The American Prosecutor - Power, Discretion, and Misconduct

Angela J. Davis
American University Washington College of Law, angelad@wcl.american.edu

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev

Part of the Criminal Law Commons, Law Enforcement and Corrections Commons, and the Legal Profession Commons

Recommended Citation
https://digitalcommons.wcl.american.edu/facsch_lawrev/1396

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
The American Prosecutor
POWER, DISCRETION, AND MISCONDUCT
By Angela J. Davis
Delma Banks was convicted of capital murder in Texas and sentenced to death. Just 10 minutes before he was scheduled to die, the United States Supreme Court stopped his execution and a year later reversed his sentence. The Court found that the prosecutors in his case withheld crucial exculpatory evidence.

Dwayne Washington was charged with assault with intent to kill and armed burglary in the juvenile court of Washington, D.C. Two adults were arrested with Dwayne and prosecuted in adult court. The prosecutors in the adult cases threatened to charge Dwayne as an adult if he refused to testify against the adults. When Dwayne said he could not testify against them because he didn’t know anything about the crime, the prosecutors charged him as an adult, and he faced charges that carried a maximum sentence of life in an adult prison.

Andrew Klepper lived in Montgomery County, a suburb of Washington, D.C. He was arrested for attacking a woman with a baseball bat, sodomizing her at knifepoint with the same bat, and stealing more than $2,000 from her. The prosecutors in his case agreed to a plea bargain in which Andrew would be placed on probation and sent to an out-of-state facility for severely troubled youth, where he would be in a locked facility for six to eight weeks, followed by intensive group therapy in an outdoor setting. Andrew’s parents—a lawyer and a school guidance counselor—agreed to foot the bill. Andrew’s two accomplices—whose involvement in the crime was much less serious than Andrew’s—each served time in jail.

All three of these cases illustrate the wide-ranging power and discretion of the American prosecutor. In each case, the prosecutor’s actions profoundly affected the lives of the accused. Banks was almost executed by the State of Texas threatened to charge Dwayne as an adult if he refused to testify against the adults. When Dwayne said he could not testify against them because he didn’t know anything about the crime, the prosecutors charged him as an adult, and he faced charges that carried a maximum sentence of life in an adult prison.

Andrew Klepper lived in Montgomery County, a suburb of Washington, D.C. He was arrested for attacking a woman with a baseball bat, sodomizing her at knifepoint with the same bat, and stealing more than $2,000 from her. The prosecutors in his case agreed to a plea bargain in which Andrew would be placed on probation and sent to an out-of-state facility for severely troubled youth, where he would be in a locked facility for six to eight weeks, followed by intensive group therapy in an outdoor setting. Andrew’s parents—a lawyer and a school guidance counselor—agreed to foot the bill. Andrew’s two accomplices—whose involvement in the crime was much less serious than Andrew’s—each served time in jail.

All three of these cases illustrate the wide-ranging power and discretion of the American prosecutor. In each case, the prosecutor’s actions profoundly affected the lives of the accused. Banks was almost executed by the State of Texas before the Supreme Court reversed his conviction. When Dwayne Washington told prosecutors he couldn’t help them, they followed through on their threat to charge him as an adult and he faced charges that carried a life sentence in adult prison. The favorable treatment afforded Andrew Klepper allowed him to avoid prison after committing a violent sex offense—a rare occurrence in these types of cases.

The Supreme Court ultimately found that the prosecutors in Banks’s case engaged in misconduct by failing to turn over exculpatory evidence, but the prosecutors were neither punished nor reprimanded. A trial judge found the prosecutor’s behavior in Dwayne Washington’s case to be vindictive and dismissed the charges against him. The prosecutor’s decision in Andrew Klepper’s case was never challenged; in fact, there was no legal basis for doing so.

I was a public defender at the Public Defender Service for the District of Columbia (PDS) for 12 years. It was then that I learned of the formidable power and vast discretion of prosecutors. During my years at PDS, I noticed that prosecutors held almost all of the cards, and that they seemed to deal them as they saw fit. Although some saw themselves as ministers of justice and measured their decisions carefully, very few were humbled by the power they held. Most wanted to win every case, and winning meant getting a conviction. In one of its more famous criminal cases, the U.S. Supreme Court, quoting a former solicitor general, stated that “the Government wins its point when justice is done in its courts.” (Brady v. Maryland, 373 U.S. 83, 87 n.2 (1963.) A paraphrased version of this quotation is inscribed on the walls of the U.S. Department of Justice: “The United States wins its point whenever justice is done in its courts.” Yet most prosecutors with whom I had experience seemed to focus almost exclusively on securing convictions, without consideration of whether a conviction would result in the fairest or most satisfactory result for the accused or even the victim.

During my years as a public defender, I saw disparities in the way prosecutors handled individual cases. Cases involving educated, well-to-do victims were frequently prosecuted more vigorously than cases involving poor, uneducated victims. The very few white defendants represented by my office sometimes appeared to receive preferential treatment from prosecutors. Although I saw no evidence of intentional discrimination based on race or class, the consideration of class- and race-neutral factors in the prosecutorial process often produced disparate results along class and race lines.

Sometimes neither race nor class defined the disparate treatment. At times it simply appeared that two similarly situated people were treated differently. Why did the prosecutor choose to give a plea bargain to one defendant and not another charged with the same offense? If there were a difference in prior criminal history or some other relevant factor, the disparate treatment would be explainable. But without a difference in the legitimate factors that prosecutors are permitted to consider in making these decisions, the disparities seemed unfair. Yet I saw such disparities all the time.

Prosecutors are the most powerful officials in the crimi-
nal justice system. Their routine, everyday decisions control the direction and outcome of criminal cases and have greater impact and more serious consequences than those of any other criminal justice official. The most remarkable feature of these important, sometimes life-and-death decisions is that they are totally discretionary and virtually unreviewable.

Prosecutors make the most important of these discretionary decisions behind closed doors and answer only to other prosecutors. Even elected prosecutors, who presumably answer to the electorate, escape accountability, in part because their most important responsibilities—particularly the charging and plea bargaining decisions—are shielded from public view.

When prosecutors engage in misconduct, as in the cases of Delma Banks and Dwayne Washington, they rarely face consequences for their actions. Delma Banks almost lost his life, and Dwayne Washington lost his liberty and suffered the many other damaging effects of criminal prosecution, but their prosecutors just moved on to the next case. As for Andrew Klepper, perhaps he should have been afforded the opportunity to receive treatment and rehabilitation, but fairness demands that other similarly situated youth receive the same or similar opportunities. Current laws and policies do not require equitable treatment.

Prosecutors certainly are not the only criminal justice officials who make important, discretionary decisions. Discretion is a hallmark of the criminal justice system, and officials at almost every stage of the process exercise discretion in the performance of their duties and responsibilities. In fact, without such discretion, there would be many more unjust decisions at every stage of the criminal process. A system without discretion, in which police, judges, and prosecutors were not permitted to take into account the individual facts, circumstances, and characteristics of each case, would undoubtedly produce unjust results.

Police officers, for example, who are most often at the front line of the criminal process, routinely exercise discretion when making decisions about whether to stop, search, or arrest a suspect. Although they are permitted to arrest an individual upon a showing of probable cause to believe he or she has committed a crime, they are not required to do so, and frequently do not. A police officer may observe two individuals involved in a fistfight. Such an observation provides probable cause to arrest the individuals. Yet the officer has the discretion to break up the fight, resolve the conflict between the individuals, and send them on their way without making an arrest. Such an exercise of discretion may well be in the interest of justice for all involved and would save the valuable resources of the court system for other, more serious offenses.

Traffic stops are among the most common of discretionary police decisions. There are hundreds of potential traffic violations, and every motorist commits at least a few each time he or she drives. Failing to come to a complete stop at a stop sign, driving over the speed limit, and changing lanes without signaling are just a few of the most common traffic violations for which police officers may issue tickets. They also are permitted to arrest drivers for some traffic violations, but are rarely required to do so. Few people would support a law that required police officers to stop and issue a ticket to every person who committed a traffic violation or to arrest every person who committed an arrestable traffic violation. In addition to the unpopularity of such a law, most would agree that the limited resources of most criminal justice systems should be preserved for more serious offenses.

Although discretion in the exercise of the police function appears necessary and desirable, the discretionary nature of police stops and arrests sometimes produces unjust, discriminatory results. When police officers exercise their discretion to stop or arrest blacks or Latinos but not whites who are engaging in the same behavior, they are engaging in racial profiling—a practice that has been widely criticized and even outlawed in some jurisdictions. Thus, the discretion granted to police officers to make reasonable decisions in individual cases also sometimes produces unfair disparities along racial lines. Although the laws and policies passed to eliminate racial profiling may not totally control police discretion, they demonstrate society’s recognition that such discretion must be scrutinized to ensure fairness in our criminal justice system.

Judges exercise discretion in the criminal justice system as well. It is the role of the judge to make decisions in individual cases about everything from whether a particular defendant should be detained before trial to what sentence
acted accordingly. Most of the criminal laws passed by state legislatures and the U.S. Congress have served to increase rather than reduce prosecutorial power.

If prosecutors always made decisions that were legal, fair, and equitable, their power and discretion would be less problematic. But, as has been demonstrated with police officers, judges, parole officers, and presidents, the exercise of discretion often leads to dissimilar treatment of similarly situated people. This is no less true for prosecutors than for any other government agent or official. In fact, since prosecutors are widely recognized as the most powerful officials in the criminal justice system, arguably they should be held more accountable than other officials, not less. However, for reasons that are not entirely clear, the judiciary, the legislature, and the general public have given prosecutors a pass. Prosecutors’ power and discretion have not been reduced, even when their decisions have produced grave injustices in the criminal justice system, and the mechanisms of accountability that purport to hold them accountable have proven largely ineffective.

The importance of prosecutorial discretion

Prosecutorial discretion is essential to the operation of our criminal justice system, despite the potential for abuse. Society, through the legislature, criminalizes certain behaviors and provides a process for holding people accountable when they commit crimes. The prosecutor’s duty is to use discretion in making the all-important decision of whether an individual should be charged, which charges to bring, and whether and how to plea bargain. If the accused chooses to exercise his or her constitutional right to a trial, the prosecutor represents the state in that trial. The criminal justice system is adversarial by design. Ideally, a capable and zealous defense attorney represents the accused, and a similarly capable prosecutor represents the state. If both sides have sufficient resources and follow the rules, the criminal process should work fairly and produce a fair result. But the process is not that simple, nor is the theory always realized in practice. Most people charged with crimes are represented by public defenders or court-appointed attorneys who do not have sufficient resources to provide an adequate defense. Some prosecutors don’t always follow the rules, and some defense attorneys don’t work hard enough for their clients. To complicate matters even more, prosecutors have a special, very different role in the criminal process. Their duty is not to simply represent the state in the pursuit of a conviction but to pursue justice. “Doing justice” sometimes involves seeking a conviction and incarceration, but at other times, it might involve dismissing a criminal case or forgoing a prosecution. These decisions, however, are left to the prosecutor’s discretion. Without enforceable laws or policies to guide that discretion, all too often it is exercised haphazardly at worst and arbitrarily at best, resulting in inequitable treatment of both victims and defendants.
Discretion is as necessary to the prosecution function as it is to the police and judicial functions. It is difficult to imagine a fair and workable system that does not include some level of measured discretion in the prosecutorial process. As a part of the executive branch of government, it is the prosecutor’s duty to enforce the laws, and it would be virtually impossible to perform this essential function without exercising discretion.

One of the reasons prosecutorial discretion is so essential to the criminal justice system is the proliferation of criminal statutes in all 50 states and the federal government. Legislatures pass laws criminalizing a vast array of behaviors, and some of these laws, such as fornication and adultery, for example, stay on the books long after social mores about these behaviors have changed. In addition, some offenses warrant prosecution in some instances but not others. For example, it may be reasonable to bring a prosecution in a jurisdiction that criminalizes gambling for someone engaged in a large-scale operation but not for individuals placing small bets during a Saturday night poker game in a private home. In addition, in some cases, the evidence may not be sufficient to meet the government’s heavy burden of proving guilt beyond a reasonable doubt. Without discretion, prosecutors might be required to bring criminal charges in cases that most people would view as frivolous and in cases where the evidence is weak or lacking in credibility.

Other closely related reasons why prosecutorial discretion is so essential are the limitation on resources and the need for individualized justice. There are not enough resources in any local criminal justice system to prosecute every alleged criminal offense. Of course, with every prosecution comes the corresponding need for defense attorneys, judges, and other court personnel, and if there is a conviction, possibly prison facilities. Some entity must decide which offenses should be prosecuted, and prosecutors are presumably best suited to make these judgments. Most would agree that the state’s limited resources should be used to prosecute serious and/or strong cases, while minor or weak cases should be dismissed or resolved short of prosecution.

Just prosecutions require a consideration of the individual facts and circumstances of each case. All defendants and crime victims are not the same. Similarly, there are significant differences between perpetrators and victims of particular types of crimes. For example, some robbers have long criminal histories while others are first offenders or provide minor assistance to more serious offenders. Some assault victims are totally innocent of wrongdoing while others may have provoked their assailants with their own criminal behavior. These examples illustrate just a few of the many factors that should be considered in deciding whether, and to what extent, a case should be prosecuted.

Despite the obvious need for the exercise of discretion at this stage of the criminal process, one might question why we delegate this important function to prosecutors and why we don’t provide more oversight by the judiciary or some other entity. The most common answer has to do with the separation of powers. As part of the executive branch of government, prosecutors have been granted the power and responsibility to enforce the laws. (U.S. Const. art. II § 3.) Courts have consistently deferred to the expertise of prosecutors in declining to question their motives for charging and other important prosecutorial decisions. The Supreme Court explains this deference as follows:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy. (Wayte v. United States, 470 U.S. 598, 607 (1985).)

The Court is concerned that too much interference with the prosecutor’s responsibilities might interfere with the enforcement of the criminal laws, either because prosecutors might decline some prosecutions for fear of judicial reprisal or because judicial review or requiring prosecutors to explain their decisions to some other entity might result in law enforcement secrets being revealed to criminals.

The dilemma of prosecutorial discretion
All of the reasons in support of prosecutorial discretion explain why it is so essential, but they do not address the problems that have resulted from the failure to monitor how that discretion is exercised. In their effort to give prosecutors the freedom and independence to enforce the law, the judicial and legislative branches of government have failed to perform the kind of checks and balances essential to a fair and effective democracy. Consequently, prosecutors, unlike judges, parole boards, and even other entities within the executive branch such as police, presidents, and governors, have escaped the kind of scrutiny and accountability that we demand of public officials in a democratic society. Prosecutors have been left to regulate themselves, and, not surprisingly, such self-regulation has been either nonexistent or woefully inadequate.

There have been some efforts to promote the fair and eq-
uitable exercise of prosecutorial discretion, but these efforts have been minimal and largely ineffective. For example, the Criminal Justice Section of the American Bar Association (ABA) promulgates standards of practice for judges, defense attorneys, and prosecutors. The standards for prosecutors address how prosecutors should perform their most important responsibilities, with the goal of assuring that prosecutors exercise their discretion fairly and in a way that will promote the administration of justice. However, these standards are aspirational. No prosecutor is required to follow or even consider them. The Justice Department also sets standards and guidelines for federal prosecutors in its U.S. attorney’s manual. However, like the ABA standards, the extent to which individual prosecutors follow these guidelines is left to the U.S. attorneys in each district or, in some instances, to the attorney general of the United States. There is no legal requirement that federal prosecutors act in accordance with the U.S. attorney’s manual, nor are they accountable to anyone outside the Department of Justice if justice officials whose discretionary decisions contribute to unfair disparities, their decisions carry greater consequenc- es and are most difficult to challenge.

Most prosecutors join the profession with the goal of doing justice and serving their communities, and most work hard to perform their responsibilities fairly, without bias or favoritism. But even well-meaning prosecutors often fail because they exercise discretion arbitrarily and without guidance or standards, under the daily pressures of overwhelming caseloads in a system with inadequate representation for most defendants, and judges who are more interested in efficiency than justice. The absence of meaningful standards and effective methods of accountability has resulted in widely accepted prosecutorial practices that play a significant role in producing many of the injustices in the criminal justice system.

It is important that prosecutors make charging and plea bargaining decisions on the basis of the facts and circumstances of individual cases to achieve individualized jus-

Even well-meaning prosecutors often fail because they exercise discretion without guidance or standards.

and when they fail to follow their own rules. Similarly, individual state and local prosecutors may establish policies and standards of practice in their offices, but they are not required to do so, and most don’t. Although a few states (for example, Maryland and West Virginia) have passed laws that establish standards for prosecutors, there is virtually no public accountability when the standards are not followed.

Proponents of the current system of prosecution argue that prosecutors are held accountable to the people through the electoral system. They maintain that if prosecutors do not perform their duties and responsibilities fairly and effectively, they will be voted out of office. However, the electoral system and other mechanisms of accountability have proven to be ineffective.

The lack of enforceable standards and effective accountability to the public has resulted in decision making that often appears arbitrary, especially during the critical charging and plea bargaining stages of the process. These decisions result in tremendous disparities among similarly situated people, sometimes along race and/or class lines. The rich and white, if they are charged at all, are less likely to go to prison than the poor and black or brown—even when the evidence of criminal behavior is equally present or absent. Although prosecutors certainly are not the only criminal

CRIMINAL JUSTICE  SPRING 2008 29

and when they fail to follow their own rules. Similarly, individual state and local prosecutors may establish policies and standards of practice in their offices, but they are not required to do so, and most don’t. Although a few states (for example, Maryland and West Virginia) have passed laws that establish standards for prosecutors, there is virtually no public accountability when the standards are not followed.

Proponents of the current system of prosecution argue that prosecutors are held accountable to the people through the electoral system. They maintain that if prosecutors do not perform their duties and responsibilities fairly and effectively, they will be voted out of office. However, the electoral system and other mechanisms of accountability have proven to be ineffective.

The lack of enforceable standards and effective accountability to the public has resulted in decision making that often appears arbitrary, especially during the critical charging and plea bargaining stages of the process. These decisions result in tremendous disparities among similarly situated people, sometimes along race and/or class lines. The rich and white, if they are charged at all, are less likely to go to prison than the poor and black or brown—even when the evidence of criminal behavior is equally present or absent. Although prosecutors certainly are not the only criminal
democracy has a vested interest in assuring that no one individual or institution exercises power without accountability to the people. For some reason, we have given prosecutors a pass—allowing them to circumvent the scrutiny and accountability that we ordinarily require of those to whom we grant power and privilege while affording them more power than any other government official. We have become complacent, affording trust without requiring responsibility. The time has come to focus on prosecutors, require information, and, most important, institute fundamental reforms that will result in more fairness in the performance of the prosecution function.

**Unfair deals**

**Andrew Klepper.** The media discovered and reported the arrest and prosecution of Andrew Klepper, a white, middle-class young man who lived in a Maryland suburb outside Washington, D.C., with his parents. His father was a lawyer, and his mother was a high school guidance counselor. Andrew attended a prestigious high school with a reputation for high achievement among its students. When he was 15, Andrew and two friends who attended the same school hired a prostitute, invited her to Andrew’s home, and proceeded to brutally assault and rob her. They struck her with a baseball bat, sodomized her with the bat handle and a large ink marker, and robbed her of more than $2,000.

Andrew was charged as an adult with first-degree sex offense, conspiracy to commit a first-degree sex offense, armed robbery, and conspiracy to commit armed robbery. All of these charges carry a maximum penalty of life in prison in the State of Maryland. The evidence against Andrew was overwhelming and included his own confession to the crimes.

Despite the horrific nature of the crimes, Andrew Klepper never served a day in prison. The prosecutor offered him a deal that involved his guilty plea to robbery, first-degree assault, and fourth-degree sexual offense. The prosecutor also agreed to support a suspension of his prison term and a five-year term of probation so that he could enroll in a facility for troubled youth in Tennessee called Peninsula Village. Peninsula Village treats severely troubled youth with six to eight weeks in a locked admissions unit followed by intensive group therapy in an outdoor setting. As part of the agreement, Klepper would spend an additional 18 months at Peninsula before enrolling in an unspecified boarding school that specializes in treating troubled youth. Klepper’s parents agreed to pay for the cost of the treatment. Ultimately, the Tennessee authorities declined to supervise Klepper’s probation, so the Maryland judge resented Klepper and placed him on unsupervised probation so he could receive the rehabilitative treatment at the Tennessee facility.

First offenders are frequently offered deals that result in a probationary sentence, but rarely if they commit very serious offenses, and Klepper’s crimes were among the most serious. Furthermore, Klepper’s involvement in the offense was much more destructive than that of his codefendants. According to the victim, he seemed to be the leader of the group, and he performed the most heinous act—the sodomy with the baseball bat and marker. Yet, ironically, he was the only one of the three boys to avoid imprisonment. His 19-year-old less culpable accomplice, Young Jiu Song, was not present during the sexual assault and received a four-year sentence. Even the 14-year-old accomplice, whose case was transferred to juvenile court, was detained in a juvenile facility.

Did Klepper’s social status, wealth, and possibly his race influence the prosecutor’s decision to offer him such a lenient plea bargain? It certainly may be reasonable to provide rehabilitative services rather than punishment for a juvenile first time offender. But if Andrew Klepper was deserving of such help, then so are other young first offenders charged with the same offenses.

The prosecutor might respond that he gave Klepper a break because his parents found and paid for an alternative that provided rehabilitative services and that he would have given a similar break to other similarly situated defendants, regardless of their race or socioeconomic background, had they proposed to provide a similar appropriate alternative. The prosecutor might further argue that it is not his role to secure alternatives to incarceration for criminal defendants and that he is not responsible for the inequities in society that divide people along socioeconomic lines. Why should Andrew Klepper be denied rehabilitative treatment because others in his situation cannot afford it?

These arguments have some force, but they may not tell the whole story. Could the prosecutor have agreed to the plea bargain because he empathized with Andrew Klepper and his parents? Klepper’s parents were well-educated professionals who hired a well-known criminal defense attorney to represent their son. Klepper was a popular student at one of the best high schools in the county. He was bound for college and had a bright future. Could the prosecutor have looked at Andrew and his parents and seen a life and family worth saving? Would the prosecutor have offered the same deal to a poor, African-American male with no family support, no education, and no foreseeable future? The reality is that the poor African-American male would never be able to afford such services, so prosecutors are rarely compelled to confront these issues.

The fact that few if any governmental entities provide free programs or services to treat defendants with problems and needs like those of Andrew Klepper is an indication that legislatures do not support such alternatives for individuals who commit crimes this serious. The legislatures may be shortsighted or just plain wrong, but should an individual
like Klepper be allowed to buy his way out of punishment with the assistance of the prosecutor while others who may be just as deserving of help are sent to prison?

Erma Faye Stewart. Erma Faye Stewart's case was much more typical. Stewart was a poor African-American woman with very limited education and even less understanding of the criminal justice system. She was arrested on November 2, 2000, in Hearne, Texas, for drug distribution on the word of a confidential informant who later was proven to have lied. She was held in jail on a $70,000 bond pending the outcome of her case.

Stewart proclaimed her innocence steadfastly from the moment she was arrested. Nonetheless, her court-appointed attorney urged her to accept the prosecutor's plea offer. He told her that if she did not take the plea, she would be facing a 10-year prison term. When Stewart told her lawyer that she couldn't plead guilty to something she didn't do, he became impatient with her. According to Stewart,

He was, like, pushing me to take the probation. He wasn't on my side at all. He wasn't trying to hear me. He wasn’t trying to explain nothing to me. And I even had told him, you know, "My understanding, you know, is not that good, so, you know, you’re just going to have to really break it down to me, for me to understand.”

(Frontline, The Plea (PBS television show, June 17, 2004), www.pbs.org.)

Stewart’s lawyer told her that if she pled guilty, she would be released and placed on probation. After almost a month in jail, she decided to plead guilty to something she insisted she didn’t do.

Even though I wasn’t guilty, I was willing to plead guilty because I had to go home to my kids. My son was sick. And I asked him, “Listen, now, you know—you know, I can plead for five-year probation. You know, just—just let me go home to my kids.”

(Id.)

On the date of her guilty plea hearing, Stewart learned that the prosecutor insisted on a 10-year period of probation. Desperate to go home, she agreed and pled guilty. The judge imposed a fine and court costs. Three years after the plea, Stewart was working as a cook making $5.25 per hour. She was evicted from the housing project where she and her children had lived, and they were put in foster care. Because of her conviction, she was ineligible for food stamps or federal aid to pursue an education. She won't be able to vote until two years after her 10-year period of probation has ended. Needless to say, she was not able to pay the $1,000 fine or the court and probation costs.

Stewart was one of 25 people who were arrested on the word of the same confidential informant. The first trial of one who declined to plead guilty started on February 19, 2001. It was soon revealed that the informant had lied, and within a few weeks, all of the remaining cases were dismissed. Had Stewart not pled guilty, her case would have been dismissed as well. The prosecutor offered no assistance and expressed no regrets.

Obviously, many people who plead guilty actually committed the offense to which they admit guilt. But Erma Faye Stewart’s case illustrates the pressures that many defendants feel when facing long prison terms, especially when they are detained prior to their trials. Unfortunately, most defendants have lawyers more like Stewart’s than Klepper’s, without the time, resources, or desire to investigate the case and mount a viable defense, and prosecutors who are more than willing to offer a plea even when they are not confident that they can prove guilt beyond a reasonable doubt. No one should plead guilty under these circumstances, but it happens frequently.

Prosecutorial misconduct: the abuse of power and discretion

Brian was a 15-year-old African-American boy charged in the District of Columbia juvenile court with assault with intent to kill, burglary, and related charges. The government claimed that Brian and two adult men had severely beaten an older man during a burglary of his home. Brian’s adult codefendants were charged with the same offenses and faced up to life in prison in adult court, where the office of the U.S. attorney for the District of Columbia prosecuted them. As a juvenile, the Office of the Corporation Counsel prosecuted Brian, and he faced a maximum punishment of two years in the juvenile correctional facility upon conviction. The juvenile court rules protected his anonymity and offered the possibility of rehabilitative treatment if needed.

The assistant U.S. attorney (AUSA) handling the case against the adult codefendants sought Brian’s assistance in their prosecution. He contacted the assistant corporation counsel in charge of Brian’s case and Brian’s court-appointed attorney to arrange an “off-the-record” conversation. The prosecutor hoped to secure Brian’s cooperation in the prosecution of the adults in exchange for lenient treatment, including possible dismissal of Brian’s case. During the meeting, the prosecutor questioned Brian about the events surrounding the assault and burglary. Brian’s attorney and mother were present during the meeting. Brian denied that either he or the adult codefendants had participated in the crimes.

The prosecutor expressed his displeasure with Brian’s denials and pressured him to testify that the adults were involved. When Brian refused to submit to pressure, the prosecutor threatened to charge Brian as an adult if he declined to testify against the codefendants, warning him that
he could receive a life sentence in an adult prison if convicted in adult court. Brian maintained that he knew nothing about the offenses, and the meeting ended without a deal. Soon thereafter, the prosecutor made good on his threats. The juvenile case was dismissed, and Brian was charged as an adult.

I was appointed to represent Brian in adult court. He immediately told me about the meeting with the prosecutor. I interviewed his mother, who verified the prosecutor’s threats and expressed her shock and dismay at what the prosecutor had done. “Can he get away with that?” she asked. I agreed that his behavior was unscrupulous, and after consulting with other lawyers at PDS, I decided to file a motion to dismiss the indictment for prosecutorial vindictiveness.

The judge assigned to Brian’s case scheduled a hearing, and Brian’s mother testified. She described the prosecutor’s threats in great detail, explaining how he had yelled at Brian and had threatened to charge Brian as an adult if he did not corroborate the government’s story that he had helped the two adults beat and rob the complainant. The prosecutor representing the government at the hearing was not the same prosecutor who had threatened Brian. To my surprise, he declined to cross-examine Brian’s mother. Instead, he began to argue, in a very dismissive manner, that Brian’s mother was lying and that the threats were never made. The judge interrupted the prosecutor’s argument and asked whether he planned to present any evidence. The prosecutor appeared surprised and informed the judge that he would just “make representations” as an officer of the court. This prosecutor apparently believed that he was not required to present testimony under oath and that the judge should simply accept his word to rebut the testimony of Brian’s mother. When it became clear that the judge planned to follow the rules of evidence and only consider the undisputed testimony of Brian’s mother, the prosecutor asked if he might have additional time to locate the prosecutor and present his testimony. The judge declined his request.

The hearing ended late on a Friday afternoon, and Brian’s trial was scheduled to begin the following Monday. The judge declined to rule on the motion, indicating that she would take the matter under advisement. I warned my client and his mother that they should not get their hopes up, that these motions were rarely granted, and that we should prepare to start the trial on Monday.

On the following Monday morning, the case was called, and my client and I joined the adult codefendants and their lawyers at counsel table. The case had been assigned to another judge. He looked in my client’s court file and announced, “Ms. Davis, your client’s case has been dismissed. There is an order issued by Judge Williams granting your motion to dismiss the indictment for prosecutorial vindictiveness.” I was shocked. Although I had challenged prosecutorial misconduct on many occasions during my years as a public defender, this was the only time a judge granted the relief I had requested.

The vindictiveness in Brian’s case is just one of the many forms of prosecutorial misconduct and is by no means the most common. Numerous articles and books have been written about prosecutorial misconduct. (See, e.g., Joseph F. Lawless, Prosecutorial Misconduct (2003); Scott Christianson, Innocence: Inside Wrongful Conviction Cases (2004)). Such misconduct may take many forms, including:

- Courtroom misconduct (making inappropriate or inflammatory comments in the presence of the jury; introducing or attempting to introduce inadmissible, inappropriate, or inflammatory evidence; mischaracterizing the evidence or the facts of the case to the court or jury; committing violations pertaining to the selection of the jury; or making improper closing arguments);
- Mishandling of physical evidence (hiding, destroying, or tampering with evidence, case files or court records);
- Failing to disclose exculpatory evidence;
- Threatening, badgering, or tampering with witnesses;
- Using false or misleading evidence;
- Harassing, displaying bias toward, or having a vendetta against the defendant or defendant’s counsel (including selective or vindictive prosecution, which includes instances of denial of a speedy trial); and
- Improper behavior during grand jury proceedings.

I do not attempt to present a comprehensive discussion of prosecutorial misconduct here, as such a task would be impossible in light of the breadth of the problem. Instead, I attempt to demonstrate that the line between legal prosecutorial behavior and illegal prosecutorial misconduct is a thin one. I explore whether a number of factors, including the Supreme Court’s jurisprudence and the prosecutorial culture of power and lack of accountability, create a climate that fosters misconduct. I focus on Brady violations—the most common form of misconduct—and examine how and why prosecutors continue to engage in illegal behavior with impunity.

The breadth of the problem
Much of what passes for legal behavior might in fact be illegal, but because prosecutorial practices are so rarely challenged, it is difficult to define the universe of prosecutorial misconduct. Because it is so difficult to discover, much prosecutorial misconduct goes unchallenged, sug-
gesting that the problem is much more widespread than the many reported cases of prosecutorial misconduct would indicate. As one editorial described the problem, "it would be like trying to count drivers who speed; the problem is larger than the number of tickets would indicate." (Editorial, Policing Prosecutors, St. Petersburg Times, July 12, 2003, at 16A.)

One of the most comprehensive studies of prosecutorial misconduct was completed in 2003 by the Center for Public Integrity, a nonpartisan organization that conducts investigative research on public policy issues. A team of 21 researchers and writers studied the problem for three years and examined 11,452 cases in which charges of prosecutorial misconduct were reviewed by appellate court judges. In the majority of cases, the alleged misconduct was ruled harmless error or was not addressed by the appellate judges. The center discovered that judges found prosecutorial misconduct in more than 2,000 cases, in which they dismissed charges, reversed convictions, or reduced sentences. (See Weinberg, supra.) In hundreds of additional cases, judges believed that the prosecutorial behavior was inappropriate but affirmed the convictions under the "harmless error" doctrine. (See generally 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 conviction).)

The cases investigated by the Center for Public Integrity only scratch the surface of the issue, as they only represent the cases in which prosecutorial misconduct was discovered and litigated. Most of the prosecutorial practices that occur behind closed doors, such as charging and plea bargaining decisions and grand jury practices, are never revealed to the public. Even after cases are indicted, defense attorneys are not entitled to discover what occurred behind the scenes. 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. Of course, there is no opportunity to challenge any misconduct that may have occurred in the more than 95 percent of all criminal cases that result in a guilty plea, since defendants give up most of their appellate rights when they plead guilty.

Why is prosecutorial misconduct so widespread and how did it reach this stage? An examination of the Supreme Court’s jurisprudence in this area may shed some light. The Court has shielded prosecutors from scrutiny in a series of cases that have narrowly defined the universe of behaviors that constitute prosecutorial misconduct and the circumstances under which victims of such behaviors are entitled to relief. Might these cases have emboldened prosecutors to engage in misconduct, since they know that even if their behavior is discovered and challenged, courts will most likely find the behavior to be "harmless error"?

The Supreme Court—protecting prosecutorial power

The Supreme Court has established nearly impossible standards for obtaining the necessary discovery to seek judicial review of some forms of prosecutorial misconduct. Inappropriate or unethical charging decisions, intimidat-
ity to oversee the implementation of criminal justice grants the Court powers to regulate lower court procedures. For example, in *McNabb v. United States*, 318 U.S. 332, 340 (1943), the Court concluded that when determining the admissibility of evidence, it obeys the Constitution, and, under its power of judicial supervision, formulates “civilized standards of procedure and evidence.” These standards are to be applied in federal criminal prosecutions, in an effort to deter governmental misconduct and preserve judicial integrity. The Court’s standards are satisfied by more than simple adherence to due process laws and are derived from considerations of “evidentiary relevance” and justice. (Id. at 341.)

In *United States v. Russell*, 411 U.S. 423, 435 (1973), however, the Supreme Court drastically curtailed the supervisory power doctrine by reversing a lower court’s use of the power in a case involving questionable law enforcement tactics. The Court invoked the separation of powers doctrine as it warned lower courts not to meddle in the business of law enforcement. In a further effort to limit the reach of a federal court’s supervisory power, in *United States v. Hastings*, 461 U.S. 499, 506 (1983), the Court held that judges may not use the supervisory power doctrine to reverse convictions because of prosecutorial misconduct in cases involving harmless error.

Civil lawsuits have proven equally ineffective as remedies for prosecutorial misconduct. The Supreme Court established a broad rule of absolute immunity from civil liability for prosecutors in *Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976). This rule immunizes prosecutors from liability for acts “intimately associated with the judicial phase of the criminal process.” (Id. at 430.) 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.

The Supreme Court’s decision to avoid the problem and pass it on to state bar authorities has proven totally ineffective. All attorneys, including prosecutors, must abide by their state’s code of professional responsibility. Attorneys who violate the code are subject to various forms of discipline, including disbarment. However, the Center for Public Integrity found only 44 cases since 1970 in which prosecutors faced disciplinary proceedings for misconduct that infringed on the constitutional rights of criminal defendants. 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;
- 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.


Out of the 44 attorney disciplinary cases,

- In seven, 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 two, the prosecutor was disbarred.
- In one, 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 three, the court remanded the case for further proceedings.

(1d.)

For many years, federal prosecutors refused to abide by state disciplinary rules. In 1989, the Thornburgh Memo declared that federal prosecutors would abide by internal Justice Department rules rather than the ethical rules of the state in which they practiced. (See *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992) (including the memorandum from Richard Thornburgh (June 8, 1989)).) Although this memorandum was overturned by the Citizens Protection Act of 1998, 28 U.S.C. § 530B, the act simply returned prosecutors to the status quo, which has proven highly ineffective in deterring or punishing misconduct.

It is not surprising that very few prosecutors are referred to state disciplinary authorities. In many ways, the phenomenon brings to mind the old saying “If you shoot at the king, you’d better kill him.” Since more than 95 percent of criminal cases result in guilty pleas, every defense attorney knows that future clients are at the mercy of the prosecutor, whose unfettered discretion determines what plea offers will be made and to whom. (See DOJ, Bureau of Statistics, *Felony Defendants in Large Urban Counties, 2000* 28 (December 2003) at www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf.) Challenging the bar license of an official who holds all the cards is risky business, especially given the odds of prevailing. Prosecutors are powerful and often popular political figures. Even when referrals are made, bar authorities frequently decline to rec-
ommend serious punishment, as the statistics from the Center for Public Integrity indicate. Thus, referring prosecutors to state bar authorities has proven to be a dismal failure.

The Court’s rulings have sent a very clear message to prosecutors—we will protect your practices from discovery; when they are discovered, we will make it extremely difficult for challengers to prevail; and as long as you mount overwhelming evidence against defendants, we will not reverse their convictions if you engage in misconduct at trial. Prosecutors are well aware of these facts, and although they may not always intentionally set out to engage in misconduct, it leads one to question whether the Supreme Court has provided prosecutors with a comfort zone that fosters and perhaps even encourages a culture of wrongdoing.

Brady violations: withholding exculpatory evidence

The obligation of a prosecutor to reveal favorable, exculpatory information about a criminal defendant is not only fair, it is a constitutional requirement. In Brady v. Maryland, 373 U.S. 83 (1963), 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. The Court expanded this rule in United States v. Agurs, 427 U.S. 97 (1976), 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. Professional ethical and disciplinary rules in each state and the District of Columbia reiterate and reinforce the duty to turn over information. The obligation to reveal Brady information is ongoing and is not excused even if the prosecutor acts in good faith.

Brady violations are among the most common forms of prosecutorial misconduct. Because the obligation is expansive, continuing, and not limited by the good faith efforts of the prosecutor, great potential for wrongdoing exists. The failure to provide Brady information can have dire consequences for the defendant. In capital cases, Brady violations have resulted in the execution of arguably innocent persons. At the very least, withholding Brady information can determine the outcome of a trial.

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. (Ken Armstrong & Maurice Possley, Verdict: Dishonor, Chi. Trib., Jan. 10, 1999, at www.chicagotribune.com.) The study revealed widespread, almost routine, violations of the Brady doctrine by prosecutors across the country. They discovered that since 1963, courts had dismissed homicide convictions against at least 381 defendants because prosecutors either concealed exculpatory information or presented false evidence. Of the 381 defendants, 67 had been sentenced to death. Courts eventually freed approximately 30 of the 67 death row inmates, including two defendants who were exonerated by DNA tests. One innocent defendant served 26 years before a court reversed his conviction. Armstrong and Possley suggest that this number represents only a fraction of cases involving this type of prosecutorial misconduct, since the study only considered cases where courts convicted the defendant of killing another individual. They also reported that the prosecutors who engaged in the reported misconduct were neither convicted of a crime nor barred from practicing law.

Another study by Bill Moushey of the Pittsburgh Post-Gazette found similar results. (See Bill Moushey, Win at All Costs, Pitt. Post-GAZETTE, at www.post-gazette.com.) In his examination of more than 1,500 cases throughout the nation, Moushey discovered that prosecutors routinely withheld evidence that might help prove a defendant innocent. 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.

Few defense attorneys have the time, resources, or expertise to conduct massive investigations of prosecution officials. Nor should the discovery of prosecutorial misconduct depend on investigative reporting. However, the current law and practices result in the random and infrequent discovery of Brady violations. Even when discovered, remedies for the accused are inadequate, and punishment of the offending prosecutor is rare.

Misconduct that leads to a death sentence

Prosecutorial misconduct in any case is reprehensible and can lead to the wrongful conviction of the innocent. When misconduct occurs in a capital case, however, the stakes are the highest because an innocent person might be sentenced to death. In fact, prosecutorial misconduct has been discovered in an extraordinary number of capital cases. Although various types of misconduct have been reported in capital cases, a high percentage of these cases, 16–19 percent, 41 involve Brady violations. Delma Banks’s case is one example. (See Banks v. Dretke, 540 U.S. 668 (2004).) The misconduct in Banks’s case was so egregious that even the U.S. Supreme Court, which had been unresponsive to claims of prosecutorial misconduct in the past, provided relief.

In 1980, Texas authorities charged Delma Banks with the death of 16-year-old Richard Whitehead. Prior to Banks’s trial, the prosecutor informed Banks’s defense attorney that he had turned over all discoverable information. In fact, the prosecutor failed to reveal key exculpatory information about two of its primary witnesses—Charles Cook and Robert Farr. During the trial, Cook testified that Banks had confessed to killing Whitehead and that he had seen Banks with blood on his leg and in possession of a gun soon after Whitehead’s death. On cross-examination, Cook denied that he had rehearsed his testimony with law enforcement officials. Farr
tested during the trial as well and corroborated key aspects of Cook's testimony. During Farr's cross-examination, he denied that law enforcement officials had promised him anything in exchange for his testimony. Farr also testified during the penalty phase of Banks's trial in support of his death sentence. Banks was sentenced to death.

Banks filed several post-conviction motions in Texas state courts. The court denied the first two motions on grounds unrelated to alleged Brady violations, but the third motion alleged that the prosecutor had failed to reveal exculpatory information about Cook and Farr. The third motion was denied, but Banks raised the allegations of Brady violations again in 1996 in a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Texas. Prior to an evidentiary hearing on Banks's motion, the magistrate judge ordered the prosecutor to turn over the prosecutor's trial files. Information in the prosecutor's files, affidavits signed by Cook and the deputy sheriff, and evidence uncovered at the hearing proved extraordinary and egregious prosecutorial misconduct.

Hidden in the prosecutor's file was a 74-page transcript of Cook's interrogation by law enforcement officers and prosecutors. During this interrogation, Cook was coached repeatedly on what to say at trial and how to reconcile his many inconsistent statements. In his affidavit, Cook stated that he was warned that if he did not conform his testimony to the state's evidence, he would "spend the rest of his life in prison." (Id. at 684.) The deputy sheriff testified at the hearing, and revealed, for the first time, that Farr, the other witness, was a paid police informant who received $200 for his assistance in Banks's case.

The prosecutor obviously knew that Cook's testimony had been coached, even scripted, and that Farr was a paid informant. These facts were clearly exculpatory and should have been revealed to the defense prior to trial. Furthermore, the prosecutor knew that Cook and Farr had committed perjury when they denied these facts under oath during the trial, yet he allowed these lies to become part of the record and stressed them heavily in the punishment phase.

The magistrate judge granted partial relief after the evidentiary hearing, recommending a writ of habeas corpus as to the death sentence, but not the guilty verdict. The district court adopted the magistrate's recommendation, but the Court of Appeals for the Fifth Circuit reversed the district court's grant of partial relief to Banks. In March 2003, just 10 minutes before Banks's scheduled execution by lethal injection and after he had been strapped to the gurney, the Supreme Court issued a stay of execution while it decided whether to review Banks's case.

The Court ultimately decided to hear Banks's claims and overturned his death sentence on February 24, 2004, by a vote of seven to two. In reversing the Fifth Circuit's decision, the Supreme Court held that Banks had demonstrated all three elements of a Brady prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. (Id. at 691, citing Strickler v. Greene, 527 U.S. 263, 281-82 (1999).) The Court used particularly harsh language in criticizing the prosecutor's conduct:

"It remains to be seen if Banks is a trend toward holding the fire to prosecutors' feet or just an anomaly."
judges, prosecutors, and public officials, including federal judges John Gibbons, Timothy Lewis, and William Sessions. Sessions is a former director of the Federal Bureau of Investigation. Thomas Sullivan, a former U.S. attorney for the Northern District of Illinois, also joined this brief; and the ABA also filed an amicus brief.

Third, some have speculated that the Supreme Court has taken umbrage in what it perceives as defiance of its jurisprudence by the Court of Appeals for the Fifth Circuit. There is certainly language in Banks that lends some credence to this theory. In Banks, the Court cites and relies on its holding in Strickler v. Greene and chides the Fifth Circuit for ignoring it: “Surprisingly, the Court of Appeals’ per curiam opinion did not refer to Strickler v. Greene, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the controlling precedent on the issue of ‘cause.’” (Banks v. Dretke, 540 U.S. 668, 692 n.12 (2004).)

Regardless of its reasons, the Court’s holding in Banks is a departure from its usual deference to prosecutors. It remains to be seen whether Banks is the beginning of a trend toward holding the fire to prosecutors’ feet or an anomaly attributable to Banks’s death row status at a time when the death penalty is under particular scrutiny. The latter characterization is more likely, in light of the large body of Supreme Court jurisprudence that defers to prosecutorial power and discretion.

Why prosecutors escape punishment
Prosecutors are rarely punished for misconduct, even when the misconduct causes tremendous harm to its victims. Of the 11,000 cases of alleged prosecutorial misconduct examined by the Center for Public Integrity, the appellate courts reversed convictions, dismissed charges, or reduced sentences in just over 2,000. However, in these cases, most of the prosecutors suffered no consequences and were not held accountable or even reprimanded for their behavior.

Ken Armstrong and Maurice Possley found the same lack of punishment and accountability in their 1999 study:

With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases. . . . They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs.

They do it to win.

They do it because they won’t get punished. (Armstrong & Possley, supra at C1.)

Armstrong and Possley found that a number of the prosecutors not only totally escaped punishment or even a reprimand but also advanced in their careers. In the 381 cases they examined in which appellate courts reversed convictions based on either Brady violations or prosecutors knowingly allowing lying witnesses to testify, the courts described the behavior in terms such as “unforgivable,” “intolerable,” “beyond reprehension,” and “illegal, improper and dishonest.” (Armstrong & Possley, supra at C1.) Yet, of those cases,

[o]ne was fired, but appealed and was reinstated with back pay. Another received an in-house suspension of 30 days. A third prosecutor’s law license was suspended for 59 days, but because of other misconduct in the case. . . . Not one received any kind of public sanction from a state lawyer disciplinary agency or was convicted of any crime for hiding evidence or presenting false evidence, the Tribune found. Two were indicted, but the charges were dismissed before trial. (Armstrong & Possley, supra at C1.)

None of the prosecutors were publicly sanctioned or charged with a crime. It is unclear whether any were sanctioned by state bar authorities, because these proceedings are not a matter of public record if the sanction was minor. Several of the offending prosecutors advanced significantly in their careers:

In Georgia, George “Buddy” Darden became a congressman after a court concluded that he withheld evidence in a case where seven men, later exonerated, were convicted of murder and one was sentenced to death. In New Mexico, Virginia Ferrara failed to disclose evidence of another suspect in a murder case. By the time the conviction was reversed she had become chief disciplinary counsel for the New Mexico agency that polices lawyers for misconduct. (Armstrong & Possley, supra at C1.)

If state bar authorities are hesitant to bring disciplinary actions against prosecutors, it is not surprising that criminal charges are even more infrequent. Yet much of prosecutorial misconduct is criminal behavior. When prosecutors knowingly put witnesses on the stand to testify falsely, they suborn perjury. Subornation of perjury is a felony in all 50 states. Prosecutors are not above the law or immune from prosecution. In fact, as the chief law enforcement officers, they should be held to the highest standard of conduct. Yet despite overwhelming evidence that prosecutors routinely break the law, they are not punished. ■