Representing the Sovereign Ethically: Increasing Prosecutorial Accountability Through Disciplinary System Enhancements

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INTRODUCTION

The American justice system places an abundant amount of trust in its prosecutors to protect the interests of the public and bring criminals to justice. Prosecutors represent the state or federal sovereign governments in criminal proceedings.[1] Prosecutors also enjoy considerable power in their access to facts and the availability of options at their disposal to shape the outlook of a case of alleged criminal conduct.[2] A familiar phrase should come to the reader's mind: *With great power comes great responsibility*. But countless studies and scholars have shown that some prosecutors exploit the justice system across the United States through misconduct and continue to tarnish the reputation of an essential component of a lawful society.[3] Even more disturbing is that the venues through which the sovereign can hold its representatives accountable for misconduct are extremely limited. As a result of several significant court opinions, prosecutors enjoy close to complete immunity from civil or criminal suits.[4] Theoretically, the

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1. *Prosecutor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

2. *See* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314 (2001) ("The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, . . . and whether to confer immunity from prosecution.") (quoting BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:1 (2d ed. 1999)); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L. REV. 2150, 2156 (2013) ("Prosecutors have vast resources and immense power in conducting their inquests"); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 385 (2001) ("Indeed, this power is an enormous draw for many would-be prosecutors.").

3. *See, e.g.*, Gershman, *supra* note 2, at 313 (citing a study by Ken Armstrong and Maurice Possley identifying at least 381 homicide cases between 1963 and 1999 reversed because prosecutors concealed evidence or presented evidence they knew to be false); David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson: *Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 211, 220 (2011) (citing (1) a 2003 study by the Center for Public Integrity finding that between 1970 and 2003, prosecutorial misconduct led to dismissals, sentence reductions, or reversals in 2012 appellate cases, and (2) a 2010 study by the Northern California Innocence Project covering the period between 1997 and 2009 and identifying 707 cases in California in which courts "made explicit findings of prosecutorial misconduct").

4. *See, e.g.*, Van de Kamp v. Goldstein, 555 U.S. 335, 349 (2009) (holding that district attorneys and their supervisors are entitled to absolute civil immunity from claims relating to the management of a trial-related information system); Connick v. Thompson, 563 U.S. 51, 72 (2011) (overturning a $14 million jury verdict

uniquely American system of prosecutorial elections should function as an alternative check on unethical prosecutorial conduct. However, experience shows that such elections do not foster accountability because they are generally "low-information, low-turnout affairs" where the electorate is not fully aware of the issues at stake and incumbents run uncontested.[5] As a result, elections do not provide a viable venue to hold a prosecutor accountable for her behavior. Electorates may also be sympathetic towards prosecutors who promise to protect the public by being *tough on crime*, regardless of the means used.[6]

In *Connick v. Thompson*[7] and *Imbler v. Pachtman*,[8] the Supreme Court directed concerned citizens' attention to the professional disciplinary system as a viable alternative for prosecutorial accountability. Indeed, Rule 3.8 of the ABA *Model Rules of Professional Conduct* recognizes the importance of the prosecutor's role by imposing "[s]pecial [r]esponsibilities" on prosecutors.[9] Every state has adopted a version of Model Rule 3.8.[10] In addition, every state has a disciplinary sanction system to address unethical conduct.[11] However, as many scholars have noted, disciplinary systems incorporating variations of the *Model Rules* do not work effectively or do not work at all when prosecutorial misconduct occurs.[12] Thoughtful observers have suggested ways to improve the disciplinary system in

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awarded against the Orleans Parish District Attorney's Office for failing to train prosecutors about proper disclosure procedures); Imbler v. Pachtman, 424 U.S. 409, 425 (1976) ("[I]f the prosecutor could be made to answer in court each time [a defendant] charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."). *See also* Bright & Sanneh, *supra* note 2, at 2155–60 (observing that prosecutors "have absolute immunity for their work in prosecuting cases").

5. Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 592 (2017).

6. *See id*. at 611–12.

7. *Connick*, 563 U.S. at 66 ("An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.").

8. *Imbler*, 424 U.S. at 429 ("[A] prosecutor stands perhaps unique . . . in his amenability to professional discipline by an association of his peers.").

9. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2018) [hereinafter MODEL RULES].

10. Keenan et al., *supra* note 3 at 227 (noting that at the time of the article "every state save California ha[d] adopted a version of Model Rule 3.8[.]"). As of November 2018, the Supreme Court of California has approved a similar rule. *See* CAL. RULES OF PROF'L CONDUCT R. 3.8 (2018).

11. *See* Keenan et al., *supra* note 3, at 221.

12. *See, e.g*., Richard A. Rosen, *Disciplinary Sanctions against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 693 (1987); R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 382 (2000) (observing that "bar discipline is too erratic and uncertain" to incentivize prosecutors to behave ethically); Aditi Sherikar, *Prosecuting Prosecutors: A Need for Uniform Sanctions*, 25 GEO. J. LEGAL ETHICS 1011, 1020 (2012) (citing a 2003 study by the Center for Public Integrity identifying only forty-four cases since 1970 in which disciplinary boards sought action against prosecutors); John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALB. L. REV. 881, 883 (2013) (characterizing professional discipline for prosecutorial misconduct as "toothless"); Keenan et al. *supra* note 3, at 218–19 ("Many state bar disciplinary systems barely seem to contemplate prosecutorial misconduct as a cognizable complaint, focusing instead on fee disputes and failure to diligently pursue a client's claim."); Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 314 (2019) ("Even when prosecutorial misconduct is reported to disciplinary authorities, prosecutors often go unpunished.").

order to hold prosecutors accountable. While some scholars have suggested fundamental changes, such as establishing an independent commission to enforce disciplinary rules for prosecutors,[13] others have focused on making practical changes within the existing framework.[14]

This Note takes the latter approach and recommends changes within the existing systems. In doing so, the Note bears in mind the recent reaction of prosecutors against the inaugural effort to create an independent commission to investigate and sanction prosecutorial misconduct in New York.[15] While independent commissions focusing on prosecutors' actions have potential to offer a comprehensive solution, they are difficult to implement. Instead, prosecutorial misconduct can be effectively and practically curtailed by (1) establishing a program of mandatory referral from courts to disciplinary agencies regarding judicially-identified prosecutorial misconduct to trigger formal disciplinary review, and (2) enhancing and optimizing the resources available to disciplinary agencies. There is considerable room for improvement within the existing systems to increase the deterrent effect of professional discipline on prosecutors and achieve pragmatic results in curtailing misconduct.

Part I of this Note provides an overview of the ethical obligations imposed on prosecutors through various professional sources. Part II considers the examples of independent judicial conduct commissions ("JCCs") targeting misconduct undertaken by judges and evaluates the prospect of establishing a comparable commission on prosecutorial conduct in New York. Finally, Part III discusses recommendations for disciplinary enforcement by looking at comparable data on disciplinary systems.

I. PROFESSIONAL SOURCES OF ETHICAL OBLIGATIONS FOR PROSECUTORS

A. MODEL RULE 3.8

While most of the *Model Rules* apply to all attorneys—including prosecutors—without difference, Model Rule 3.8 is directed specifically at prosecutors. The comments to the rule explain that the prosecutor has "the responsibility of a minister of justice and not simply that of an advocate."[16] Accordingly, prosecutors need to make sure that "special precautions are taken to prevent and to rectify the conviction of innocent persons."[17] One of the most important parts of Rule 3.8 requires a prosecutor to:

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13. *See* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 278 (2004).

14. *See* Keenan et al., *supra* note 3, at 203.

15. *See* Dan M. Clark, *NY State DAs Move to Block Creation of Prosecutorial Conduct Watchdog*, N.Y. L. J. (Apr. 1, 2019), https://www.law.com/newyorklawjournal/2019/04/01/ny-state-das-move-to-block-creation-of-prosecutorial-conduct-watchdog/ [https://perma.cc/QC9C-2GS5].

16. MODEL RULES R. 3.8, cmt. 1.

17. MODEL RULES R. 3.8, cmt. 1.

> [M]ake 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[.][18]

This is significant because Rule 3.8(d) is understood to impose "more demanding disclosure obligations" than what is required by the Supreme Court in *Brady v. Maryland*.[19] Therefore, while every violation of Rule 3.8(d) cannot be characterized as a *Brady* violation, every *Brady* violation can be considered an ethical violation.[20] This creates an opportunity to establish a direct link between court rulings and the disciplinary system. Every state has adopted Model Rule 3.8(d) in full or modified form.[21] Equally important as the universal adoption is the fact that even though some scholars have observed that the rest of Model Rule 3.8 may appear to be "vague and subject to interpretation,"[22] there is not much room for discretion in interpreting the direct link between a *Brady* violation and a Rule 3.8(d) violation. For these reasons, this Note limits the scope of the mandatory referral program explained in Part III below to *Brady* violations.

B. ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION

In addition to the *Model Rules*, the ABA publishes its Criminal Justice Standards for the Prosecution Function ("ABA Standards"), revised most recently in 2017. The ABA Standards impose extensive obligations on prosecutors regarding the disclosure of information and evidence, and arguably go beyond the requirements imposed by Model Rule 3.8. For example, Standard 3-5.4(g) provides that "[a] prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused."[23]

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18. MODEL RULES R. 3.8(d).

19. ABA Comm'n on Prof'l Ethics & Prof'l Responsibility, Formal Op. 09-454, at 3 (2009). *See* Cone v. Bell, 556 U.S. 449, 470 n.15 (2009) ("Although the Due Process Clause . . . , as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations.") (citing MODEL RULES R. 3.8(d)); Kreag, *supra* note 12, at 311 ("Notably, in many jurisdictions, prosecutors' ethical disclosure obligations reach beyond the constitutional requirements demanded by *Brady*. And where they do not, the ethical obligations reach at least as far as prosecutors' constitutional duties.") (internal citations omitted).

20. Kreag, *supra* note 12, at 311 ("Brady violations are also ethical violations"). *See* Kyles v. Whitley, 514 U.S. 419, 436–37 (1995) (recognizing that *Brady* "requires less of the prosecution" than the *Model Rules*). *See also In re* Roland Seastrunk, 236 So. 3d 509, 510 (La. 2017) (holding that Louisiana's ethical disclosure obligations are "coextensive" with *Brady*).

21. Keenan, *supra* note 3, at 229. *See also* CAL. RULES OF PROF'L CONDUCT R. 3.8(d).

22. Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 284 (2009).

23. ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-5.4 (4th ed. 2017).

Despite the transformational outlook, the ABA Standards are restricted by the ABA itself, which explains that the standards are "aspirational" and are "not intended to serve as the basis for the imposition of professional discipline[.]"[24] This self-restraint presumably allows the ABA to be more aggressive in drafting the ABA Standards, but it also prevents any substantive impact on disciplinary enforcement.

C. NDAA NATIONAL PROSECUTION STANDARDS

Finally, the National District Attorneys Association publishes its own National Prosecution Standards ("NDAA Standards"). The NDAA Standards recognize that "[a] prosecutor shall abide by all applicable provisions of the rules of ethical conduct in his or her jurisdiction[,]"[25] and that "[a] prosecutor's obligation to comply with the rules of ethical conduct of his or her jurisdiction is a fundamental and minimal requirement."[26] This limited reading might lead an observer to believe that the NDAA Standards encourage full compliance with the *Model Rules*. After all, the NDAA Standards warn prosecutors that "[w]hen a prosecutor falls below [the jurisdictional ethical standards], he or she may expect sanctions impacting . . . the individual prosecutor."[27]

However, the NDAA Standards clarify that "[t]o the extent prosecutors are bound by his or her jurisdiction's rules of ethical conduct that are inconsistent with [the NDAA Standards], they shall comply with the rules but *endeavor to seek modification of those rules to make them consistent with these standards*."[28] This is consistent with the NDAA's official position against the *Model Rules* as seen in Supreme Court opinions.[29] So, in reality, the NDAA Standards expectedly take a conservative view by opposing an expansive reading of the ethical obligations of prosecutors.

II. THE JUDICIAL CONDUCT COMMISSIONS AND THE UPHILL BATTLE TO ESTABLISH SIMILAR INDEPENDENT COMMISSIONS FOR PROSECUTORIAL MISCONDUCT

So far, only one state in the U.S. has taken the "fundamental change" approach and attempted to create an independent commission to regulate prosecutorial mis

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24. *Id*. at Standard 3-1.1. *See also* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 877 (2012) ("Unlike the *Model Rules*, the [ABA] Standards are not designed to be adopted by courts as enforceable rules, but rather codify a professional consensus among prosecutors, defense lawyers, and judges about how lawyers and others should behave in criminal cases.").

25. NAT'L DIST. ATTORNEYS ASS'N NAT'L PROSECUTION STANDARDS, Standard 1-1.4 (3d ed. 2009).

26. *Id*. at Standard 1-2.1, commentary.

27. *Id*.

28. *Id*. at Standard 1-1.5 (emphasis added).

29. Green, *supra* note 24, at 885 (observing that in an amicus brief filed in *Smith v. Cain*, 132 S. Ct. 627 (2012), the NDAA "challenged the very legitimacy of professional conduct rules insofar as they impose obligations on prosecutors beyond those established by the Constitution, statutes, or other law").

conduct.[30] Understanding the operation of the comparable JCCs handling judicial conduct and the resistance by the prosecutors against the creation of an independent commission in New York is necessary to explain why the recommendations provided in Part III take a restricted but pragmatic approach.

A. JUDICIAL CONDUCT COMMISSIONS

JCCs constitute an interesting phenomenon in the professional discipline environment because they operate separately from the disciplinary boards that enforce state bar ethics rules on lawyers. Instead, JCCs focus exclusively on the conduct of judges. The National Center for State Courts, an independent, non-profit court improvement organization, reports that all fifty states and the District of Columbia have a version of a JCC.[31]

While they may be named in different ways,[32] JCCs generally have similar structures in that they are independent from the other disciplinary bodies, include a diverse composition of members, and provide publicly available information about their decisions. For example, the D.C. Commission on Judicial Disabilities and Tenure ("D.C. JCC"), created by the District of Columbia Court Reorganization Act of July 29, 1970, has the "authority to remove a judge for willful misconduct in office, for willful and persistent failure to perform judicial duties, and for conduct prejudicial to the administration of justice, or which brings the judicial office into disrepute."[33] The D.C. JCC enforces a Code of Judicial Conduct separate from the D.C. Rules of Professional Conduct, as adopted by the Joint Committee on Judicial Administration of the District of Columbia Courts.[34] Another example is the Texas Commission on Judicial Conduct ("Texas JCC"). According to the Texas JCC's website, commission members do not receive pay for their service and serve six-year terms.[35] The Texas JCC includes six judges appointed by the Supreme Court of Texas, two non-judge attorneys appointed by the State Bar of Texas, and five citizen members appointed by the Governor.[36] The proportion of appointees may differ among states, but the JCCs generally include members who are judges, lawyers,

30. Bennett L. Gershman, *New Commission to Regulate Prosecutorial Misconduct*, HuffPost (May 20, 2014), https://www.huffpost.com/entry/new-commission-to-prosecutorial-misconduct_b_5353570 [https://perma.cc/6XQ6-YQ8A].

31. *Ethics State Links*, NAT'L CTR. FOR ST. CTS., https://www.ncsc.org/Topics/Judicial-Officers/Ethics/State-Links.aspx?cat=Judicial%20Conduct%20Commissions [https://perma.cc/8572-TSRY] (last visited Mar. 7, 2020).

32. For example, Florida and Georgia have a "Judicial Qualification Commission," whereas the similar commission is called the "Judicial Standards Commission" in New Mexico.

33. *About CJDT*, COMM'N ON JUD. DISABILITIES AND TENURE, https://cjdt.dc.gov/page/about-cjdt [https://perma.cc/W7F4-WM9P] (last visited Mar. 7, 2020).

34. *Code of Judicial Conduct*, COMM'N ON JUD. DISABILITIES AND TENURE, https://cjdt.dc.gov/publication/code-judicial-conduct [https://perma.cc/3TUZ-Y5HK] (last visited Mar. 7, 2020).

35. *Commissioners*, OFF. OF ST. COMM'N ON JUD. CONDUCT, http://www.scjc.texas.gov/about/commissioners/ [https://perma.cc/UVP4-5FQZ] (last visited Mar. 7, 2020).

36. *Id.*

and non-lawyer citizens.[37] Finally, many JCCs publish the public sanctions issued against the judges in their respective jurisdictions.[38] A 2002 study estimated that approximately 100 judges are publicly sanctioned each year in state judicial discipline proceedings.[39]

Even though the structure of the JCCs may seem similar, JCCs can differ in significant parts of their operations. One of the most important examples of divergence can be seen in the submission of complaints. While most JCCs accept anonymous complaints, some provide complex or qualified explanations about anonymity. For example, although the Rules of the Judicial Qualifications Commission of Georgia provide that "[t]he Director and the Investigative Panel may consider complaints submitted anonymously or confidentially in the same manner as other complaints[,]"[40] the relevant section about complaints on the Georgia Judicial Qualifications Commission website provides that a complaint "must be in writing with an original signature," without any clarification about anonymity.[41]

Although an evaluation of the efficacy of JCCs is beyond the scope of this Note, the unanimous adoption of judicial disciplinary bodies appears to signal that JCCs have become an established part of the professional disciplinary system. Independence from the other disciplinary bodies, diverse composition of members, and emphasis on publicly available information are defining features of the JCCs. It should also be noted that some states have recently acted to curtail the independence of their respective JCCs. Georgia, for example, passed a constitutional amendment in 2017, which reorganized its JCC and created a legislative oversight structure.[42] However, JCCs continue to operate across the nation and provide a meaningful check on judicial conduct.

B. THE NEW YORK EXPERIMENT

In 2014, New York became the first state to contemplate establishing a public commission called the State Commission on Prosecutorial Conduct ("N.Y.

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37. For example, the North Dakota Judicial Conduct Commission includes two judges, one lawyer, and four non-lawyers. *See Judicial Conduct Commission*, ST. OF N.D. CTS. COMM'N ON JUD. CONDUCT, https://www.ndcourts.gov/supremecourt/committees/judicial-conduct-commission [https://perma.cc/2C2H-6QBD] (last visited Mar. 7, 2020).

38. *See Disciplinary Actions*, OFF. OF ST. COMM'N ON JUD. CONDUCT, http://www.scjc.texas.gov/disciplinary-actions/ [https://perma.cc/4GGU-GMJ3] (last visited Mar. 7, 2020).

39. Cynthia Gray, *A Study of State Judicial Discipline Sanctions*, AM. JUDICATURE SOC'Y, at 3 (2002), https://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/Study-of-State-Judicial-Discipline-Sanctions.ashx [https://perma.cc/WZB5-M68G].

40. RULES OF THE JUD. QUALIFICATIONS COMM'N OF GA. R. 17(E), cmt. 2 (2018), https://img1.wsimg.com/blobby/go/d72953e9-9d0a-4693-87a4-cedcc5933b8d/downloads/1crj4pet1_354716.pdf?ver=1575901785489 [https://perma.cc/ZPJ6-HKQA].

41. *Functions & Procedures*, GA. JUD. QUALIFICATIONS COMM'N, https://gajqc.com/functions-and-procedures [https://perma.cc/WV4F-LB6B] (last visited Mar. 7, 2020).

42. *See* Gabriel L. Daniel, *House Bill 808: Courts; Judicial Qualification Commission; Create*, 10 J. MARSHALL L.J. 239 (2016-2017).

CPC"), designed to exclusively investigate prosecutorial misconduct and impose disciplinary action.[43] This commission was modeled after the New York State Commission on Judicial Conduct ("N.Y. JCC"), which at the time had disciplined 826 judges since its creation in 1975, compared to 23 judges disciplined in the 100 years prior to the N.Y. JCC.[44] Proponents of the N.Y. CPC saw the commission as a crucial alternative to the "abject failure of other mechanisms to discipline prosecutors[.]"[45] The proposed N.Y. CPC "would create an 11-member panel of defense attorneys, prosecutors, and retired judges to review complaints of misconduct against the state's district attorneys and their assistants."[46] It would publicly sanction prosecutors or recommend removal from the office by the Governor, who is granted the authority under the state constitution.[47]

Despite the surrounding excitement, the independent commission has not yet been established. Since the early days of the proposal, some prosecutors have voiced strong opposition against the N.Y. CPC.[48] In March 2019, New York's Governor Andrew Cuomo signed a bill that would create the N.Y. CPC.[49] Less than a month later, the District Attorneys Association of the State of New York filed a lawsuit to block the legislation, arguing—among other things—that the commission "violates the separation of powers doctrine of the constitution because the panel would be composed of individuals appointed by each branch of state government" and it could "unconstitutionally interfere with the work of the state's district attorneys," who may hesitate to pursue difficult matters out of fear that their operations would be scrutinized by a hybrid panel.[50]

The bill is currently back in the Senate Standing Committee on Rules.[51] The District Attorneys Association appears to be determined to maintain its challenge against the creation of an independent commission. While the fate of the N.Y. CPC remains unclear, the ensuing legal and political battles show that the creation of an independent commission may not provide an ideal venue to find pragmatic solutions to a persistent problem. The legal process could be lengthy, and the independent commission may ultimately be deemed unconstitutional.

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43. Gershman, *supra* note 30.

44. *Id.*

45. *Id.*

46. Dan M. Clark, *Defenders, Criminal Justice Reformers Call on Cuomo to Approve Prosecutorial Watchdog*, N.Y. L. J. (Mar. 26, 2019), https://www.law.com/newyorklawjournal/2019/03/26/defenders-and-criminal-justice-reformers-call-on-cuomo-to-approve-prosecutorial-watchdog/ [https://perma.cc/466B-MM37].

47. *Id.*

48. *See* Gershman, *supra* note 30 ("[S]ome prosecutors in New York even claim that the prosecutor commission has been created to retaliate against the Moreland Commission, which subpoenaed legislators in connection with its investigation into public corruption.").

49. Clark, *supra* note 15.

50. *Id.*

51. S.B. S24B, 2015-2016 Leg. Sess. (N.Y. 2016), https://www.nysenate.gov/legislation/bills/2015/S24 [https://perma.cc/5YDN-SWQA].

III. RECOMMENDATIONS

As seen in Part I, while the ABA Standards and NDAA Standards establish heightened requirements for prosecutorial conduct, the state rules of professional conduct remain the sole venue through which discipline can be imposed on prosecutors. Model Rule 3.8(d) and its variations in state rules are directly linked to *Brady* obligations, which are the subject of many reversals of lower court opinions tainted by prosecutorial misconduct. Although scholars have supported the creation of independent commissions focusing on prosecutorial conduct, the theory faces significant opposition from vocal prosecutor groups, demonstrated by the uncertainty around the N.Y. CPC. In light of these observations, and without in any way dismissing proposals for more structural changes, this Note recommends several ways to improve the disciplinary systems in different states.

A. MANDATORY *BRADY* REFERRALS FROM COURTS TO DISCIPLINARY AGENCIES

One of the alleged reasons for the lack of prosecutorial discipline is that the individuals who are most likely to report misconduct by prosecutors—defense attorneys, other prosecutors, and judges—do not speak up. Defense attorneys may care about a neutral relationship with the prosecutor's office in order to prevent any costs to their future clients.[52] Prosecutors may have difficulty blowing the whistle on their colleagues out of fear of resentment and hostility.[53] Finally, observers argue, judges may be hesitant to report prosecutors because of "familiarity" between the prosecutor and judge.[54] One common aspect of these shortcomings is that the actors use their discretion not to report prosecutorial misconduct, even though they would be required to do so under separate ethical rules.[55]

A constructive way to respond to these shortcomings would be to remove discretion from judges and instead require them to refer each finding of a *Brady* violation to the relevant disciplinary authority. This shift could be preferable to judges. Such a rule would not damage—and could even improve—the relationship between the judges and prosecutors, since judges would no longer be in a position where they would need to use discretion and choose between reporting and not reporting. It is true that such a regime would require formal adoption through rules or statutes. But limiting mandatory referrals to *Brady* violations is a reasonable proposal, as courts, prosecutors, and state bar all agree that state ethics rules can be at least as demanding as constitutional requirements.[56]

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52. Sherikar, *supra* note 12, at 1021.
53. Smith, *supra* note 2, at 396.
54. Sherikar, *supra* note 12, at 1021.
55. *See* MODEL RULES R. 8.3.
56. *See supra* Part I.A.

In his argument in favor of incentivizing the use of *Brady* Violation Disclosure Letters by the judges, Professor Jason Kreag presented the voluntary nature of such letters as an advantage, since they could be used without "formal changes to rules or statutes[.]"[57] While using a voluntary disclosure system might appear more practical than establishing a rule-based system, judges will continue to hesitate when reporting misconduct for as long as discretion exists. The scapegoat needs to be the rules, as determined by the JCCs, or statutes based on legislative action. Every *Brady* referral should trigger a formal investigation by the relevant disciplinary agency based on the relevant Model Rule 3.8(d) state variation, while the appeal process may take place independently. *Brady* violations are still happening at a disturbing enough frequency to provide a sufficient pipeline of prosecutorial misconduct cases without an urgent need to clarify the rest of the Model Rule 3.8 language.[58]

Finally, aside from the *Brady* referrals—which would necessarily reveal the identity of the referring judge—states could also provide anonymous ways to report prosecutorial misconduct through separate complaint forms, if necessary. A detailed exploration of anonymous reporting is beyond the scope of this Note.

B. ENHANCING AND OPTIMIZING DISCIPLINARY RESOURCES

Increased workload on disciplinary agencies can only be sustained if there are sufficient resources to handle disciplinary work, and it is no secret that lawyers do not want their bar membership dues to increase.[59] The result is the "resources excuse," through which practitioners claim that there are insufficient resources to tackle all misconduct. However, there are several ways to enhance and optimize the resources available to disciplinary agencies without necessarily asking more from lawyers. This Note focuses on comparable data on disciplinary systems provided in the 2017 Survey on Lawyer Discipline Systems ("SOLD 2017") by the ABA Standing Committee on Professional Regulation.[60] SOLD 2017 provides responses from disciplinary agencies across the nation, with the exception of California, Connecticut, Nevada, and one district in New York.[61] The recommendations in this Note are based on data concerning the number of lawyers with active license, total discipline system budget, source of funding, average caseload

57. Kreag, *supra* note 12, at 350.

58. *See* Davis, *supra* note 22, at 284 (observing that "much of the language of Rule 3.8 is vague and subject to interpretation").

59. In some cases, lawyers have legally, and so far unsuccessfully, challenged the collection of mandatory bar dues altogether. *See* Fleck v. Wetch, 937 F.3d 1112 (8th Cir. 2019) (rejecting a lawyer's challenge to North Dakota's procedures for collecting mandatory bar dues).

60. ABA STANDING COMM. ON PROF'L REGULATION, 2017 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) (2019), https://www.americanbar.org/groups/professional_responsibility/resources/surveyonlawyerdisciplinesystems2014/ [https://perma.cc/69AV-6AFF] [hereinafter SOLD 2017]. My research was inspired by Keenan et al., *supra* note 3, which utilized the 2009 Survey on Lawyer Discipline Systems.

61. *Id.* at 1. New York's disciplinary system is divided into several departments and judicial districts.

per lawyer, and staffing of law students or clerks in disciplinary counsel offices.[62] These recommendations are geared towards the disciplinary system in general, since improvements on the overall system would likely have a positive impact on the resources available to respond to prosecutorial misconduct.

First, state supreme courts should be more involved in assessing the portion of attorney membership fees to be allocated to disciplinary enforcement. Among the forty-two jurisdictions with comparable information in SOLD 2017, eighteen disciplinary systems are funded primarily through bar association dues,[63] where the state bar is mainly in charge of allocating a portion of the collected membership fees to disciplinary enforcement.[64] Nineteen systems are funded through state supreme court assessed fees,[65] where typically the state's highest court decides the portion of fees to be allocated to lawyer discipline.[66] Eight out of the fifteen systems with the lowest disciplinary budget per lawyer surveyed in SOLD 2017 are funded primarily through bar association dues, whereas only five are funded primarily through supreme court assessed fees.[67] On the other end of the spectrum, seven out of the fifteen systems with the largest budget per lawyer are funded primarily through court assessed fees and one through mixed funding, whereas only five systems are funded exclusively through bar association dues.[68] While the difference is not overwhelming, the data show a positive correlation between court involvement and adequate disciplinary system funding. The idea that courts are in a better position to secure sufficient resources for disciplinary matters is further supported by the recommendations of the ABA Commission on Evaluation of Disciplinary Enforcement, which argue that "[l]awyer discipline should be funded by fees levied by the highest court in the jurisdiction" and that "within state constitutional constraints, the highest court should assert its inherent power to regulate the profession to assure adequate funding of the disciplinary system."[69]

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62. A summary table of the relevant data from SOLD 2017 can be found in the Appendix.

63. SOLD 2017, *supra* note 60, at Chart VII.

64. *See, e.g.*, TEX. RULES OF DISCIPLINARY PROCEDURE R. 4.08 (2018), https://www.txcourts.gov/media/1442204/trdp-updated-612018.pdf [https://perma.cc/4KY7-TZKK] (instructing that the Texas "State Bar shall allocate sufficient funds to pay all reasonable and necessary expenses . . . to administer the disciplinary . . . system effectively and efficiently").

65. SOLD 2017, *supra* note 60, at Chart VII.

66. *See, e.g.*, THE DISCIPLINARY BD. OF THE SUPREME COURT OF PA., ANNUAL REPORT 2018 16, https://www.padisciplinaryboard.org/about/reports [https://perma.cc/97XK-5R5F] (showing that as of February 7, 2019 the Supreme Court of Pennsylvania has ordered that $140 of the $225 annual fee per active attorney shall be allocated to the state disciplinary agency). In addition to the systems funded primarily through bar association dues or state supreme court assessed fees, three disciplinary agencies in New York are funded through legislative appropriation, while North Dakota is funded through a mix of bar association dues and court assessed fees. SOLD 2017, *supra* note 60, at Chart VII.

67. SOLD 2017, *supra* note 60, at Chart VII. The budget per lawyer was calculated in the Appendix using the raw data provided in SOLD 2017.

68. *Id.*

69. ABA COMM'N ON EVALUATION OF DISCIPLINARY ENF'T, LAWYER REGULATION FOR A NEW CENTURY recommendation 13 (2018), https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ [https://perma.cc/BD2Q-Q4UV].

Second, disciplinary agencies should engage law students and clerks more often in the disciplinary process. Increased student and clerk involvement would reduce the burden on the agencies. In support of the recommendation, this Note considers the relationship between case workload and the inclusion of law student and clerks in disciplinary staffing. The average caseload per lawyer among the jurisdictions with comparable information is 143.7.[70] Colorado has the highest caseload per lawyer at 580 cases, whereas Minnesota has the lowest at 31 cases.[71] In 2017, only fourteen out of the forty-six disciplinary agencies employed law students or clerks in a full or part-time capacity.[72] Among the twenty agencies with the highest caseload per lawyer, only three have utilized law students or clerks.[73] In comparison, eight out of the twenty agencies with the lowest caseload per lawyer have utilized law students or clerks.[74] Law students are dynamic contributors who regularly support law firms, courts, and various other agencies. They have the potential to make similar contributions in the budget-conscious disciplinary agencies. In addition, their involvement would further bolster the recognition of disciplinary enforcement in the eyes of tomorrow's practitioners.

Finally, it is true the correlation between these recommendations and the successful operation of disciplinary systems may be impacted by other factors. The goal of this Note is to initiate the conversation on how to eliminate an excuse based on resources by focusing on what can be efficiently improved with limited resources. This way we can understand whether there are other reasons for not confronting prosecutorial misconduct even in obvious instances.

CONCLUSION

This Note suggests that the ability of the existing disciplinary systems to target prosecutorial misconduct can be enhanced by establishing a mandatory *Brady* referral program between courts and disciplinary agencies, increasing the role of the courts in assessing bar membership fees and disciplinary budget allocations, and integrating more law students and clerks into the disciplinary process. Other methods to enhance the existing systems, such as increasing the publicity of prosecutorial misconduct decisions, may be similarly effective but are outside the scope of this Note. The recommendations are intended to be pragmatic steps toward building a robust system for tackling prosecutorial misconduct. These practical steps could lay the groundwork for a more comprehensive undertaking to promote the integrity of the legal system in the future.

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70. SOLD 2017, *supra* note 60, at Chart V.
71. *Id.*
72. *Id.* at Chart IX – Part A.
73. *Id.*
74. *Id.*

APPENDIX

INFORMATION ON STATE DISCIPLINE SYSTEMS FROM THE 2017 SOLD

State / Dept within State	# of lawyers with active license[75]	Total discipline system budget[76]	Discipline budget per active lawyer	Source of Funding[77]	Avg. case-load per lawyer[78]	Law students / clerks (part-time or full time)[79]
Ala.[β]	13,841	$1,980,000	$143.1	BA	225	0
Alaska[α]	3,072	$867,118	$282.3	BA	N/A	0
Ariz.[α,β]	18,643	$3,986,581	$213.8	BA	565	0
Ark.[μ,β]	9,042	$931,761	$103.0	SC	216	0
Colo.[α,β]	26,590	$7,968,789	$299.7	SC	580	1
Del.	3,562	N/A	N/A	N/A	51	1
D.C.[μ]	78,310	$9,328,159	$119.1	BA	52	2
Fla.[α,β]	87,893	$18,191,338	$207.0	N/A	211	0
Ga.[μ]	39,100	$3,658,000	$93.6	BA	32	1
Haw.[α]	4,879	$1,530,502	$313.7	BA	52	1
Idaho[β]	5,205	$787,465	$151.3	BA	221	1
Ill.[α,β]	72,062	$16,591,445	$230.2	SC	140	2
Ind.[μ]	18,517	$2,400,000	$129.6	SC	N/A	2
Iowa[β]	9,800	$1,600,000	$163.3	SC	120	0

75. SOLD 2017, *supra* note 60, at Chart VII.
76. *Id*.
77. *Id*.
78. *Id*. at Chart V.
79. *Id*. at Chart IX – Part A.

State / Dept within State	# of lawyers with active license[75]	Total discipline system budget[76]	Discipline budget per active lawyer	Source of Funding[77]	Avg. case-load per lawyer[78]	Law students / clerks (part-time or full time)[79]
Kan.	N/A	$2,176,000	N/A	SC	N/A	1
Ky.[μ,β]	18,645	$1,128,654	$60.5	BA	160	0
La.[α,β]	22,306	$5,739,640	$257.3	SC	243	0
Me.[α]	5,390	$1,331,118	$247.0	SC	87	0
Md.[μ]	39,890	$4,244,303	$106.4	SC	N/A	1
Mich.[μ]	42,078	$4,898,166	$116.4	BA	64	6
Minn.	25,241	$3,870,000	$153.3	SC	31	1
Miss.[μ]	9,048	$832,101	$92.0	BA	35	0
Mo.[μ]	30,937	$3,285,161	$106.2	SC	N/A	0
Mont.	N/A	N/A	N/A	N/A	N/A	N/A
Neb.[μ]	6,933	$586,084	$84.5	SC	70	0
N.H.[α]	5,200	$1,156,440	$222.4	SC	46	0
N.J.[α]	75,131	$13,463,345	$179.2	SC	97	0
N.M.[β]	7,200	$1,000,000	$138.9	SC	215	0
N.Y. 2-10[μ,β]	23,019	$2,896,152	$125.8	N/A	168	0

State / Dept within State	# of lawyers with active license[75]	Total discipline system budget[76]	Discipline budget per active lawyer	Source of Funding[77]	Avg. case-load per lawyer[78]	Law students / clerks (part-time or full time)[79]
N.Y. 2-11,13[μ]	18,728	$1,071,000	$57.2	Legis.	N/A	0
N.Y. 2-9	15,860	N/A	N/A	Legis.	82	0
N.Y. 4-5,7,8[β]	14,765	$2,430,670	$164.6	Legis.	133	0
N.C.[μ,β]	28,975	$3,862,860	$133.3	BA	155	0
N.D.[α]	3,039	$564,390	$185.7	42 BA / 58 SC	N/A	0
Ohio	44,073	N/A	N/A	N/A	71	0
Okla.[μ]	17,859	$1,361,729	$76.2	BA	76	2
Or.[α,β]	15,211	$2,737,022	$179.9	BA	98	0
Pa.[β]	65,617	$10,180,875	$155.2	SC	174	0
R.I.[α]	5,245	$972,150	$185.3	SC	78	0
S.C.	N/A	N/A	N/A	N/A	N/A	N/A
S.D.	N/A	N/A	N/A	N/A	N/A	N/A
Tenn.[β]	22,832	$3,749,830	$164.2	SC	155	0
Tex.	100,000	N/A	N/A	BA	N/A	0
Utah[β]	9,427	$1,342,238	$142.4	BA	220	0
Vt.	N/A	N/A	N/A	N/A	N/A	N/A
Va.[α]	31,667	$5,233,555	$165.3	BA	57	0

State / Dept within State	# of lawyers with active license[75]	Total discipline system budget[76]	Discipline budget per active lawyer	Source of Funding[77]	Avg. case-load per lawyer[78]	Law students / clerks (part-time or full time)[79]
Wash.$^{\alpha}$	31,919	$5,720,418	$179.2	Not ear-marked	77	0.3
W. Va.$^{\beta}$	6,934	$1,116,644	$161.0	BA	199	0
Wis.$^{\beta}$	25,283	$3,555,000	$140.6	SC	154	0
Wyo.$^{\mu}$	2,900	$364,544	$125.7	BA	52	0
AVG.	**25,819**	**$3,825,982**	**$159.9**		**143.7**	

Table notes:
α = Among the fifteen jurisdictions with the largest discipline budget per lawyer.
μ = Among the fifteen jurisdictions with the smallest discipline budget per lawyer.
β = Among the twenty jurisdictions with the largest average caseload per lawyer.
BA = Bar association dues.
SC = Supreme court assessed fees.