow, *Tacking Too Close to the Wind*, 74 MISS. L.J. 932 (2005) (noting that prosecutors often receive poor training in professional responsibility and ethics); Gershowitz, *supra* note 3, at 1061 (stating that "law schools and [prosecutor's] offices often provide too little training demonstrating where to draw the line between aggressive prosecution and misconduct").

¹⁸⁸ Rosenthal, *supra* note 14, at 951 (asking this question in the context of determining whether a prosecutor's misconduct entitles a defendant to Double Jeopardy Clause protection).

considered standards when it comes to whether—or to what degree—they will seek to comply with its dictates as practicing attorneys.

V. CONCLUSION

If prosecutorial misconduct can be said to have an upside, it is in the tremendous teaching opportunity it offers clinicians. It strikes at the heart of a defendant's constitutional right to a fair trial and, more broadly, implicates the integrity of the criminal justice system as a whole. Teaching students about the problem before they become practitioners serves three important goals. First, such instruction can act as a preventative medicine by reducing the likelihood that future prosecutors will step over the line out of ignorance or a misplaced desire to win at all costs. Second, it enables future defense counsel to develop litigation methods designed to prevent the problem from occurring in the first instance. Third, it can prepare defense counsel to respond to unpreventable misconduct as a zealous advocate for her client and as an officer of the court, which means that, in addition to complex legal issues, she can effectively confront the intertwined ethical ones as well.

The blended learning approach that is the signature pedagogy of the clinical classroom is well-suited to addressing the fraught and complicated issue of prosecutorial misconduct because it provides the opportunity for students to engage in a frank and thoughtful dissection of the legal and ethical issues that are inextricably bound up with it. By combining instruction on black letter law and ethics with readings that offer critiques of those precedents and rules, and by modeling the process of analyzing and responding to prosecutorial misconduct using cases drawn from real-world experience, clinicians can urge their students to think critically about their roles and responsibilities as future prosecutors and defense attorneys, and ultimately develop their own informed views about how best to tackle the problem.