

THE LEGAL PROFESSION'S FAILURE TO DISCIPLINE UNETHICAL PROSECUTORS

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I. INTRODUCTION

White students at Jena High School in Jena, Louisiana, hung nooses from a tree at the high school, provoking a series of fights between groups of black and white students. Punches were thrown on both sides, and both black and white students were injured. However, the prosecutor, Reed Walters, charged one white student with a misdemeanor while charging six black students with serious felonies in adult court.

In Douglasville, Georgia, a seventeen-year-old boy named Genarlow Wilson had consensual oral sex with a fifteen-year-old girl. The prosecutor charged him with aggravated child molestation and other sex offenses. Oral sex with a person under fifteen years old is aggravated child molestation in the state of Georgia, and consent is no defense. Wilson was acquitted of all charges except the child molestation offense, which at the time carried a mandatory sentence of ten years in prison. A judge later found that Wilson's sentence constituted cruel and unusual punishment and ordered him released. But the prosecutor appealed the judge's decision, and Wilson remained in prison for over two years until the Georgia Supreme Court ordered his release on October 26, 2007.¹

Delma Banks was charged with capital murder in the state of Texas. The prosecutor in his case withheld exculpatory evidence and repeatedly coached the main witness on what his testimony should be. The prosecutor even threatened to prosecute this witness if he did not conform his testimony to the prosecutor's version of the case. A jury convicted Banks and sentenced him to death. He was strapped to the gurney, only ten minutes from death, when the Supreme Court stayed his

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1. Brenda Goodman, *Man Convicted as Teenager in Sex Case Is Ordered Freed by Georgia Court*, N.Y. TIMES, Oct. 27, 2007, at A9; Shaila Dewan, *Georgia Man Fights Conviction as Molester*, N.Y. TIMES, Dec. 19, 2006, at A22; see *Humphrey v. Wilson*, 652 S.E.2d 501 (Ga. 2007) (remanding the case to the habeas court instructing it to enter an order reversing the conviction and discharging Wilson from custody).

execution. The Court eventually reversed Banks's conviction based on the prosecutor's misconduct.²

When three members of the lacrosse team at Duke University were charged with raping an African American exotic dancer, their arrests made national news. A team of able defense attorneys with vast resources represented the young men. The lawyers publicly criticized and challenged the prosecutor, Mike Nifong, and ultimately discovered that he had engaged in various forms of misconduct, including failing to disclose clearly exculpatory evidence that ultimately led to the dismissal of the case.³

The actions of the prosecutors in all of these cases produced grave injustices, and the prosecutors have been widely criticized and condemned. Yet, only the prosecutor in the case involving the Duke lacrosse players was punished for his conduct. The Jena and Douglasville prosecutors, at a minimum, abused their discretion, yet their actions were probably well within the bounds of the legal exercise of prosecutorial discretion as defined by the United States Supreme Court. The prosecutor's behavior in the *Banks* case was clear misconduct, according to the Supreme Court, yet he continues to prosecute cases and has not been disciplined or punished.

Prosecutors are the most powerful officials in the criminal justice system. They exercise vast, almost limitless, discretion, and the Supreme Court consistently has protected that discretion and shielded them from meaningful scrutiny. Because the most important decisions prosecutors make, the charging and plea bargaining decisions, are made behind closed doors, there is rarely an opportunity to discover abuse or misconduct. Even when it is discovered, the legal remedies are ineffective. When appellate courts find misconduct, they rarely reverse convictions, usually holding that the misconduct is harmless error. In the rare cases involving reversals, the prosecutor seldom pays a price.

The Supreme Court has recommended that prosecutors be referred to the relevant disciplinary authorities when they engage in misconduct.⁴ However, for reasons that remain unclear, referrals of prosecutors rarely occur. Even when referrals occur, state bar authorities seldom hold prosecutors accountable for misconduct. The Office of Professional Responsibility of the U.S. Justice Department, the counterpart for federal

2. Linda Greenhouse, *Supreme Court Roundup; Prosecutorial Misconduct Leads Justices to Overturn Death Sentence in Texas*, N.Y. TIMES, Feb. 25, 2004, at A14; see *Banks v. Dretke*, 540 U.S. 668 (2004).

3. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337 (2007).

4. See, e.g., *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

prosecutors, has a similar weak record.

This Article will explore the legal profession's failure to hold prosecutors accountable for misconduct and other ethical violations. Part II discusses prosecutorial misconduct and argues that it is a widespread problem in the criminal justice system. Part II also sets forth the current legal remedies for prosecutorial misconduct. Part III argues that the Model Rules of Professional Responsibility have not provided adequate guidance to prosecutors, and that the disciplinary process has not disciplined prosecutors when they have abused their power and discretion in the criminal justice system. Part IV contends that the Mike Nifong disciplinary action was an aberration influenced by race and class. Part V suggests that there is some prosecutorial behavior currently not considered misconduct that should be considered unethical under the rules of professional responsibility, using the Wilson and Jena Six cases as examples. Part VI proposes measures for reform.

II. PROSECUTORIAL MISCONDUCT—A PERVASIVE PROBLEM

Prosecutorial misconduct encompasses a wide range of behaviors, including courtroom misconduct (such as making inflammatory comments in the presence of the jury, mischaracterizing evidence, or making improper closing arguments), mishandling physical evidence (destroying evidence or case files), threatening witnesses, bringing a vindictive or selective prosecution, and withholding exculpatory evidence.⁵ 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. Some suggest that the phenomenon is an aberration,⁶ but there is considerable evidence to suggest that misconduct is a pervasive problem.⁷

Defining the universe of prosecutorial misconduct is a difficult endeavor. Because it is so difficult to discover, much prosecutorial misconduct goes unchallenged, suggesting that the problem is much more widespread than the many reported cases of prosecutorial misconduct would indicate. As one editorial described the problem, “[i]t would be like trying to count drivers who speed; the problem is larger

5. See Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?*, CENTER FOR PUBLIC INTEGRITY, June 26, 2003, <http://www.publicintegrity.org/pm/default.aspx?act=main>.

6. See Randall D. Eliason, *The Prosecutor's Role: A Response to Professor Davis*, 2 CRIM. L. BRIEF 15, 17 (2006).

7. See Center for Public Integrity, <http://www.publicintegrity.org/default.aspx> (last visited Feb. 4, 2008); see also ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 123-41 (2007) [hereinafter DAVIS, *ARBITRARY JUSTICE*].

than the number of tickets would indicate.”⁸

In 2003, the Center for Public Integrity, a nonpartisan organization that conducts investigative research on public policy issues, conducted one of the most comprehensive studies of prosecutorial misconduct. A team of researchers and writers studied the problem for three years and examined 11,452 cases in which appellate court judges reviewed charges of prosecutorial misconduct.⁹ In the majority of cases, the alleged misconduct was ruled harmless error or not addressed by the appellate judges. The Center discovered that judges found prosecutorial misconduct in over 2000 cases in which they dismissed charges, reversed convictions, or reduced sentences.¹⁰ In hundreds of additional cases, judges believed that the prosecutorial behavior was inappropriate, but affirmed the convictions under the “harmless error” doctrine.¹¹

The cases investigated by the Center for Public Integrity merely scratch the surface because they only represent the cases in which prosecutorial misconduct was discovered and litigated.¹² The most significant prosecutorial practices—charging, plea bargaining, and grand jury proceedings—occur behind closed doors. In the rare cases in which practices that appear to be illegal are discovered, it is often impractical to challenge them in light of the Supreme Court’s pro-prosecution decisions on prosecutorial misconduct.¹³ Of course, in the over ninety-five percent of all criminal cases which result in a guilty plea,¹⁴ there is no opportunity to challenge misconduct since defendants give up most of their appellate rights when they plead guilty. In most cases in which defendants plead guilty, the opportunity to discover misconduct diminishes even more than in cases that go to trial because prosecutors often place deadlines on plea offers that make it impossible for defense

8. Editorial, *Policing Prosecutors*, ST. PETERSBURG TIMES, July 12, 2003, at 16A.

9. Center for Public Integrity, Harmful Error, Methodology: How the Center Compiled Data for These Articles, <http://www.publicintegrity.org/pm/default.aspx?act=methodology> (last visited Feb. 4, 2008).

10. See Weinberg, *supra* note 5 (noting that there are countless other cases in which prosecutorial misconduct occurred but constituted harmless error).

11. *Id.*; see *Chapman v. California*, 386 U.S. 18, 22 (1967) (adopting the harmless error rule and deciding that some constitutional errors are not significant or harmful and therefore do not require an automatic reversal of the conviction). The Court went on to state that, when determining whether the error was harmless, the question is whether the evidence might have contributed to the conviction. *Chapman*, 386 U.S. at 23.

12. DAVIS, ARBITRARY JUSTICE, *supra* note 7, at 126.

13. *Id.* at 127.

14. See GERARD RAINVILLE & BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000, at 28 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf>.

counsel to conduct adequate investigations.¹⁵

One of the most common forms of prosecutorial misconduct is the failure of prosecutors to turn over exculpatory information to the defense in a criminal case. The obligation of a prosecutor to reveal this information is not only fair, it is a constitutional requirement. In *Brady v. Maryland*,¹⁶ the Supreme Court held that a prosecutor's failure to disclose evidence favorable to the defendant violated due process rights when the defendant had requested such information.¹⁷ The Court expanded this rule in *United States v. Agurs*,¹⁸ requiring prosecutors to turn over exculpatory information to the defense even in the absence of a request if such information is clearly supportive of a claim of innocence.¹⁹ Professional ethical and disciplinary rules in each state and the District of Columbia reiterate and reinforce the duty to turn over information. This obligation is ongoing and not excused even if the prosecutor acts in good faith.²⁰

Ken Armstrong and Maurice Possley, staff writers for the *Chicago Tribune*, conducted a national study of 11,000 cases involving prosecutorial misconduct between 1963 and 1999.²¹ The study revealed widespread, almost routine, violations of the *Brady* doctrine by prosecutors across the country.²² Armstrong and Possley discovered that since 1963, courts dismissed homicide convictions against at least 381 defendants because prosecutors either concealed exculpatory information or presented false evidence.²³ Of the 381 defendants, sixty-seven had been sentenced to death.²⁴ Courts eventually freed approximately thirty of the sixty-seven death row inmates, including two defendants who were exonerated by DNA tests.²⁵ One innocent defendant served twenty-six years before a court reversed his conviction.²⁶ It is important to note that these cases only represent homicide cases during a limited time span, and then only those homicide

15. Angela J. Davis, *Incarceration and the Imbalance of Power*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 70-75 (Marc Mauer & Meda Chesney-Lind eds., 2002).

16. 373 U.S. 83 (1963).

17. *Id.* at 87.

18. 427 U.S. 97 (1976).

19. *Id.* at 107.

20. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 151.

21. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

cases in which the defendant went to trial, a relatively small number considering the high percentage of cases that are resolved with a guilty plea.²⁷

Bill Moushey of the *Pittsburgh Post-Gazette* also conducted a study.²⁸ In his examination of over 1500 cases throughout the nation, Moushey discovered that prosecutors routinely withhold evidence that might help prove a defendant innocent.²⁹ He found that prosecutors intentionally withheld evidence in hundreds of cases during the past decade, but courts overturned verdicts in only the most extreme cases.³⁰

An examination of the Supreme Court's jurisprudence sheds some light on how and why prosecutorial misconduct has become so widespread. The Court has consistently shielded prosecutors from scrutiny while narrowly defining the types of behaviors that constitute prosecutorial misconduct and the circumstances under which victims of misconduct are entitled to relief. Because prosecutors know that even if their behavior is discovered and challenged, courts will most likely find the behavior to be "harmless error," they may be emboldened (consciously or unconsciously) to engage in misconduct.

The Supreme Court has established nearly impossible standards for obtaining the necessary discovery to seek judicial review of some forms of prosecutorial misconduct.³¹ Inappropriate or unethical charging decisions, intimidating conversations with witnesses, selective and vindictive prosecutions, and grand jury abuse, all occur in the privacy of prosecution offices—away from the public and the parties whose cases are affected by the harmful behavior.³² As a result of the Supreme Court's rulings,³³ prosecutors know that it is highly unlikely that any of these behaviors will be discovered by defense attorneys or anyone who might challenge them.³⁴

27. Ninety-five percent of all convictions "occurring within 1 year of arrest were obtained through a guilty plea. About 4 in 5 guilty pleas were to a felony." U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal Case Processing Statistics, <http://www.ojp.usdoj.gov/bjs/cases.htm> (last visited Feb. 4, 2008); see RAINVILLE & REAVES, *supra* note 14, at 28. Guilty pleas account for ninety-one percent of all violent offense convictions; sixty-nine percent in murder cases. See U.S. Dep't of Justice, Bureau of Justice Statistics, State Court Sentencing of Convicted Felons 2004-Statistical Tables, <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm> (last visited Feb. 4, 2008).

28. See Bill Moushey, *Win at All Costs*, PITTSBURGH POST-GAZETTE, available at <http://www.postgazette.com/win/> (last visited Feb. 4, 2008) (summarizing the entire ten-part series).

29. Moushey, *supra* note 28, http://www.postgazette.com/win/day3_1a.asp (part three of ten).

30. *Id.*

31. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 414-15 (2001).

32. DAVIS, ARBITRARY JUSTICE, *supra* note 7, at 127

33. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996).

34. See DAVIS, ARBITRARY JUSTICE, *supra* note 7, at 127.

On the rare occasion when such misconduct is discovered, judicial review is extremely limited.³⁵ Under the harmless error rule, appellate courts affirm convictions if the evidence supports the defendant's guilt, even if she did not receive a fair trial.³⁶ This rule permits, perhaps even unintentionally encourages, prosecutors to engage in misconduct during trial with the assurance that so long as the evidence of the defendant's guilt is clear, the conviction will be affirmed.³⁷

It is highly unlikely that a victim of misconduct will be successful if she brings a civil lawsuit against the offending prosecutor. The Supreme Court established a broad rule of absolute immunity from civil liability for prosecutors in *Imbler v. Pachtman*.³⁸ This rule immunizes prosecutors from liability for acts "intimately associated with the judicial phase of the criminal process."³⁹ In *Imbler*, the Court expressed concern that prosecutors might be deterred from zealously pursuing their law enforcement responsibilities if they faced the possibility of civil liability and suggested that prosecutorial misconduct should be referred to state attorney disciplinary authorities.⁴⁰ However, an examination of the Model Rules of Professional Responsibility and available information about referrals of prosecutors to state authorities demonstrates that the state disciplinary process has proven woefully inadequate in holding prosecutors accountable for misconduct.⁴¹

III. PROSECUTORS, THE RULES AND THE PROCESS

A. *The Inadequacy of the Rules*

Forty-seven states and the District of Columbia have adopted some version of the *Model Rules of Professional Conduct* as the code of

35. *Id.*

36. *See, e.g.,* *Rose v. Clark*, 478 U.S. 570, 579-80 (1986) (holding that the harmless error standard dictates that courts should not set aside convictions if the error was harmless beyond a reasonable doubt).

37. *See* DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 127.

38. 424 U.S. 409, 424-25 (1976).

39. *Id.* at 430; *see generally* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53 (discussing absolute and qualified immunity for prosecutors and arguing that absolute immunity should be abandoned).

40. *See Imbler*, 424 U.S. at 438 n.4 (White, J., concurring) (agreeing with the majority that "the risk of having to *defend* a suit—even if certain of ultimate vindication—would remain a substantial deterrent to fearless prosecution"); *see also* *Burns v. Reed*, 500 U.S. 478, 486 (1991) (citing *Imbler*, 424 U.S. at 429, and stating "[t]he Court also noted that there are other checks on prosecutorial misconduct, including the criminal law and professional discipline").

41. *See generally* DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 123-61 (discussing prosecutorial misconduct and prosecutorial ethics).

ethical conduct for lawyers.⁴² The Model Rules cover a wide range of conduct, and many of the rules apply only to lawyers who represent clients.⁴³ As representatives of the state, prosecutors represent “the people” (including the defendants they prosecute), and not individual clients.⁴⁴ Furthermore, their duty is to “seek justice,” not zealously pursue the interests of any client or entity.⁴⁵ The Model Rules address an entire range of issues, including attorney fees, conflicts among clients, selling a law practice, advertising, and solicitation,⁴⁶ which do not apply to prosecutors. However, some of the Model Rules apply to all lawyers, including prosecutors. For example, the rules that govern issues such as making false statements, offering false evidence, concealing evidence, asking a witness not to cooperate with the adversary, and publicity during litigation all apply to prosecutors.⁴⁷

The only rule that specifically addresses the conduct and behavior of prosecutors is Model Rule 3.8: Special Responsibilities of a Prosecutor. According to the rule:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure

42. Center for Professional Responsibility, Model Rules of Professional Conduct: Dates of Adoption, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Feb. 5, 2008).

43. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1 to 1.8 (2007) (the Model Rules are available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

44. Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1577.

45. *Id.*

46. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5, 1.7, 1.8, 1.17, 7.2, 7.3 (2007).

47. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3, 3.6, 4.1 (2007).

- by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
- (1) promptly disclose that evidence to an appropriate court or authority, and
 - (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - (A) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - (B) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.⁴⁸

Although Rule 3.8 addresses some of the prosecutor's most important responsibilities, such as the charging decision⁴⁹ and the duty to disclose exculpatory information,⁵⁰ it fails to address a number of equally important prosecutorial issues. For example, it makes no mention of conduct before the grand jury, relations with the police and other law enforcement officers, relations with victims and government

48. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008) (amended in part by the ABA in February 2008).

49. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2008).

50. MODEL RULES OF PROF'L CONDUCT R. 3.8(d), (g), and (h) (2008).

witnesses, selective prosecution, or vindictive prosecution. In fact, these important issues are not addressed anywhere in the Model Rules. Additionally, much of the language of Rule 3.8 is vague and subject to interpretation, providing very little guidance to prosecutors and making it difficult to sustain complaints against prosecutors before disciplinary authorities.⁵¹ Furthermore, some parts of the Rule fail to hold prosecutors to a high standard of conduct and permit, if not encourage, prosecutors to engage in conduct that should be considered unethical.

For example, Rule 3.8(a) permits prosecutors to bring charges based on the very low standard of probable cause. While probable cause is the standard that the grand jury must use in deciding whether to issue an indictment, the rules should require prosecutors to meet a higher standard in the exercise of the charging decision. Since prosecutors must meet a much higher standard—proof beyond a reasonable doubt—to obtain a conviction, they should be prohibited from bringing criminal charges unless they know they can meet this standard. The low charging standard of probable cause encourages abuse of the charging power, allowing prosecutors to charge an individual in order to intimidate, harass, or coerce a guilty plea in a case in which the government cannot meet its burden of proof at trial. Prosecutors have argued that if the reasonable doubt standard is imposed as an ethical requirement, they will be subject to claims of unethical behavior in every case involving an acquittal.⁵² This argument has little merit. Jurors acquit defendants in criminal cases for a variety of reasons, and it is doubtful that ethical charges would be sustained against a prosecutor based on a jury verdict in the absence of other evidence. Likewise, it is highly unlikely that a judge's decision to grant a motion for judgment of acquittal after the government's case-in-chief would subject the prosecutor to charges of unethical behavior.

The National District Attorneys Association ("NDAA") standards appear to establish a slightly higher charging standard than the Model Rules. According to NDAA Standard 43.3, "[t]he prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial."⁵³ However, the NDAA Standards are totally unenforceable, and the decision to even use them as a guide is up to individual prosecution offices. Furthermore, the commentary to NDAA Standard 43 weakens its slightly more rigorous requirements. According to the commentary:

51. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 147.

52. See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 314 (3d ed. 2004).

53. NATIONAL PROSECUTION STANDARDS 43.3 (Nat'l Dist. Att'ys Ass'n, 2d ed. 1991).

The charging decision is not an exact science, since the prosecutor, in deciding what he feels to be the maximum charge supported by the available evidence, necessarily operates with less than total knowledge of the facts and possible trial situation. As a result, the initial charging decision may have to be modified and reduced to a lesser charge as the prosecutor gains additional information about the offense and offender.⁵⁴

This language seems to endorse prosecutors bringing charges before they are fully informed about the facts and permits prosecutors to “overcharge”—a practice that they may use to gain an advantage during the plea bargaining process.

Some prosecutors may decide to abide by a higher charging standard than either the Model Rules or the NDAA standards.⁵⁵ However, the Model Rules are the only ethical rules enforceable by law, and they do not specifically prohibit practices like overcharging. An indictment alone may destroy an individual’s life, causing personal, professional, and financial harm. As one former prosecutor stated, “[a] prosecutor’s power to damage or destroy anyone he chooses to indict is virtually limitless.”⁵⁶ Since the probable cause standard is so easy to achieve, an unethical prosecutor may bring an indictment against an individual even if she knows that she ultimately will not be able to prove that person’s guilt. Model Rule 3.8 does not specifically prohibit such behavior.

Model Rule 3.8(d) is consistent with the constitutional requirements imposed by the United States Supreme Court in *Brady v. Maryland*.⁵⁷ In fact, the rule is somewhat more stringent than *Brady* in that it requires disclosure of exculpatory evidence even when there has not been a request. However, it is very difficult to sustain a complaint against a prosecutor because of the imprecise language of the rule.

For example, Rule 3.8(d) requires “timely disclosure” of exculpatory information. Neither the rule nor the comment to the rule specifically defines what is meant by “timely.” Some prosecutors argue that disclosure is “timely” as long as it is revealed before trial.⁵⁸

54. *Id.* at cmt.

55. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 227 n.13 (“[F]ormer AUSA Julie Grahofsky stated that in close cases, she asked grand jurors not only whether they found probable cause but also whether they believed the case should go forward.”) (citing Interview with Julie Grahofsky, former Assistant United States Attorney, in Wash., D.C. (May 31, 2005)).

56. *Id.* at 148 (citing Irving Younger, *Memoir of a Prosecutor*, COMMENTARY, Oct. 1976, at 70) (alteration in original).

57. 373 U.S. 83 (1963).

58. *See, e.g.*, *Reiger v. Christensen*, 789 F.2d 1425, 1432 (9th Cir. 1986); *United States v. Boschetti*, 794 F.2d 416, 417-18 (8th Cir. 1986).

However, since ninety-five percent of all cases are resolved with guilty pleas, prosecutors with this interpretation of “timely” will fail to disclose *Brady* information in the vast majority of their cases. Unless the defense attorney discovers the information through her own investigation, her advice to her client about whether to take the plea will not be fully informed. It should be unethical for prosecutors to withhold *Brady* information when they make plea offers, but the rule does not specifically prohibit this practice.

Even if it is clear that the case will be going to trial, *Brady* information must be revealed well before trial to be used most effectively. For example, if the prosecutor knows about a witness who will testify that the perpetrator of the crime was someone other than the defendant, the defense attorney would need to locate, interview and possibly subpoena that witness well before the trial date. When prosecutors reveal *Brady* information on the day of trial, some judges will grant a continuance to the defense, but the prosecutors rarely suffer any consequences, even though the judge’s decision suggests that these prosecutors have violated Rule 3.8(d).

Rule 3.8(d) requires the disclosure of “evidence or information known to the prosecutor.” This language does not clarify whether prosecutors have an affirmative obligation to find out whether police officers, law enforcement agents, or other individuals involved in the investigation and prosecution of a case are in possession of exculpatory information. This issue has been the subject of much litigation.⁵⁹ The fact that this issue has not been firmly resolved makes it unlikely that disciplinary authorities would punish a prosecutor in the absence of proof that she had actual knowledge of exculpatory information. The rule does not specifically require prosecutors to make efforts to discover exculpatory information, so the failure to do so would not likely constitute an ethical violation.⁶⁰

The vaguest part of the Rule is probably the most important. Neither the Rule nor the Comment to the Rule clarifies what is meant by information “that tends to negate the guilt of the accused or mitigates the offense.”⁶¹ It is likely that prosecutors and defense attorneys will have very different interpretations of this language. For example, defense

59. See *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (noting that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf, including police). But see *United States v. Bagley*, 473 U.S. 667, 675 (1985) (holding that “the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial”).

60. See DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 150.

61. *Id.*

attorneys might argue that any contradictory or inconsistent statements made by a government witness should be disclosed because such statements impeach the credibility of the witnesses and thus “negate the guilt of the accused.”⁶² Prosecutors would argue that contradictory statements by a witness may not negate the guilt of the accused, perhaps arguing that the contradiction is not significant or that the witness has a credible explanation for the contradiction.

In sum, Model Rule 3.8 does not specifically prohibit prosecutorial practices that produce clear injustices in the process. The rule fails to hold prosecutors to a high standard in making the charging decision and fulfilling the constitutional duty to disclose exculpatory evidence. Sections (e) and (f) address controversial issues that prosecutors regularly confront—subpoenas to defense attorneys and extrajudicial statements by prosecutors.⁶³ Sections (g) and (h) are significant recent additions to the rule that require prosecutors to disclose evidence of wrongful convictions, and in some instances, investigate and take corrective action. However, other sections have little or no significance in the day-to-day lives of most prosecutors. For example, most prosecutors rarely deal with the issues in sections (b) and (c). In most jurisdictions, judges are responsible for the appointment of counsel. As for pretrial waivers, the Comment makes it clear that section (c) does not apply to the questioning of uncharged suspects—an issue of greater concern to defense attorneys than preliminary hearings.⁶⁴ The Comment to the rule contains language that is so vague that it provides no more guidance than the rule itself.⁶⁵ According to the commentary to Rule 3.8:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a

62. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.”) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

63. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 150-51.

64. *Id.* at 151.

65. *Id.*

violation of Rule 8.4.⁶⁶

In 1997, the ABA had an opportunity to make meaningful revisions to Rule 3.8 but failed to do so. At that time, then ABA President Jerome Shestack, his immediate predecessor, N. Lee Cooper, and his successor, Philip S. Anderson, persuaded the ABA House of Governors that the Model Rules were in need of review and revision. They established the “Ethics 2000” Commission to undertake this project.⁶⁷ The House of Governors gave two purported reasons for this project: there was substantial lack of uniformity among the various state versions of the Model Rules and the new legal issues that had been raised by the influence of advancements in technology on the delivery of legal services.⁶⁸ There are few areas of legal practice more lacking in uniformity than the performance of prosecutorial duties and responsibilities. Although complete uniformity may be neither possible nor desirable, the vast disparities in how prosecutors perform fundamental duties and responsibilities suggest a need for guidance. Yet the Ethics 2000 Commission failed to provide that guidance for the most important prosecutorial functions.

In fact, the Ethics 2000 Commission made very few recommendations that dealt with the prosecution function. The Commission recommended consolidating section (e) and former section (g) of Rule 3.8 and amending the Comment to the rule. One of the amendments to the Comment weakened prosecutors’ responsibilities under Rule 3.8(d). The original Comment made it clear that prosecutors should disclose exculpatory information to grand juries.⁶⁹ The Ethics 2000 Commission deleted this part of the comment, instead choosing to follow the Supreme Court’s holding that prosecutors are not required to disclose such information to grand juries.⁷⁰ The only other amendment to the rules that specifically addressed a prosecution issue was the

66. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2007).

67. MODEL RULES OF PROF’L CONDUCT, Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000”), Chair’s Introduction, *available at* http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html.

68. *Id.*

69. DAVIS, ARBITRARY JUSTICE, *supra* note 7, at 151-52. The original comment noted that Rule 3.3(d) applied to grand jury proceedings. According to the original rule: “In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” MODEL RULES OF PROF’L CONDUCT R. 3.3(d) (2000).

70. *See* United States v. Williams, 504 U.S. 36 (1992) (holding that the government is not constitutionally required to disclose exculpatory information to grand juries). The ABA standards recommend disclosure. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.6(b) (3d ed. 1993).

amendment to Rule 4.2. This rule states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.⁷¹

Former Attorney General Richard Thornburgh issued a memorandum in 1989 (the “Thornburgh Memo”), which exempted federal prosecutors from Rule 4.2.⁷² The Commission held numerous meetings about the Rule with the ABA Standing Committee on Ethics and Professional Responsibility and attempted to draft an amendment that would clarify how prosecutors should interpret the rule.⁷³ However, the Justice Department never supported the effort, so the Commission abandoned the amendment.⁷⁴ Instead, the Commission added the words “or a court order” to the end of the previous rule, again weakening the rule by giving prosecutors the opportunity to convince a court to permit communications that would otherwise be prohibited.⁷⁵

Some organizations and individuals submitted suggestions and comments to the Commission on various aspects of the Model Rules, but only a few bar associations and individuals commented on Rule 3.8. Rex Heinke, then President of the Los Angeles County Bar Association, sent a letter objecting to proposed language in the comment regarding prosecutors’ discovery obligations.⁷⁶ Robert O’Malley, then Chair of the District of Columbia Bar Rules of Professional Conduct Review Committee, sent a letter to the ABA Commission on Evaluation of the Rules of Professional Conduct recommending that prosecutors be required to submit exculpatory information to the grand jury.⁷⁷ None of the national prosecutor or defense organizations submitted comments.⁷⁸

The ABA Criminal Justice Standards Committee submitted a report that was highly critical of Model Rule 3.8.⁷⁹ The report suggested the

71. MODEL RULES OF PROF’L CONDUCT R. 4.2 (2000).

72. See William Glaberson, *Thornburgh Policy Leads to a Sharp Ethics Battle*, N.Y. TIMES, Mar. 1, 1991, at B4 (“In the memorandum, Mr. Thornburgh wrote that a Federal prosecutor’s duty to enforce the law sometimes conflicts with a written ethics rule of the legal profession that generally forbids a lawyer to talk with an opponent’s client without the permission of the opposing lawyer.”).

73. DAVIS, ARBITRARY JUSTICE, *supra* note 7, at 152 (citing Green, *supra* note 44, at 1582).

74. *Id.*

75. *Id.*

76. Green, *supra* note 44, at 1583 n.49.

77. *Id.*

78. *Id.* at 1583.

79. *Id.* at 1584.

need for a number of amendments, including raising the standard for bringing charges. It also suggested the need to add provisions that address important issues about which Rule 3.8 is silent, but which are addressed by various state ethics codes.⁸⁰ One of the suggestions was to add a provision prohibiting selective prosecution.⁸¹ However, the report discouraged the Commission from recommending a comprehensive overhaul of the rule, instead suggesting that there should be a separate, long-term review of the rule at a later time.⁸²

There has been much litigation and controversy surrounding the issues of grand jury practice, selective prosecution, *Brady* obligations, and contact with represented persons, suggesting the need for more guidance and clarity in the ethical rules. However, the ABA failed to provide that clarity during its last revision of the Model Rules. This failure is especially troubling in light of the Supreme Court's suggestion that state disciplinary authorities address prosecutorial misconduct. With both the Supreme Court and the ABA failing to hold prosecutors accountable, the findings of the studies which documented the prevalence of misconduct should come as no surprise.

B. *The Inadequacy of the Process*

Even if the Ethics 2000 Commission had strengthened Rule 3.8, prosecutors would continue to escape accountability without reform of the disciplinary process. The current process has proven totally ineffective in sanctioning prosecutors who engage in misconduct.⁸³ The Center for Public Integrity examined the frequency of bar referral for prosecutors and found only forty-four cases since 1970 in which prosecutors faced disciplinary proceedings for misconduct that adversely affected criminal defendants.⁸⁴ The misconduct in these cases included:

- discovery violations;
- improper contact with witnesses, defendants, judges or jurors;
- improper behavior during hearings or trials;
- prosecuting cases not supported by probable cause;

80. *Id.* at 1584 & n.54 (citing NIKI KUCKES, REPORT TO THE ABA COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT: CONCERNING RULE 3.8 OF THE ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY 39-42 (1999)).

81. *Id.* at 1584 n.54.

82. *Id.* at 1585-86.

83. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987) (discussing how infrequently prosecutors are sanctioned for *Brady* violations).

84. NEIL GORDON, CENTER FOR PUBLIC INTEGRITY, MISCONDUCT AND PUNISHMENT: STATE DISCIPLINARY AUTHORITIES INVESTIGATE PROSECUTORS ACCUSED OF MISCONDUCT (2003), <http://www.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=39>.

- harassing or threatening defendants, defendants' lawyers or witnesses;
- using improper, false or misleading evidence;
- displaying a lack of diligence or thoroughness in prosecution; and
- making improper public statements about a pending criminal matter.⁸⁵

Out of the forty-four prosecutor disciplinary cases:

In 7, the court dismissed the complaint or did not impose a punishment.

In 20, the court imposed a public or private reprimand or censure.

In 12, the prosecutor's license to practice law was suspended.

In 2, the prosecutor was disbarred.

In 1, a period of probation was imposed in lieu of a harsher punishment.

In 24, the prosecutor was assessed the costs of the disciplinary proceedings.

In 3, the court remanded the case for further proceedings.⁸⁶

It is not surprising that criminal defense attorneys rarely refer prosecutors to state disciplinary authorities, especially if the same prosecution office handles most or all of their cases. These attorneys know that their future clients are at the mercy of that office and its wide-ranging discretion in determining the charges and plea offers in their cases. Challenging the bar license of a prosecutor is risky business, especially since even when referrals are made, bar authorities frequently decline to recommend serious punishment, as the statistics from the Center for Public Integrity indicate.⁸⁷ It is understandable why defense attorneys are afraid to take the risk. However, it is unclear why more judges do not refer offending prosecutors to bar counsel, especially when these judges have made a finding of misconduct. In sum, the current process has proven to be a dismal failure.

C. The Rules, the Process, and Federal Prosecutors

Even though the rules and the process are weak, the Justice Department has taken steps to protect its lawyers from both. After former Attorney General Richard Thornburgh issued the so-called Thornburgh Memo in 1989, exempting federal prosecutors from the state disciplinary rules which prohibit lawyers from contacting persons represented by counsel, his successor, Attorney General Janet Reno, re-

85. *Id.*

86. *Id.*

87. *See id.*

issued it for public comment with some modifications. That rule was codified in a series of regulations in 1994.⁸⁸

The Thornburgh Memo and the Reno Rule became moot in 1998, when Congress passed the Citizens Protection Act (“CPA”).⁸⁹ This law required federal prosecutors to abide by the ethics rules of the states in which they practiced. Section 530B of the law provided, in part, that:

- (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.
- (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.⁹⁰

Not surprisingly, federal prosecutors have been highly critical of the CPA. Section 530B does not limit federal prosecutors to compliance with state ethical rules, instead declaring that they are subject to all “[s]tate laws and rules.”⁹¹ The Act did not clarify what federal prosecutors should do when federal and state laws conflict, as they frequently do. The Supremacy Clause of the United States Constitution suggests that federal law should prevail if there is a clear conflict.⁹² However, if particular state laws impose additional obligations on federal prosecutors, it is unclear whether a federal prosecutor would violate the CPA by merely complying with the federal rules.⁹³ Congress passed the CPA to ensure that federal prosecutors comply with ethical rules—a laudable and necessary purpose. However, like the Model Rules, the language of the statute is broad and unclear, does not provide adequate guidance to federal prosecutors, and leaves too many questions

88. 28 C.F.R. §§ 77.1 to 77.12 (1995). Thornburgh issued his memorandum in response to a controversy surrounding the extent to which federal prosecutors should be required to comply with Rule 4.2 of the ABA Model Rules of Professional Conduct. For a thorough discussion of this controversy and its resolution, see DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 113-14, 154-60.

89. Pub. L. No. 105-277, § 801, 112 Stat. 2681-118 to -119 (1998).

90. 28 U.S.C. § 530B(a)-(b) (2000).

91. *Id.* § 530B(a).

92. Under the Supremacy Clause of the U.S. Constitution (Article VI, Clause 2), federal laws prevail when state and federal laws conflict. *See* *Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982) (noting that “a state statute is void to the extent that it actually conflicts with a valid federal statute”); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) (noting “[a] conflict will be found ‘where compliance with both federal and state regulations is a physical impossibility’”) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (alteration in original)).

93. *See* Gregory B. LeDonne, Recent Development, *Revisiting the McDade Amendment: Finding the Appropriate Solution for the Federal Government Lawyer*, 44 HARV. J. ON LEGIS. 231 (2007) (discussing the continued confusion over the applicability of ethical standards since the CPA was passed).

unanswered.⁹⁴

The Justice Department has its own internal process for holding federal prosecutors accountable for unethical behavior. The Justice Department's Office of Professional Responsibility ("OPR") purportedly serves this purpose. The Department describes OPR as follows:

The Office of Professional Responsibility, which reports directly to the Attorney General, is responsible for investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct within the jurisdiction of OPR.

The objective of OPR is to ensure that Department of Justice attorneys continue to perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency.

The Office is headed by the Counsel for Professional Responsibility. Under the Counsel's direction, OPR reviews allegations of attorney misconduct involving violation of any standard imposed by law, applicable rules of professional conduct, or Departmental policy. When warranted, OPR conducts full investigations of such allegations, and reports its findings and conclusions to the Attorney General and other appropriate Departmental officials.⁹⁵

The obvious flaw of OPR is the absence of independent review. Even though OPR may ultimately refer its prosecutors to state disciplinary authorities, it only does so if its own investigation and the disciplinary process of the particular federal prosecutor's office sustain a finding of misconduct, and then only if the misconduct implicates that state's disciplinary rules.⁹⁶ In other words, the Justice Department provides layers of internal review before referring a prosecutor to a state bar counsel.

According to OPR's 2003 Annual Report, "[t]he majority of complaints reviewed by OPR each year are determined not to warrant further investigation because, for example, the complaint is frivolous on its face, is outside OPR's jurisdiction, or is vague and unsupported by

94. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 157.

95. United States Department of Justice, Office of Professional Responsibility, <http://www.usdoj.gov/opr/> (last visited Feb. 14, 2008).

96. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 158.

any evidence.”⁹⁷ The fact that the majority of complaints are dismissed is not, in and of itself, proof of bias. Many of the complaints may, in fact, be frivolous, and someone has to make these judgments. However, there is a great risk of actual and perceived bias in the decision-making process since the Justice Department has a vested interest in demonstrating that its prosecutors do not engage in misconduct.⁹⁸

OPR dismissed the vast majority of complaints against its lawyers in 2003. In the 2003 Annual Report, OPR summarizes its intake and evaluation of complaints as follows:

In fiscal year 2003, OPR received 913 complaints and other letters and memoranda requesting assistance, an increase of approximately 33% from fiscal year 2002. OPR determined that 342 of the matters, or approximately 37%, warranted further review by OPR attorneys. OPR opened full investigations in ninety-two of those matters; the remaining 250, which are termed “inquiries,” were resolved with no findings of professional misconduct, based on further review, responses from the subjects, and other information. When information developed in an inquiry indicated that further investigation was warranted, the matter was converted to a full investigation.

The remaining 571 matters were determined not to warrant an inquiry by OPR because, for example, they related to matters outside the jurisdiction of OPR; sought review of issues that were being litigated or that had already been considered and rejected by a court; were frivolous, vague, or unsupported by any evidence; or simply requested information. Those matters were addressed by experienced management analysts through correspondence or referral to another government agency or Department of Justice component. A supervisory OPR attorney and the Deputy Counsel reviewed all such dispositions.⁹⁹

Only ninety-two of the 913 complaints resulted in an investigation. Of the ninety-two complaints, only thirteen attorneys were found to have engaged in professional misconduct. OPR took disciplinary action, including suspension without pay and written reprimands, against twelve of the thirteen attorneys. The reports do not provide information about the number of federal prosecutors who resigned either during an

97. OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEPARTMENT OF JUSTICE, FISCAL YEAR 2003 ANNUAL REPORT, available at <http://www.usdoj.gov/opr/annualreport2003.htm> [hereinafter OPR ANNUAL REPORT].

98. DAVIS, ARBITRARY JUSTICE, *supra* note 7, at 159.

99. OPR ANNUAL REPORT, *supra* note 97.

investigation or after learning that they would be investigated,¹⁰⁰ but the vast number of complaints that were dismissed leaves the clear impression that the Justice Department is protecting its own.

Critics of OPR have complained that it fails to provide adequate information to state disciplinary authorities on the rare occasions when it actually makes a referral.¹⁰¹ When OPR provides reports on the prosecutors they refer, these reports are often incomplete. The office frequently redacts classified or grand jury information and other information that falls under certain privacy acts.¹⁰² On the rare occasion when a complaint against a federal prosecutor reaches the state disciplinary level, it is difficult for the independent authority to conduct an adequate investigation when OPR redacts important information from their reports or delays referrals for many years after the initial complaint.¹⁰³

OPR does serve a useful purpose. The Justice Department should be commended for devoting an entire office to assuring that its lawyers engage in ethical practices. However, OPR's lack of independence and failure to disclose information to state and local authorities damages its credibility, leaving serious questions about its overall effectiveness in deterring and punishing prosecutors.

IV. THE MIKE NIFONG EXCEPTION

The Mike Nifong case undoubtedly has left the public with misperceptions about prosecutorial misconduct and the extent to which it is punished. The first misperception, initiated and fostered by the Attorney General of North Carolina, is that Nifong's behavior was an aberration. Nothing could be further from the truth, as demonstrated by the studies conducted by the Center for Public Integrity and various journalists.¹⁰⁴ The second misperception is that prosecutors are punished when they engage in misconduct. Again, the evidence proves just the

100. OPR may continue an investigation after an attorney resigns. The Deputy Attorney General makes this decision based on factors such as the seriousness of the allegation and how long the investigation has been pending. Telephone Interview with H. Marshall Jarrett, Chief Counsel & Dir., Office of Prof'l Responsibility (July 17, 2006).

101. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 160.

102. OPR will release some private information if the local bar office signs a confidentiality agreement. Offices that are required to report certain types of information to the public may not be permitted to sign these agreements.

103. In a case involving former AUSA Paul Howes, Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia ordered OPR to provide information it redacted from its report. Telephone Interview with Sandra Levick, Staff Attorney, Pub. Defender Serv. for D.C. (July 17, 2006).

104. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 126-27; *See, e.g.*, Weinberg, *supra* note 5.

opposite.¹⁰⁵ So why was Mike Nifong disciplined severely when other prosecutors who have engaged in similar behavior and much worse have escaped punishment altogether? The facts of the case and the individuals involved provide some insight.

On March 13, 2006, the Duke lacrosse team held a party at the home of the team captains. Some of the members called an escort service and requested two white strippers, but the service instead sent two African American strippers. After an argument between the women and some team members, the two women left. According to the women, after they left the house and walked to their car, one member of the team came out to their car, apologized, and asked them to return. When they came back in, they were separated, and one of the women allegedly was raped and assaulted. The women left the house party, and the alleged victim later reported to police that several white males had raped her at the party earlier that evening.¹⁰⁶

Members of the lacrosse team who were present at the party were ordered to provide DNA samples. The prosecutor, Mike Nifong, ultimately charged Reade Seligmann, Collin Finnerty, and David Evans with rape and related charges. Nifong's initial decision to charge the Duke lacrosse players with the rape of an exotic dancer was not an unreasonable one. Prosecutors frequently charge individuals in rape cases on the word of the complainant alone, even in the absence of corroborating physical evidence.¹⁰⁷ In this case, a nurse who examined the complainant reported injuries consistent with a sexual assault.¹⁰⁸ Nifong was undoubtedly mindful of the criminal justice system's poor treatment of rape victims. Historically, prosecutors never charged white men who raped African American women.¹⁰⁹ If Nifong had failed to pursue the prosecution of wealthy white college students accused of raping a poor black woman, he would have been justifiably criticized. Facing an election in a jurisdiction with a sizable African American community, Nifong was eager to demonstrate that he was not providing favorable treatment to the students. Thus, he zealously pursued the

105. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 135-40.

106. See Samiha Khanna & Anne Blythe, *DNA Tests Ordered for Duke Athletes*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 24, 2006, at A1 (discussing the incident and the resulting investigation); see also Mosteller, *supra* note 3, at 1341-46.

107. See, e.g., *State v. Bunyard*, 133 P.3d 14 (Kan. 2006).

108. Joseph Neff, *Cop Says Nurse Found Trauma in Duke Case*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 27, 2006, at A1.

109. See generally Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1 (2006).

prosecution.¹¹⁰

Unfortunately, Nifong's behavior crossed the line from zeal to misconduct. Nifong clearly violated the *Brady* doctrine, thus engaging in misconduct, when he failed to turn over a DNA report that revealed the DNA of several other men in the complainant's body.¹¹¹ Nifong also withheld reports of contradictory statements that cast serious doubt on the credibility of the complainant.¹¹² Nifong dismissed the rape charges (but not the kidnapping and sexual offense charges) against all three men on December 22, 2006,¹¹³ some time after members of the defense team discovered the misconduct and announced it in the press.¹¹⁴ In less than a week, the North Carolina bar filed ethics charges against Nifong.¹¹⁵ In January 2007, Nifong asked the North Carolina attorney general's office to assume responsibility for the case, and Attorney General Roy Cooper ultimately dismissed all charges in April 2007.¹¹⁶ Nifong was disbarred in June 2007, convicted of contempt on August 31, 2007, and sentenced to a day in jail.¹¹⁷ Such action is rarely, if ever, taken against prosecutors.¹¹⁸

Nifong's misconduct was deplorable and worthy of the punishment he received. But why did he receive such harsh punishment when other prosecutors who engage in similar or much more egregious behavior escape punishment altogether? The prosecutor in the Delma Banks case, for example, threatened witnesses with jail time if they did not conform their testimony to the government's theory of the case and then failed to disclose additional exculpatory evidence.¹¹⁹ Delma Banks was sentenced to death and came within minutes of being executed.¹²⁰ Yet the prosecutor in that case was never even referred to disciplinary

110. Angela J. Davis, *They Must Answer for What They Have Done: Prosecutors Who Misuse Discretion or Abuse Power Should Be Held Accountable*, LEGAL TIMES, Aug. 6, 2007, at 42 [hereinafter Davis, *They Must Answer*].

111. *Id.*

112. *Id.*; see Mosteller, *supra* note 3, at 1358-64.

113. Joseph Neff & Benjamin Niolet, *Rape Charges Dropped, Others Remain*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 23, 2006, at A1.

114. For example, *The News & Observer* reported on December 14, 2006, that the players' defense attorneys filed a motion stating that the DNA lab withheld findings. See Joseph Neff & Benjamin Niolet, *Motion Says Lab Withheld DNA Findings*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 14, 2006, available at <http://www.newsobserver.com/1185/story/521326.html>.

115. Matt Dees, *Nifong Broke Rules, Bar Alleges*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 29, 2006, at 1A.

116. Mosteller, *supra* note 3, at 1347; Davis, *They Must Answer*, *supra* note 110, at 42.

117. Associated Press, *Day in Jail for Ex-Duke Prosecutor*, N.Y. TIMES, Sept. 1, 2007, at A9.

118. Davis, *They Must Answer*, *supra* note 110, at 42.

119. *Banks v. Dretke*, 540 U.S. 668, 684-86 (2004).

120. Peter T. Kilborn, *Texas Death Row Inmate Gets a Last-Minute Stay*, N.Y. TIMES, Mar. 13, 2003, at A18.

authorities, much less punished.

Race and class undoubtedly played a role in the outcome of the Duke lacrosse case and the Nifong disciplinary proceedings. The three Duke students are wealthy and white. Although some have actually suggested that these students were treated more harshly because of their race,¹²¹ the evidence suggests the opposite. Certainly one cannot imagine a more damaging accusation than being accused of rape, and the young men clearly suffered from the accusation. But the case was dismissed in a relatively short period of time compared to the cases of the thousands of poor people who have spent years in jail and even on death row as a result of prosecutorial misconduct.¹²² The Duke students never spent a day in jail; moreover, they continued with their college education.¹²³ A prominent writer wrote a best-selling book about their innocence and spoke out widely in their support in the media.¹²⁴

Many victims of misconduct are not only accused, but convicted, and spend years in jail for very serious offenses that they did not commit. Innocence Projects established across the country have revealed the prevalence of wrongful convictions, and prosecutorial misconduct is cited as one of the main causes of these injustices.¹²⁵ Almost all of these

121. See STUART TAYLOR, JR. & K.C. JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* (2007).

122. See generally JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2001).

123. Duke eventually invited Colin Finnerty and Reade Seligman back as students, but both declined. In 2007, Finnerty transferred to Loyola of Maryland; Seligman transferred to Brown. Both continue to play NCAA Lacrosse. Jeff Barker, *Finnerty to Play Lacrosse for Loyola*, BALT. SUN, July 12, 2007, at 1D; *Former Duke Player Will Attend Brown*, WASH. POST, May 30, 2007, at E2. David Evans graduated the day before being indicted in the case. He is now an investment banking analyst with the Wall Street firm Morgan Stanley. See Todd Venezia, *Duke Kid's Bonus—Plum Wall St. Job*, N.Y. POST, Apr. 19, 2007, at 3.

124. TAYLOR & JOHNSON, *supra* note 121; see also *Writer Examines Duke Lacrosse Case*, PRINCETON WEEKLY BULLETIN, Oct. 15, 2007, available at <http://www.princeton.edu/pr/pwb/07/1015/nn/>; Book TV on C-SPAN2, Search Book TV, <http://www.booktv.org/search.aspx> (last visited Feb. 15, 2008) (enter "Taylor, Stuart" under "Author" search; then follow "Program" hyperlink).

125. See, e.g., Innocence Project, *Understand the Causes: Government Misconduct*, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Feb. 15, 2008); Mid-Atlantic Innocence Project, *Causes of Wrongful Convictions: Police/Prosecutorial Misconduct*, <http://www.exonerate.org/facts/causes-of-wrongful-convictions/policeprosecutorial-misconduct/> (last visited Feb. 15, 2008); North Carolina Center on Actual Innocence, *Causes and Remedies: Police/Prosecutorial Misconduct*, http://www.law.duke.edu/innocencecenter/causes_and_remedies.html#police (last visited Feb. 15, 2008); Santa Clara University School of Law, *Northern California Innocence Project*, <http://www.northerncaliforniainnocenceproject.org/> (last visited Feb. 15, 2008) (follow "Causes of Wrongful Convictions" hyperlink).

victims are poor, and a disproportionate number of them are African American or Latino/a.¹²⁶

There is little question that African Americans and Latinos are treated less well in the criminal justice system than whites.¹²⁷ Likewise, the poor fare much worse than the middle-class or wealthy, and sometimes both class and race play a role at various stages in the criminal process.¹²⁸ These disparities exist for victims of crimes as well as defendants. The experiences of the Duke students and Mike Nifong reflect the reality of these race and class disparities.

The Duke students were fortunate to be able to hire a team of top-notch defense attorneys who had the power and resources to not only

126. See AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 7, 50 (2004), available at <http://www.thejusticeproject.org/press/reports/pdfs/17187.pdf> (recognizing that inadequately funded indigent defense systems puts indigent persons accused of crimes at risk for wrongful conviction); Innocence Project, News and Information: Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php#> (finding that of the 208 exonerees, 125 are African-American and stating that, in over half of DNA exonerations, "forensic scientists and prosecutors presented fraudulent, exaggerated, or otherwise tainted evidence to the judge or jury which led to the wrongful conviction") (last visited Feb. 15, 2008); see also Nina Martin, *Innocence Lost*, SAN FRANCISCO, Nov. 2004, at 78; Death Penalty Information Center, Innocence and the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?did=412> (last visited Feb. 15, 2008).

127. See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); RACIAL ISSUES IN CRIMINAL JUSTICE: THE CASE OF AFRICAN AMERICANS (Marvin D. Free, Jr. ed., 2003) (discussing the enormous racial disparities in the criminal justice system); MILTON HUEMANN & LANCE CASSAK, *GOOD COP, BAD COP: RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE* (2003) (discussing the impact of the practice of profiling on racial and ethnic minorities); MARC MAUER, *RACE TO INCARCERATE* (2d ed. 2006); KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* (1998); Developments in the Law, *Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) (examining the problem of race discrimination within the criminal justice system); Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219 (1994) (discussing the disadvantages that racial minorities face in the criminal justice system due to inadequate resources of public defender services); Mark D. Rosenbaum & Daniel P. Tokaji, *Healing the Blind Goddess: Race and Criminal Justice*, 98 MICH. L. REV. 1941, 1942 (2000) (discussing the "massive and flagrant abuses" of law enforcement officers and their disparate effect on racial minorities).

128. The behavior and treatment of almost everyone involved in the criminal justice process reflect the complexities of race and class. For a discussion of the relevance of both race and socio-economic status to discriminatory behavior by criminal justice officials, see DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 5 (1987) (noting that "race-related disadvantages" are "now as likely to be a result as much of social class as of color"); MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 62-63 (1995) (discussing critiques of criminal justice statistics as reflecting racial and class bias); Angela J. Davis, *It's Class and Race*, WASH. POST, Nov. 25, 1995, at A19 (arguing that both race and class discrimination exist in the criminal justice system). It is often difficult to discern whether discrimination is based on race, class, or both.

investigate their cases and provide first class representation, but to command the attention of the media when it was in the best interest of their clients to do so. CNN and other networks broadcast press conferences called by the defense lawyers on a number of occasions, permitting them to present evidence of their clients' innocence and the prosecutor's misconduct to a worldwide audience.¹²⁹ So despite the damaging effects of the rape charges, they were able to present a counter-narrative early and regularly throughout the case. The value of this access to the media cannot be understated as it gave the defendants the opportunity to tell their story and garner sympathy and support from members of the public. In addition to the lawyers' press conferences, the parents of the defendants appeared on "60 Minutes" and other national television shows and presented a very sympathetic picture of their sons.¹³⁰ All of this media exposure undoubtedly influenced the North Carolina bar in their decision to disbar Nifong.

More important than the media exposure, however, were the vast resources at the disposal of the defense team that resulted in the discovery of Nifong's misconduct. One of the attorneys on the defense team discovered the exculpatory information buried in 1844 pages of laboratory data after reading a book on DNA and spending 60 to 100 hours analyzing the data.¹³¹ No public defender and few private attorneys have the resources to mount this type of investigation.¹³² Wealth clearly played a large role in the outcome of the Duke case. Without the ability of the defense team to not only discover the misconduct but also expose it in the national media, it is doubtful that the North Carolina bar would have taken such extreme action against Nifong.

Did race play a role as well? Because race and class issues frequently intersect,¹³³ it is often difficult to discern which has a more significant effect. Nifong's decision to believe an African American woman's allegations that white men had raped her does not mean that these men did not receive favorable treatment based on their race. A

129. See e.g., CNN.com, Transcripts: Rape Charges Dropped Against Duke Players (Dec. 22, 2006), <http://transcripts.cnn.com/TRANSCRIPTS/0612/22/cnr.05.html>.

130. See CBS News, Duke Rape Suspects Speak Out (Oct. 15, 2006), <http://www.cbsnews.com/stories/2006/10/11/60minutes/main2082140.shtml>.

131. David Zucchino, *DNA Results in Rape Case Withheld*, L.A. TIMES, Dec. 14, 2006, at A12 ("Enough of [the] DNA [from the rape kit] existed for [the lab] to conclude that none of it matched the defendants, their teammates . . . or anyone else who submitted a DNA sample to the investigation.").

132. Davis, *They Must Answer*, *supra* note 110, at 42.

133. Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187 (2004) (recognizing the intersectionality of gender, race, sexuality, and class).

number of studies have demonstrated that individuals subconsciously associate crime with African Americans while failing to see criminal behavior in whites who commit the same acts.¹³⁴ There are also examples of wealthy African Americans being publicly scorned even when they have been acquitted or charges have been dismissed against them.¹³⁵ However, the Duke students have been able to go on with their lives, attend school, and secure excellent jobs.

What about the fact that Mike Nifong is white as well? It is noteworthy that he is a white man who believed a black woman and who responded to the advocacy of his black constituents. Although some accuse Nifong of bringing the charges because he feared losing black voters in an upcoming election, he may have been responding (at least initially) to legitimate concerns of his constituents about black victims receiving poor treatment in the criminal justice system.¹³⁶ Prosecutors must walk the fine line between accountability and independence,¹³⁷ and Nifong's initial decision to bring charges may have been an attempt on his part to be accountable to the constituents he was elected to serve. It is possible that his decision to respond to a black victim and members of the black community caused some whites to empathize with the Duke students rather than support the decision of the prosecutor, as most members of the public usually do.

134. Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375 (1997) (finding a strong relationship between whites' perceptions of African Americans and judgments of crime and citing additional studies in which behaviors undertaken by African Americans were viewed as more aggressive and more guilty than the same behaviors undertaken by whites); Mark Peffley, Jon Hurwitz & Paul M. Sniderman, *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL. SCI. 30 (1997) (finding that whites with negative perceptions of African Americans are more likely to judge African Americans more harshly concerning issues of crime than whites similarly situated); Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717 (2001) (finding that perceptions of crime in a particular neighborhood are positively associated with the percent of young black men in that neighborhood).

135. Even when rape charges were dismissed against basketball star Kobe Bryant, he received hate mail and was shunned by fans and other members of the public. Howard Beck, *The Collapse of Kobe: Bryant Gets His Way, and Then Loses It*, N.Y. TIMES, Dec. 17, 2004, at D1 (referring to Bryant's loss of endorsements and destroyed image); David DuPree, 'This Game Has to Be Personal,' USA TODAY, Dec. 22, 2004, at C1 (recognizing that the rape case tarnished Kobe Bryant's image); Sam Smith, *Kobe's Climbed Back, Now the Star Among the Stars*, MSNBC, Feb. 19, 2006, <http://www.msnbc.msn.com/id/11416952/> (acknowledging that Kobe Bryant's popularity is on the upswing after being so tarnished that his image was no longer valuable). Likewise, O.J. Simpson continued to be held in contempt by most members of the public even before his most recent criminal charges, despite the fact that he was acquitted of the murders of Ron Goldman and Nicole Simpson over ten years ago.

136. See DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 61-76.

137. See *id.* at 163-78.

V. UNETHICAL BEHAVIOR NOT COVERED BY THE RULES

State and federal disciplinary authorities have failed to hold prosecutors accountable for misconduct for a variety of reasons. However, even if prosecutors were referred to disciplinary authorities more regularly, the legal profession may not hold them accountable if the rules do not prohibit their offending behavior. Two recent cases demonstrate this problem in stark terms.

A. *Genarlow Wilson*

Genarlow Wilson was seventeen years old when he decided, along with some of his teenage friends, to rent a hotel room. The young men invited their girlfriends, and the group drank alcohol, smoked marijuana, and performed various sexual acts at the hotel. They also videotaped themselves engaging in this behavior. One of the girls called her mother after she woke up the following morning and reported that she had been raped. Her mother called the police who searched the room and found the videotape. The police arrested the boys and the prosecutor charged them with several sex offenses, including rape. All of the boys except Wilson accepted a plea offer with a five-year prison sentence and the requirement that they register as sex offenders.¹³⁸

Wilson went to trial and the jury acquitted him of rape, but found him guilty of aggravated child molestation.¹³⁹ At the time of the trial, this offense included having oral sex with a child under the age of sixteen—even if the child is fifteen, the “offender” is her seventeen-year-old boyfriend, and the behavior is totally consensual.¹⁴⁰ The videotape clearly demonstrated that Wilson participated in this behavior with a girl who also willingly participated in the act. Several jurors were outraged and upset when they later found out that the penalty for this

138. See Wright Thompson, *Outrageous Injustice*, ESPN E-TICKET MAGAZINE, <http://sports.espn.go.com/espn/eticket/story?page=Wilson> (“The other boys didn’t want to risk a jury, and one by one each took an offer and went to prison . . .”) (last visited Feb. 19, 2008).

139. *Id.*

140. At the time of the conviction, the statute read: “A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy.” GA. CODE ANN. § 16-6-4(c) (2005). The statute imposed a mandatory minimum sentence of ten years. *Id.* § 16-6-4(d)(1). In July 2006, Georgia amended the statute by adding subsection (b)(2): “If the victim is at least 14 but less than 16 years of age and the person convicted of child molestation is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor . . .” GA. CODE ANN. § 16-6-4(b)(2) (2007).

offense was ten mandatory years in prison with no possibility of parole.¹⁴¹

Douglasville, Georgia, District Attorney David McDade saw the same videotape that the jurors saw. The physical evidence demonstrated that Wilson engaged in consensual oral sex with another teenager. The girl's mother testified at Wilson's trial, identifying her daughter on the videotape, but the girl did not testify. After Wilson was convicted, the mother stated that the prosecutor told her that she could "face legal trouble for 'neglect' as a parent" if she did not participate in the prosecution.¹⁴² She further stated that her daughter "did not want any of this to happen."¹⁴³ Although prosecutors are not required to consult with crime victims when making charging decisions,¹⁴⁴ the American Bar Association *Standards for the Prosecution Function* lists the interest of the victim in prosecution as an important factor to consider when making this decision.¹⁴⁵ Although Assistant District Attorney Eddie Barker, who worked closely on the case, denied that the girl's mother asked the prosecutors not to charge Wilson,¹⁴⁶ there is at least some evidence that the victim did not willingly participate in the prosecution.

After Wilson had been incarcerated for some time, his story slowly caught the attention of the media. Prior to his arrest, Wilson was a college bound high school athlete on the honor roll with no prior criminal record.¹⁴⁷ A ten year mandatory prison sentence and registration as a sex offender for having consensual sex with another teenager seemed harsh to just about everyone. There were rallies led by civil

141. See Thompson, *supra* note 138 ("When the jurors found out there was a 10-year mandatory minimum sentence, several were incensed . . . The prosecution told them to write a letter, then moved on to the next case.").

142. See Jeremy Redmon, *Girl's Mother Defends Wilson*, ATLANTA J. CONST., June 14, 2007, at A1.

143. *Id.*

144. See DAVIS, ARBITRARY JUSTICE, *supra* note 7, at 65.

145. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.2(h) (3d ed. 1993).

146. See Redmon *supra* note 142.

147. See Thompson, *supra* note 138 (Wilson had a 3.2 grade point average and was the school's homecoming king).

rights leaders and many stories in the national press.¹⁴⁸ Former President Carter spoke out in support of Wilson's release,¹⁴⁹ as did presidential candidate Barack Obama.¹⁵⁰ The Georgia state legislature eventually changed the law to make Wilson's behavior a misdemeanor, but it did not make the law retroactive.¹⁵¹ A judge ordered Wilson's release, finding the sentence to be "cruel and unusual punishment," but the state attorney general Thurbert Baker appealed the judge's decision. Finally, on October 26, 2007, after Wilson spent over two years in adult prison, the Georgia Supreme Court freed him in a 4-3 decision in which the court found the sentence to be in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁵²

District Attorney McDade did not violate any laws or ethical rules when he charged Wilson with aggravated child molestation.¹⁵³ Likewise, the attorney general's decision to appeal Wilson's release, even though the state legislature had reduced the sentence from a mandatory ten year sentence to a misdemeanor, and Wilson had served almost two years in prison at the time of the appeal, was legally permissible and not a violation of Georgia's ethical rules. An ethical rule that would forbid prosecutors from bringing or pursuing charges that contradict the legislative intent may have subjected the attorney general to disciplinary action.

Prosecutors understandably would be opposed to an ethical rule that

148. Associated Press, *Sharpton, Lowery, Others Hold Vigil for Genarlow Wilson*, THE DAILY CITIZEN, July 6, 2007, available at http://www.northwestgeorgia.com/statenews/local_story_187104853.html; Geoffrey Bennett, *Sharpton Rallies for Release of Genarlow Wilson*, NPR: NEWS & VIEWS, July 6, 2007, http://www.npr.org/blogs/newsandviews/2007/07/sharpton_rallies_for_release_o.html; Amy Goodman, *10 Years in Prison for Consensual Sex: Genarlow Wilson's Mother Speaks Out on Why Her Son Remains Locked Up*, DEMOCRACY NOW!, July 17, 2007, <http://www.democracynow.org/article.pl?sid=07/07/17/1356206>. The incident even commanded international attention. See Errin Haines, *Rally Held for Inmate in Teen Sex Case*, GUARDIAN UNLIMITED (U.K.), July 5, 2007, <http://www.guardian.co.uk/worldlatest/story/0,-6760093,00.html>.

149. *Last Minute Appeal in Teen Sex Case Sparks Outrage*, CNN, June 12, 2007, <http://www.cnn.com/2007/US/06/11/teen.sex.case/index.html> (stating that Wilson's case has commanded national attention as well as requests for his release, including those of former President Carter); Goodman, *supra* note 148.

150. Goodman, *supra* note 148; see Senator Barack Obama, Remarks During the 140th Howard University Opening Convocation (Sept. 28, 2007), available at <http://www.howard.edu/newsroom/news/2007/071001RemarksOfSenatorBarackObama.htm> (referring to Wilson and stating, "a 21-year-old honor student is still sitting in a Georgia prison for something that wasn't even a felony. That's wrong.").

151. GA. CODE ANN. § 16-6-4(b)(2) (2007).

152. *Humphrey v. Wilson*, 652 S.E.2d 501 (Ga. 2007) (remanding the case to the habeas court instructing it to enter an order reversing the conviction and discharging Wilson from custody).

153. Because the sexual act was videotaped, the "technical" violation existed, providing probable cause. Thus, the District Attorney did not violate the rules by charging Wilson.

would unduly interfere with their broad discretionary powers. Discretion serves an important and essential function in the exercise of prosecutorial power. However, when prosecutors abuse their discretion as they did in the *Wilson* case, the ethical rules should hold them accountable.

B. *The Jena Six*

Jena High School in Jena, Louisiana, was like many high schools across the country—integrated in theory but segregated in reality. Jena High School was about eighty-five percent white and fifteen percent black, and the black and white students rarely socialized with each other.¹⁵⁴ Most of the white students gathered beneath a large tree on the school grounds while the black students socialized near the school auditorium. On August 31, 2006, a black student asked the principal if he could sit under the tree, and the principal told him he could sit wherever he wanted.¹⁵⁵ The next day, several white students hung nooses from the tree—a clear threat to the black students with a frightening message of racial hatred. Although the principal recommended expulsion for the white students, the Board of Education and Superintendent overruled the principal, categorizing the incident as an adolescent prank.¹⁵⁶ Instead, the principal imposed in-school detention—a punishment that the black students and their parents believed to be inadequate. The black students staged a non-violent protest by standing silently under the tree. The principal then called the local prosecutor, Reed Walters, and asked him to speak at the school assembly. Walters raised his fountain pen in the air, and proclaimed, “[w]ith one stroke of this pen, I can make your life disappear.”¹⁵⁷ The black students said that he was looking directly at them when he made the outrageous threat.¹⁵⁸

In the following weeks, racial tensions grew. There were fights between groups of black and white students and several individual

154. See Gretel C. Kovach & Arian Campo-Flores, *A Town In Turmoil*, NEWSWEEK, Aug. 27, 2007, at 36 (“African-Americans—who make up about 12 percent of the town’s 3,500 residents—are concentrated in an area called ‘the country,’ a mix of tidy brick homes and rusted trailers. You won’t find many of them in the middle-class white neighborhood with tall pines and manicured lawns known by blacks and whites as ‘Snob Hill.’”).

155. Mary Mitchell, *Did Civil Rights Movement Pass Louisiana By?: Racist Incident Leads to Harsh Justice for Black Students*, CHICAGO SUN-TIMES, Aug. 30, 2007, at 12.

156. ACLU, Background: Jena 6 (Sept. 20, 2007), <http://www.aclu.org/racialjustice/racialprofiling/31881res20070920.html>.

157. See Wade Goodwyn, *All Things Considered: Beating Charges Split La. Town Along Racial Lines*, NPR, July 30, 2007, <http://www.npr.org/templates/story/story.php?storyId=12353776>.

158. *Id.*

incidents. One white student displayed a pistol grip shotgun to a group of black students who attempted to disarm him. Walters chose to charge the black student who disarmed the white student with theft of the gun, robbery, and disturbing the peace.¹⁵⁹ The white student was not charged. White students allegedly assaulted a black student at a party, breaking a bottle over the black student's head. One white student was charged with a misdemeanor and received probation.¹⁶⁰ Yet when six black students allegedly assaulted a white student, Walters charged them with numerous serious felonies in adult court, including attempted murder and assault with a dangerous weapon (the alleged weapons were the tennis shoes that the students were wearing).¹⁶¹ The white student was not hospitalized and attended a school function later that night. The prosecutor ultimately dismissed the attempted murder charges.¹⁶²

The first black student to go to trial, Mychal Bell, was convicted and faced twenty-two years in adult prison before a judge ultimately dismissed the charges and ruled that he should not have been charged in adult court.¹⁶³ Mychal Bell ultimately pled guilty to second degree battery in juvenile court and received an eighteen month sentence with credit for the ten months he had already served.¹⁶⁴ The other five students are currently awaiting trial.¹⁶⁵

The prosecution of the "Jena Six" provoked one of the largest civil rights marches in recent history. Civil rights leaders and organizations, church groups, and students from all over the country came to Jena, Louisiana on September 20, 2007, to participate in a march to protest the unfair treatment of the Jena Six. Over 20,000 people are reported to have participated in the march.¹⁶⁶ Like the Genarlow Wilson case, this case received national and international attention in the media and numerous

159. *Id.*

160. The white student, Justin Sloan, was charged with simply battery. Darryl Fears, *La. Town Wrestles With Deep-Rooted Racial Issues*, WASH. POST, Aug. 5, 2007, at A10.

161. Kovach & Campo-Flores, *supra* note 154, at 36.

162. *Race, Justice and Jena*, ECONOMIST, Sept. 29, 2007, at 33 (stating that after public outcry the charges were reduced to second-degree battery).

163. *Teenager Released in Louisiana Case*, N.Y. TIMES, Sept. 28, 2007, at A21.

164. Associated Press, *Teenager in Jena Six Pleads Guilty to Lesser Charge*, N.Y. TIMES, Dec. 4, 2007, at A24.

165. *Id.*

166. *Race, Justice and Jena*, *supra* note 162, at 33.

individuals, including presidential candidates, renounced the prosecutor's actions.¹⁶⁷

A complaint has been filed against Reed Walters with the Louisiana bar, but the nature of the complaint reveals the inadequacy of the ethical rules. In December 13, 2006, Walters made a statement that was published in *The Jena Times*. In this statement he said:

I will not tolerate this type of behavior. To those who act in this manner, I tell you that you will be prosecuted to the fullest extent of the law and with the harshest crimes that the facts justify. When you are convicted, I will seek the maximum penalty allowed by law. I will see to it that you never again menace the students at any school in this parish.¹⁶⁸

The *Louisiana Rules of Professional Conduct* state:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.¹⁶⁹

Although Walters' statement may violate this ethical rule, arguably his most egregious act was his selective prosecution of the black students. Although there was evidence that both white and black students engaged in assaultive behavior, he charged only one white student with a minor misdemeanor while charging a group of black students with serious adult felonies for engaging in similar behavior—charges that a judge ultimately dismissed. Yet there is no ethical rule that prohibits this behavior. The Supreme Court's jurisprudence requires a showing of intentional discrimination to obtain even the discovery necessary to pursue a motion to dismiss the indictment for selective prosecution based on race.¹⁷⁰ So if the legal profession fails to prohibit this behavior, victims of race-based selective prosecution are left without an effective

167. See Press Release, Senator Barack Obama, Obama Comments on Repeal of Jena 6 Conviction (Sept. 14 2007), available at http://www.barackobama.com/2007/09/14/obama_comments_on_repeal_of_je.php ("I hope that today's decision will lead the prosecutor to reconsider the excessive charges brought against all the teenagers in this case. And I hope that the judicial process will move deliberately to ensure that all of the defendants will receive a fair trial and equal justice under the law."); see also Alec MacGillis, *Democrats Weigh In On Jena 6*, WASH. POST, at A04 ("[O]n Al Sharpton's radio show, Sen. Hillary Rodham Clinton (D-N.Y.) said 'People need to understand that we cannot let this kind of inequality and injustice happen anywhere in America.'" John Edwards stated: "As someone who grew up in the segregated South, I feel a special responsibility to speak out on racial intolerance.").

168. *D.A. Issues Statement Concerning JHS Incident*, JENA TIMES, Dec. 13, 2006, at 1.

169. LA. RULES OF PROF'L CONDUCT R. 3.6(a) (2006).

170. See *United States v. Armstrong*, 517 U.S. 456, 461-71 (1996).

remedy.

VI. CONCLUSION: THE NEED FOR REFORM

National, state, and local bar associations should begin prosecutorial reform efforts by conducting in-depth investigations and evaluations of state disciplinary proceedings to determine (a) why they have not been effective in remedying prosecutorial misconduct; and (b) whether and what changes might make the process more effective.¹⁷¹ Strengthening the disciplinary process should be a top priority for reform because the United States Supreme Court has identified this process as the appropriate remedy for prosecutorial misconduct. This reform effort is essential in light of the ineffectiveness of the Supreme Court's remedies for misconduct.

The Criminal Justice Section of the American Bar Association should submit a resolution to the association's House of Delegates proposing that state and local bar associations evaluate their attorney disciplinary processes to determine whether they have been effective in remedying prosecutorial misconduct.¹⁷² The state and local bar associations should form task forces to conduct the evaluations. These task forces should first determine the number of complaints of prosecutorial misconduct within a prescribed period and document how they were resolved.¹⁷³ They should then meet with members of the local trial court to determine the extent to which there have been claims of prosecutorial misconduct in the courts and whether members of the judiciary have referred offending prosecutors.¹⁷⁴ Each jurisdiction may decide the extent to which it wishes to conduct an empirical study of the issue, but at a minimum, the task forces should do the type of data collection performed by the Center for Public Integrity.¹⁷⁵ If it is determined that the disciplinary process has been underutilized for complaints of prosecutorial misconduct, each task force should determine the reasons for its underutilization and propose reforms to make it a more effective mechanism for remedying these claims.¹⁷⁶

If it is determined that there are far fewer complaints to the state disciplinary authorities than there are to the courts, the task forces may reasonably conclude that members of the bench and bar are failing to

171. DAVIS, *ARBITRARY JUSTICE*, *supra* note 7, at 181.

172. *Id.* at 182.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 181-82.

refer offending prosecutors.¹⁷⁷ However, a low number of complaints in a particular jurisdiction—in the courts and with the state disciplinary authorities—may be interpreted in different ways.¹⁷⁸ Low numbers may indicate that prosecutors in that jurisdiction rarely engage in prosecutorial misconduct.¹⁷⁹ A dearth of complaints might also suggest that prosecutorial misconduct is not being discovered and/or that defense attorneys or others are failing to make appropriate referrals. If the task forces discover a low referral rate, they should investigate the cause and seek an appropriate resolution.

The ABA should also undertake a comprehensive study and review of the Model Rules of Professional Conduct with the specific goal of determining the extent to which these rules fail to address critical aspects of the prosecution function.¹⁸⁰ The work of the Ethics 2000 Commission should be completed, as promised, with the specific goal of addressing prosecutorial behavior. The current rules are silent on many of the most important prosecutorial duties and responsibilities. Until the rules and the disciplinary process are reformed, prosecutors will continue to engage in misconduct without consequences.

177. *Id.* at 183.

178. *Id.*

179. *Id.*

180. *Id.*