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Cover Page Footnote

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SEE NO EVIL: WRONGFUL CONVICTIONS AND THE PROSECUTORIAL ETHICS OF OFFERING TESTIMONY BY JAILHOUSE INFORMANTS AND DISHONEST EXPERTS

*Myrna S. Raeder**

INTRODUCTION

Jailhouse informants and dishonest experts have long been identified as significant causes of wrongful convictions.[1] While DNA tests can negate the accusatory testimony of these witnesses, many cases do not have biological evidence to test—either because the evidence is lost or destroyed, or, more likely, because the type of crime cannot be solved by DNA testing. When DNA evidence is unavailable, defendants convicted based on the testimony of jailhouse informants or dishonest experts often seek reversal for due process violations. In these due process claims, defendants generally allege that the prosecutors knowingly introduced false or perjurious testimony,[2] did not correct the testimony when its falsity was discovered,[3] or failed to disclose exculpatory *Brady*[4] material that would have contradicted the mendacious witness.[5] The testimony of jailhouse

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1. *See, e.g.*, Jim Dwyer et al., Actual Innocence: When Justice Goes Wrong and How to Make It Right 361 (2001) (noting that, out of the first 74 DNA exonerations, 19% of the convictions involved "informants/snitches" and 34% involved defective or fraudulent science); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 543–44 (2004) (noting that, out of 340 exonerations, 24 included allegations of perjury by forensic scientists testifying for the government, and at least 97 cases involved perjury by a "jailhouse snitch" or another witness who stood to gain from the false testimony). *See generally* Northwestern Univ. Sch. of Law Ctr. on Wrongful Convictions, The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row (2004) [hereinafter Northwestern], *available at* http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf.

2. *See, e.g.*, Mooney v. Holohan, 294 U.S. 103, 110 (1935).

3. *See, e.g.*, Napue v. Illinois, 360 U.S. 264, 265 (1959).

4. *Brady v. Maryland* holds "that the suppression of evidence by the prosecution favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution." 373 U.S. 83, 87 (1963).

5. *See, e.g.*, Banks v. Dretke, 540 U.S. 668, 703 (2004) (holding that *Brady* requires prosecutors to disclose a witness's status as a paid informant); Giglio v. United States, 405

informants and dishonest experts also may violate a myriad of other constitutional, procedural, and evidentiary laws.[6] Little attention has been directed toward the ethical implications for prosecutors who solicit and present the dubious testimony of experts or informants in court. Even assuming full compliance with *Brady* and the absence of any prosecutorial request for false testimony, the government's reliance on these witnesses is cause for concern. Are such prosecutors willfully blind to the likelihood of perjury, or are they simply taking their witnesses as they find them to advance the cause of justice in a criminal justice system where investigative resources are stretched thin over an ever-increasing caseload? While some claim that the introduction of such testimony is inherently intertwined with disclosure issues, I believe that assessing the two issues separately is better suited to formulate solutions that encourage ethical prosecution.

In an era defined by the reversal of more than 200 wrongful convictions through DNA testing, there is no shortage of articles addressing the false testimony of cooperating witnesses, derogatorily called "snitches" even by many who use them. This essay refers to them as jailhouse informants, since the issue here is not the morality of informing, but whether their testimony is untruthful, and whether the falsity is or should be obvious to prosecutors. The commentators and other groups analyzing this problem suggest a variety of procedural remedies,[7] such as reliability hearings,

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U.S. 150, 154–55 (1972) (holding that *Brady* requires prosecutors to disclose any evidence related to a witness's credibility).

6. *See, e.g.*, Fed. R. Evid. 702 (reliability and expert qualifications); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993) (prohibiting unreliable expert testimony); Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986); United States v. Henry, 447 U.S. 264, 274 (1980) (holding that a violation of the Sixth Amendment occurs if an undercover agent coaxes information out of a prisoner); Massiah v. United States, 377 U.S. 201, 206–07 (1964) (discussing dimensions of the Sixth Amendment right to counsel concerning law enforcement use of jailhouse informants); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (prohibiting scientific evidence that is not generally accepted). Other cases involve jurisdictional requirements concerning corroboration, and cautionary instructions among other restrictions. For example, California Penal Code sections 1127 and 4001.1 (West 2007) respectively require the contemporaneous filing of a written statement with the court that describes all consideration promised to or received by the in-custody informant and restricts monetary payments to $50.

7. *See, e.g.*, Achieving Justice: Freeing the Innocent, Convicting the Guilty, Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process 63–78 (Paul Giannelli & Myrna Raeder eds., 2006) [hereinafter ABA Report]; Aaron M. Clemens, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 Quinnipiac L. Rev. 151 (2004); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645 (2004); Barry Scheck, *Closing Remarks*, 23 Cardozo L. Rev. 899 (2002); Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 Hastings Const. L.Q. 81 (1994); Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 Fordham L. Rev. 257 (2005); *see also* Cal. Comm'n on the Fair Admin. of Justice, Report and Recommendations Regarding Informant Testimony 4–6 (2007) [hereinafter CCFAJ Report], *available at* http://www.ccfaj.org/documents/reports/jailhouse/official/Official%20Report.pdf; Ontario Ministry of the Att'y Gen., Comm'n on Proceedings Involving Guy Paul Morin, Recommendations 36–39 (1998) [hereinafter Morin Recommendations], *available at*

cautionary instructions, corroboration requirements, and full disclosure of any consideration offered to or reasonably expected by the witness. A few articles concentrate solely on jailhouse informants,[8] but most focus primarily on accomplices and confidential informants who act as soldiers on the front line of the war on drugs. Even the little empirical data that exists about cooperation has been directed at accomplices, rather than jailhouse or other informants.[9]

Arguably, prosecutors should also be aware that the testimony of questionable experts carries a high probability of falsity. While it may be difficult to separate incompetent experts from dishonest experts, my definition includes (1) expert shopping by prosecutors who cast a wide net before finding an expert who agrees with their desired conclusion, (2) experts who describe the results of problematic techniques using statistical comparison that have no basis in fact,[10] (3) experts who see something that none of his or her colleagues can find or duplicate, and (4) experts who simply lie, whether about their qualifications or their findings. Countless articles condemn the admission of junk science and lying experts in criminal cases,[11] particularly concerning microscopic hair analysis, bite marks, boot marks, and handwriting, as well as syndrome evidence and

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http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_recom.pdf; Manitoba Justice, The Inquiry Regarding Thomas Sophonow: Jailhouse Informants, Their Unreliability and the Importance of Complete Crown Disclosure Pertaining to Them (2001) [hereinafter Sophonow Inquiry], http://www.gov.mb.ca/justice/publications/sophonow/jailhouse/recommend.html.

8. *See, e.g.*, Valerie Alter, *Jailhouse Informants: A Lesson in E-snitching*, 10 J. Tech. L. & Pol'y 223 (2005); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1 (2000); Robert M. Bloom, *Jailhouse Informants*, Crim. Just., Spring 2003, at 20.

9. *See, e.g.*, Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 937 n.89 (1999).

10. *See, e.g.*, Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 Okla. City U. L. Rev. 17, 32 (2003) [hereinafter Gershman, *Misuse of Scientific Evidence*] (discussing fabricated statistics concerning a hair analysis and concluding that the results were so far-fetched that they suggest the prosecution made a conscious effort to obtain a conviction based on manufactured testimony with the expert's assistance).

11. *See, e.g.*, Mark S. Brodin, *Behavioral Science Evidence in the Age of* Daubert*: Reflections of a Skeptic*, 73 U. Cin. L. Rev. 867 (2005); Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 Stan. L. & Pol'y Rev. 381 (2004); Elizabeth L. DeCoux, *The Admission of Unreliable Expert Testimony Offered by the Prosecution: What's Wrong with* Daubert *and How to Make It Right*, 2007 Utah L. Rev. 131; David L. Faigman, *Embracing the Darkness:* Logerquist v. McVey *and the Doctrine of Ignorance of Science Is an Excuse*, 33 Ariz. St. L.J. 87 (2001); Paul Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y & L. 439 (1997) [hereinafter Giannelli, *Abuse of Scientific Evidence*]; Myrna S. Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 Mich. St. L. Rev. 1315; D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99 (2000); D. Michael Risinger & Michael J. Saks, *Rationality, Research and Leviathan: Law Enforcement-Sponsored Research and the Criminal Process*, 2003 Mich. St. L. Rev. 1023, 1036–50; Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 Emory L.J. 275 (2006); Paul Giannelli, *Bite Mark Evidence*, Crim. Just., Spring 2007, at 10, 42; Paul C. Giannelli, *Fabricated Reports*, Crim. Just., Winter 2002, at 49.

predictions of future dangerousness. Yet very few of these are written from an ethical rather than evidentiary perspective,[12] and most of the proposed remedies are aimed at the judicial process, not at prosecutors. Calls for lab accreditation, certification of experts, and expanded disclosure requirements for expert data, if successful, will clearly decrease the ability of dishonest experts to escape notice. However, this essay encourages self-regulation by prosecutors, since they can act as the initial gatekeepers who prevent the introduction of testimony based on bogus science, deceitful experts, and lying jailhouse informants that might otherwise be admitted by the courts.

Thus, I explore a much narrower issue than is presented by most of the jailhouse informant and expert literature: Are prosecutors at fault for reaching out to witnesses whose testimony sounds too good to be true when it fills in the gaps that otherwise would likely derail the prosecution's case? This essay addresses the following questions: Does such conduct clearly violate prosecutorial ethical obligations when all impeachable material possessed by the government is disclosed? Is an ethical violation sufficient to obtain a reversal of the defendant's conviction by a jury that chooses to believe the testimony of these impeachable witnesses?[13] Assuming that answer is no, is it beneficial to clearly label the presentation of such testimony as ethically problematic and to propose clarifying ethical rules to specifically address such conduct?

I conclude that significant institutional goals warrant such clarification, regardless of the reach of the current ethical rules,[14] or the defendant's inability to obtain a reversal when the introduction of this type of evidence does not violate constitutional or statutory law. My objective is not to bash prosecutors for resorting to jailhouse informants or questionable experts. There may be instances where, even under stringent prosecutorial review, such witnesses appear to be truthful,[15] justifying prosecutors to introduce

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12. *See* Michael J. Saks, *Scientific Evidence and the Ethical Obligations of Attorneys*, 49 Clev. St. L. Rev. 421, 436 (2001). *See generally* Gershman, *Misuse of Scientific Evidence*, *supra* note 10; Jane Campbell Moriarty, *"Misconvictions," Science, and the Ministers of Justice*, 86 Neb. L. Rev. 1 (2007).

13. *Cf.* Plascencia v. Alameida, 467 F.3d 1190, 1199 (9th Cir. 2006). The court affirmed the defendant's conviction and rejected a habeas claim of ineffective assistance by defense counsel who had challenged the testimony of jailhouse informants in closing argument by reviewing in detail how the informants "could have concocted information about the crime." *Id.* Defense counsel also pointed out that one informant had said "'I'm going to use this to get out of my case,' which is precisely what jailhouse informants bent on securing their own freedom at any price frequently do." *Id.* The case did not address any ethical questions. *Id.*

14. Although the ethics of experts is beyond the scope of this essay, it is a related topic that has received little discussion in the legal literature. *See generally* Michael J. Saks, *Ethics in Forensic Science: Professional Standards for the Practice of Criminalistics*, 43 Jurimetrics J. 359 (2003) (book review); J. Vincent Aprile II, *Know the Ethics of the Expert Witness, Whether Friend or Foe*, Crim. Just., Summer 2006, at 45.

15. *See, e.g.*, Fredric N. Tulsky, *Tighter Safeguards Urged When Using Jail Informants*, San Jose Mercury News, Sept. 21, 2006, at A1 (citing a prosecutor who noted rare cases in which an informant pointed officials to the body of a murder victim or to the weapon used in a crime); *see also* Morin Recommendations, *supra* note 7; Sophonow Inquiry, *supra* note 7

the testimony pursuant to their role as advocates.[16] This is particularly true, given that the evidence will still be subject to defense challenges, as well as to judicial and jury review. Rather, I hope this essay encourages prosecutors to seriously consider their ethical obligations to innocent defendants[17] by creating standards and policies to self-regulate prosecutorial reliance on such witnesses so that their appearance at trial is the exception, rather than the norm.[18] As commentators have recognized, hortatory rules are not a perfect solution, but promote education, self-reflection, and transparency in the decision-making process.[19] In fact, some believe that internal regulations are "'absolutely critical'" to setting and maintaining the appropriate ethical tone for prosecutors.[20]

Beyond strengthening rules and standards, I also suggest that prosecutors create their own self-regulatory commission to review cases of individuals who were wrongfully convicted of crimes and later exonerated by the judicial system. Such retrospectives would both reinforce the ethical obligation of prosecutors as ministers of justice and provide a friendly forum to address the underlying causes of erroneous convictions. Hopefully, these reviews would lessen the knee-jerk hostility that many prosecutors hold toward innocence commissions, because they fear "witch

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(severely restricting but not instituting outright bans against the use of jailhouse informants). Similarly, expert shopping may be appropriate when the expertise is so specialized that the contrary opinion of a less qualified expert consulted earlier should not disallow the testimony, assuming the previous negative opinion is disclosed to the defense.

16. *See* Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-1.2(b) (3d ed. 1993) (stating that the prosecutor is "an advocate"). Ethical questions implicated by the general introduction of evidence in an adversarial trial are also not considered in this essay. *See* Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 Geo. J. Legal Ethics 1 (2006).

17. *See* Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-1.2 cmt. ("[I]t is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty.").

18. I recognize that self-regulation sometimes connotes that specific ethical rules are not adopted. *See, e.g.*, Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 Vand. L. Rev. 381, 469–73 (2002). However, given the infrequent resort to disciplinary proceedings against prosecutors, I view the adoption of specific ethical precepts, whether in the ABA Model Rules or the ABA Prosecution Function Standards, or by the National District Attorneys Association Standards, as a means to self regulate and educate prosecutors.

19. *See* Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-adversarial Roles of Federal Prosecutors*, 37 B.C. L. Rev. 923, 964 (1996) (self-reflection); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399, 421–25 (transparency through adoption of policy manuals); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 Fordham L. Rev. 1511, 1513 (2000) (education); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 Notre Dame L. Rev. 223, 231–37 (1993) (explaining the parameters of the system and promoting introspection).

20. Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 Cardozo L. Rev. 875, 889 (2002) (quoting Panel Discussion, *The Regulation and Ethical Responsibilities of Federal Prosecutors*, 26 Fordham Urb. L.J. 737, 744 (1999)).

hunts" directed to unmask evidence of their wrongdoing. In contrast, the actual purpose of such reviews is to assess the reasons behind the justice system's failure and the lessons we can learn from these tragedies, regardless of whether their cause was purposeful wrongdoing or a combination of unintentional mistakes. Prosecutors, as well as the defense bar, recognize that, whenever an innocent person is convicted, the true assailant remains at large and continues to threaten public safety. Thus, adopting policies and practices best suited to ensure the conviction of the guilty and the acquittal of the innocent is a goal that unites the entire criminal justice community.

While my exceedingly short stint as a special assistant U.S. attorney in Washington, D.C., in 1972 to 1973, as part of an E. Barrett Prettyman Fellowship at Georgetown Law Center, does not qualify me as a true former prosecutor, it left me with a profound respect for that office, as well as for the power and responsibilities of ethical prosecutors. My many encounters with state and federal prosecutors during the last twenty years within the American Bar Association (ABA) Criminal Justice Section, in the section's council, as chair of the section, and more recently as co-chair of its Ad Hoc Innocence Committee, have reaffirmed my belief that good prosecutors take their ethical responsibilities seriously. However, some prosecutors undeniably care little about ethics and may easily evade or misconstrue their obligations. As constitutional or evidentiary principles cannot magically solve the issues presented here, the prophylactic effect of ethical rules appears to offer the best solution for keeping jailhouse informants and dishonest experts from polluting the search for truth at trial. Moreover, the current push toward corroboration requirements for jailhouse informants and more stringent regulation of forensic science by accreditation, certification, and pretrial disclosure requirements[21] will complement the imposition of heightened ethical obligations.

I. JAILHOUSE INFORMANTS AND DISHONEST EXPERTS: THE NATURE OF THE PROBLEM

Significant ethical and legal implications arise for prosecutors when the government offers leniency to individuals who take part, or claim to take part, in crimes. An offer of leniency "gives the witness a powerful incentive to fabricate his testimony in order to curry favor with the government,"[22] and also to find "a fast and easy way out of trouble with the law."[23] Judge Stephen S. Trott, a judge on the U.S. Court of Appeals for

21. *See, e.g.*, ABA Report, *supra* note 7 (citing recommendations); CCFAJ Report, *supra* note 7.

22. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 Notre Dame L. Rev. 635, 655 (2006); *see* Kim Wherry Toryanski, *No Ordinary Party: Prosecutorial Ethics and Errors in Death Penalty Cases*, Fed. Law, Jan. 2007, at 45.

23. Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1123 (9th Cir. 2001).

the Ninth Circuit and a longtime critic of the unregulated use of cooperating witnesses,[24] has cautioned,

> [B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the low value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot.[25]

My present essay is limited to the most problematic of the cooperating witnesses: jailhouse informants. As jailhouse informants pose the clearest threat to the integrity of the criminal justice system, an appeal to prosecutorial ethics to limit the most flagrant examples of their misuse should garner the broadest possible support. As Judge Trott has warned, "The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him."[26] A Canadian commission investigating the causes of a wrongful conviction flatly stated that "[j]ailhouse informants comprise the most deceitful and deceptive group of witnesses known to frequent the courts.... They are smooth and convincing liars."[27] Jailhouse informants claim no insider knowledge of the crime; rather, their ticket to freedom or other rewards is based entirely on the alleged confessions made to them by defendants, which in an information-friendly world may be spun from whole cloth.

Nearly twenty years ago, Leslie Vernon White, who admitted to committing multiple acts of perjury as a jailhouse informant, joked that the "snitch" system had spawned such slogans as "Don't go to the pen, send a friend" and "If you can't do the time, just drop a dime," demonstrating to a shocked nation watching *60 Minutes* exactly how easy it is to create a false confession without ever having spoken to the defendant.[28] In many jurisdictions, little has changed and access to the Internet, media, and cell phones by inmates and/or their friends has increased their ability to obtain what sounds like insider knowledge. The incentives for jailhouse informants to lie are so great, and the consequences so minimal, that prosecutorial reliance on this category of cooperating witnesses is always ethically challenging. The truthfulness of jailhouse informants is permanently suspect, unless the conversation with the defendant is

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24. *See generally* Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381 (1996).

25. *Bowie*, 243 F.3d at 1124.

26. Trott, *supra* note 24, at 1394.

27. Sophonow Inquiry, *supra* note 7.

28. *See* Northwestern, *supra* note 1, at 2.

recorded, and the confession is actually captured on the tape.[29] Jailhouse informants are willing to ply their trade not only when requested by jailers, police, or the prosecution, but also as entrepreneurs, claiming confessions were made to them by cellmates, seatmates on the bus to court, or simply by high-profile defendants who passed their way in the yard or cafeteria. In some jurisdictions the focus of jailhouse informants' testimony has shifted in capital cases from the guilt phase to the penalty phase in order to prove special circumstances or provide evidence of aggravating factors.[30]

Similarly, when prosecutors go "expert shopping" (casting a wide net before finding an expert to agree with their desired conclusion) and find an expert whose conclusion cannot be duplicated, they arguably are on notice that the expert's testimony is potentially false. In addition, prosecutors should be on the lookout for inaccurate or misleading testimony when offering an expert who presents statistics without scientific basis or relies on questionably reliable techniques, such as hair or bite mark analysis. This is true even if the testimony otherwise goes unchallenged by the defense, or the judge finds the issue is one of credibility, rather than admissibility.

Such experts are often called "prosecution friendly," a term that captures their bias, which in turn may color their evaluation of the evidence.[31] Some might argue that this term sweeps legitimate forensic experts into the mix, when the evidence realistically favors the prosecution and the expert's testimonial style persuasively reinforces the findings. But something more than persuasive pro-prosecution testimony is at play with dishonest experts. For example, Fred Zain, the director of serology in West Virginia, whose forensic misdeeds spurred a lengthy investigation and report to the Supreme Court of Appeals of West Virginia,[32] as well as ultimately unsuccessful prosecutions for perjury, was referred to by colleagues as "'pro prosecution.'"[33] After Zain left to work in Texas, prosecutors asked him to review his previous results when they could not be duplicated. Again his

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29. *Cf.* Steve Mills & Ken Armstrong, *The Failure of the Death Penalty in Illinois: The Inside Informant*, Chi. Trib., Nov. 16, 1999, at 1 (noting that a jailhouse informant taped defendant for six hours with a recorder supplied by the Federal Bureau of Investigations and, in spite of the absence of an alleged confession from the recordings due to claimed malfunctions, the prosecution offered the testimony on the theory that the informant knew private details of the crime, although a different prosecutor called the jailhouse informant a pathological liar).

30. *See* CCFAJ Report, *supra* note 7, at 1–2 (noting that State Public Defender Michael Hersek reported that 17 of the 117 death penalty appeals then pending in his office featured testimony by in-custody informants, rarely concerning evidence in the guilt phase of the trial, but crucial to special circumstances); *see also* Ted Rohrlich & Steve Berry, *Judge Deals Blow to Use of Jailhouse Informants*, L.A. Times, Apr. 9, 1999, at B1 (reporting that a death penalty sentence was overturned where a jailhouse informant with a "proclivity to lie" provided the only evidence of the identity of the shooter but that other evidence was sufficient to establish defendant's guilt).

31. *See* Gershman, *Misuse of Scientific Evidence*, *supra* note 10, at 31. *See generally* D. Michael Risinger et al., *The* Daubert/Kumho *Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1 (2002).

32. *See In re* W. Va. State Police Crime Lab., 438 S.E.2d 501 (W. Va. 1993).

33. *Id.* at 503.

results favored the prosecution.[34] Moreover, in spite of concerns about his work, Zain was asked to perform new tests after he left because "several prosecutors expressed dissatisfaction with the reports they were receiving from serology and specifically requested that the evidence be analyzed by Zain."[35] In essence, unless prosecutors had reason to believe that everyone else in serology was incompetent, only willful blindness kept them from knowing that Zain's testimony was false.

Similarly, Joyce Gilchrist, an African-American forensic chemist, known as "Black Magic" for her ability to sway juries with evidence only she could see,[36] was later investigated when many of her incorrect hair analyses were disclosed by DNA exonerations. In a reversal of one of her more egregious cases, the court found that she knew her testimony was false and misleading because it was contradicted by evidence that was withheld from the defense.[37] Years earlier, she had been criticized within the forensic community for her "missionary zeal" that put "blinders on her professional conscience."[38] On *60 Minutes*, another crime lab examiner noted, "You have to look at the prosecutor's office. They must have understood what was going on with all those flags being waved."[39]

Unprofessionally zealous prosecution experts are not simply denizens of crime labs. Dr. James Grigson, referred to more dramatically as Doctor Death,[40] was a favorite with prosecutors who wanted to demonstrate the future dangerousness of defendants in capital cases. Without a doubt, Grigson's willingness to classify every defendant that he examined as dangerous accounts for his testimony in one murder case where he was certain the defendant, Randall Adams, would kill again.[41] In fact, the prosecution's key witness in that case, Davis Harris, was later revealed as the murderer, and it was Harris who killed again before Adams was eventually freed.[42] Similarly, the special prosecutor who convicted a Texas pathologist accused of fabricating autopsy results claimed, "If the prosecution theory was that death was caused by a Martian death ray, then that was what [he] reported."[43]

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34. *Id.* at 512.

35. *Id.* at 512–13 n.16.

36. Randall Coyne, *Dead Wrong in Oklahoma*, 42 Tulsa L. Rev. 209, 236 (2006).

37. Mitchell v. Gibson, 262 F.3d 1036, 1064 (10th Cir. 2001).

38. James E. Starrs, *The Forensic Scientist and the Open Mind*, 31 J. Forensic Sci. Soc'y 111, 132–33 (1991).

39. *See* Paul C. Giannelli, *Alchemy, Magic, and Forensic Science*, Crim. Just., Fall 2006, at 50, 52.

40. *See* Eric F. Citron, Note, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 Yale L. & Pol'y Rev. 143, 159 (2006).

41. *See* Richard H. Underwood, *The Professional and the Liar*, 87 Ky. L.J. 919, 979 (1999).

42. *See id.*

43. Richard L. Fricker, *Pathologist's Plea Adds to Turmoil: Discovery of Possibly Hundreds of Faked Autopsies Helps Defense Challenges*, A.B.A. J., Mar. 1993, at 24, 24.

Buckley v. Fitzsimmons,[44] one of the seminal U.S. Supreme Court decisions concerning the nature of prosecutorial immunity, analyzed the following statement of facts:

> After three separate studies by experts from the Du Page County Crime Lab, the Illinois Department of Law Enforcement, and the Kansas Bureau of Identification, all of whom were unable to make a reliable connection between the print and a pair of boots that petitioner had voluntarily supplied, respondents obtained a "positive identification" from one Louise Robbins, an anthropologist in North Carolina who was allegedly well known for her willingness to fabricate unreliable expert testimony.[45]

The jury deadlocked and *Buckley* was never retried, although the defendant languished in prison for two more years, while someone else confessed to the crime.[46] Charges were only dismissed after the death of Robbins,[47] whose $10,000 fee clearly reflected her contribution to the prosecution's case.[48] Unfortunately, other examples of fake expertise abound.[49] A forensic dentist earned a fee of $50,000, ten times more than the average fee at the time, for testifying that a jagged bite mark came from the defendant, in contradiction to the testimony of nine other forensic dentists. The resulting conviction was ultimately overturned by DNA testing.[50]

II. PRACTICAL CONSTRAINTS ON PROSECUTORIAL DECISIONS CONCERNING JAILHOUSE INFORMANTS AND EXPERTS

While it is easy to favor abstract principles of justice when writing in an academic setting, it would be facile not to recognize that these ethical problems arise in a real-world context that has changed dramatically in the recent past. The minimal amendments to the ABA Model Rules of Professional Conduct in 2002 that affected prosecutors[51] provided little concrete guidance as to how to exercise prosecutorial discretion in a twenty-first-century world. Today's center stage is occupied by the war on drugs, an ever-expanding technological revolution, an ever-growing prison

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44. 509 U.S. 259 (1993).

45. *Id.* at 262.

46. *Id.* at 264.

47. *Id.*

48. *See* Barry Siegel, *Presumed Guilty: An Illinois Murder Case Becomes a Test of Conscience Inside the System*, L.A. Times, Nov. 1, 1992, (Magazine), at 18.

49. *See, e.g.*, Brooks v. State, 748 So. 2d 736, 748 (Miss. 1999) (McCrae, J., dissenting) (rejecting the majority's approval of bite mark evidence and stating that "[t]his is not the first time that Dr. West has been able to boldly go where no expert has gone before"). *See generally* Gershman, *Misuse of Scientific Evidence*, *supra* note 10 (identifying examples of dishonest experts); Giannelli, *Abuse of Scientific Evidence*, *supra* note 11 (same); Richard H. Underwood, *Evaluating Scientific and Forensic Evidence*, 24 Am. J. Trial Advoc. 149 (2000) (same).

50. *See* Robert Nelson, *About Face, Ray Krone's Got It All. A New Look. Money. Problem Is, He Can't Seem to Forgive Those Who Screwed Up and Put Him on Arizona's Death Row*, Phoenix New Times, Apr. 21, 2005, http://www.phoenixnewtimes.com/2005-04-21/news/about-face/print.

51. *See, e.g.*, Joy, *supra* note 19, at 417–20.

population, and the advent of terrorism. Just as the television show *24* stirred debates about whether its depictions would affect how a new generation of soldiers views the role of torture to obtain information,[52] one can hardly turn on the television without seeing the role of a district attorney glorified as that of simply putting the bad guys away in an hour, regardless of the tricks employed. This Machiavellian view that the ends justify the means in criminal justice has been ingrained for so long that an entire generation has grown up assuming this is the appropriate way for prosecutors to behave, regardless of whether it is "an idea that is plainly incompatible with our constitutional concept of ordered liberty."[53]

The public pressure on prosecutors has grown significantly in a world where news is 24/7, blogs are omnipresent, and commentators abound. Victims' rights have become an anthem, and while previous disregard of them called for some rebalancing, the result has been a wholesale denigration of the rights of criminal defendants.[54] Legislators fear being considered soft on crime, and punitive sentencing schemes make even innocent defendants blanch, particularly when they have a prior criminal history that will greatly increase their sentences if they gamble on a trial.[55] In addition, a phenomenon commonly referred to as the "CSI effect"[56] reinforces the public's belief that forensic scientists have all of the answers that will lead unerringly to the bad guy, though this ironically may backfire against the prosecutor when the jurors' unrealistic expectations are not met. Considering the no-holds-barred attitudes fueled by the "wars" on drugs, crime, and now terrorism, it is unsurprising that prosecutors feel it necessary to solve major crimes quickly and publicly. This pressure is exacerbated by extremely large caseloads in urban jurisdictions, coupled with inevitable funding shortfalls. When the evidence demonstrates probable cause but is not convincing without an added bounce from a

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52. *See* Jane Mayer, *Whatever It Takes: The Politics of the Man Behind "24,"* New Yorker, Feb. 19, 2007, at 66.

53. Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1118–19 (9th Cir. 2001) ("What emerges from this record is an intent to secure a conviction of murder even at the cost of condoning perjury. This record emits clear overtones of the Machiavellian maxim: 'the end justifies the means,' an idea that is plainly incompatible with our constitutional concept of ordered liberty." (citation omitted)).

54. My writings concerning domestic violence, child abuse, and the Confrontation Clause have tried to address this tension. *See, e.g.*, Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 Ind. L.J. 1009 (2007); Myrna S. Raeder, *Domestic Violence Cases After* Davis*: Is the Glass Half Empty or Half Full*, 15 J.L. & Pol'y 759 (2007); Myrna S. Raeder, *Domestic Violence in Federal Court: Abused Women as Victims, Survivors, and Offenders*, 19 Fed. Sent'g Rep. 91 (2006); Myrna S. Raeder, *Gender-Related Issues in a Post-*Booker *Federal Guidelines World*, 37 McGeorge L. Rev. 691 (2006); Myrna S. Raeder, *Confrontation Clause Analysis After* Davis, Crim. Just., Spring 2007, at 10.

55. *See, e.g.*, Gary C. Williams, *Incubating Monsters?: Prosecutorial Responsibility for the Rampart Scandal*, 34 Loy. L.A. L. Rev. 829, 840 (2001) (discussing that over one hundred convictions have been reversed due to police planting of evidence and perjury).

56. *See generally* Michael Mann, *The "CSI Effect": Better Jurors Through Television and Science?*, 24 Buff. Pub. Int. L.J. 211 (2006).

jailhouse informant or overly helpful expert, is it any wonder that prosecutors leave it to the jury to decide if they got the wrong person? Such witnesses also take the pressure off of law enforcement to fully investigate cases, the vast majority of which will not result in trial. Yet this Faustian bargain imposes the terrible cost of making police and prosecutors lazy in both their investigation and prosecution of the case, which increases the potential for a wrongful conviction when the lying witnesses are believed, and the other evidence is weak.

Elections for local district attorneys add another consideration, since win-loss records tend to dominate the media, as does a high-profile defeat. Even within a prosecutor's office, advancement may depend on a high conviction rate.[57] Yet, when a prosecutor took an unpopular, but ethically principled stance, and moved for dismissal of a high-profile case because his office believed that the circumstantial evidence was not strong enough to satisfy proof beyond a reasonable doubt, the judge was unwilling to comply, and the jury ultimately returned a guilty verdict, which was upheld on appeal.[58] This outcome reinforces the view that when the crimes are heinous and involve serial killings, public safety concerns and public perception require the trial of questionable cases.

As has been aptly described by other commentators, much of the alleged prosecutorial misconduct relates to "activities that the codes refer to only obliquely, if at all."[59] This helps to explain the paucity of cases in which prosecutors are disciplined. Another reason for the scarcity of cases where prosecutors are disciplined is the absence of complaints, which tend to be filed primarily in high-profile cases or because of written opinions documenting the misconduct.[60] In addition, misconduct may be monitored by prosecutorial agencies, judges, and the ballot box,[61] with uneven results. Many believe that bar discipline is ineffective to deter prosecutorial misconduct[62] and suggest other remedies, such as rethinking absolute prosecutorial immunity,[63] establishing independent commissions,[64] or even

57. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 134–35 (2004).

58. Then–Los Angeles District Attorney John Van de Kamp approved dismissal of the "Hillside Strangler" case due to the perceived untrustworthiness of evidence from the coconspirator who was to be the main prosecution witness. The judge, Ronald George, now chief justice of the Supreme Court of California, refused to enter the dismissal. The California attorney general's office took over the prosecution of the case and obtained the defendant's conviction. *See* Justice Roger W. Boren, *The Hillside Strangler Trial*, 33 Loy. L.A. L. Rev. 707, 720, 724 (2000).

59. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721, 735 (2001).

60. *Id.* at 749–50.

61. *Id.* at 763–65.

62. *See* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. Rev. 275, 276 (2004) ("[T]he lack of accountability for such misconduct is typical and cannot be blamed upon a lack of enforceable standards governing the behavior of prosecutors.").

63. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53.

employing criminal sanctions.[65] Indeed, the disbarment of Michael Nifong after the Duke rape case was highly unusual and involved violations of specific obligations concerning *Brady* and press conferences, as well as claims regarding more discretionary activities. Moreover, Nifong not only admitted his fault at the hearing, but the investigation was also fueled by a firestorm of publicity focusing on the sympathetic defendants, one of whom appeared to have a strong alibi.[66] In contrast, the complainant made many contradictory statements and virtually no corroboration existed for her account of what happened, other than statements of a nurse who indicated that the complainant's behavior was consistent with that of a rape victim. Can anyone doubt that if public sentiment had been against the defendants, and if their cases had not been dismissed by a different prosecutorial agency, the swift response by the North Carolina State Bar and the resulting disbarment would have been unlikely?[67] In fact, a *Chicago Tribune* study analyzed 381 murder cases that were reversed because of prosecutorial misconduct and found that none of the prosecutors were disbarred.[68]

Except for a perfect storm like the Duke case, it is impractical to assume that disciplinary hearings provide a practical remedy for misconduct. The parents of the Duke defendants were reported to have spent $3 million on legal advice during the pendency of the case.[69] As defendant Reade Seligmann explained,

> "This entire experience has opened my eyes up to a tragic world of injustice I never knew existed. . . . If police officers and a district attorney can systematically railroad us with absolutely no evidence whatsoever, I can't imagine what they'd do to people who do not have the resources to defend themselves. So rather than relying on disparaging stereotypes and creating political and racial conflicts, all of us need to take a step back from this case and learn from it.["][70]

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64. Yaroshefsky, *supra* note 62, at 297–98 (concluding that it is necessary to establish an independent commission to examine wrongful cases and to promulgate, implement, and enforce disciplinary rules for prosecutors).

65. *See* Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. Tex. L. Rev. 801, 826–47 (2006).

66. *See* Duff Wilson & David Barstow, *Duke Prosecutor Throws Out Case Against Players*, N.Y. Times, Apr. 12, 2007, at A1; *see also* Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 Fordham L. Rev. 1337 (2007) (discussing the ethical violations and subsequent disbarment of Michael Nifong in great detail).

67. *See* Adam Liptak, *Prosecutor Becomes Prosecuted*, N.Y. Times, June 24, 2007, at WK4 (claiming that the same factors that were a huge publicity magnet for his reelection led to his undoing in the court of public opinion when the case collapsed).

68. *Id.*

69. Anne Blythe & Joseph Neff, *About $750,000 Raised: Group Helping Cover Duke Players' Bills, Defendant's Father Says $3 Million Spent So Far*, Charlotte Observer (N.C.), Feb. 6, 2007, at 5B.

70. Wilson & Barstow, *supra* note 66.

Yet the high-profile disciplinary proceeding has the practical benefit of making the public understand when a prosecutor's conduct is unacceptable. Moreover, it reinforces the ethical precepts by which prosecutors are bound. Indeed, the National District Attorneys Association (NDAA) felt it necessary to issue several press releases in the wake of the disbarment. One described the false accusations of rape by members of the Duke lacrosse team as "abhorrent, dishonest, and self-serving, and fly[ing] in the face of the ethical conduct that prosecutors not only accept and endorse, but adhere to."[71] The release also recognized,

> No prosecutor wants to subject an innocent person to prosecution. This is a nightmare scenario for every prosecutor. In millions of cases and trials prosecutors go to great lengths to investigate, use DNA evidence if available, talk to witnesses and use every law enforcement tool available to them before they make a decision to charge a suspect. To do less would be intolerable.[72]

Another release by the NDAA specifically addressed the ethical implications of the case: "The recent case of the exonerated athletes in North Carolina has affirmed the importance of the ethical standards of America's prosecutors and serves as a reminder that the primary ethical duty of a prosecutor is to seek justice, not merely to convict."[73]

That press release also recognized that "[t]he confidence of the public and the very integrity of the criminal justice process depend on strict compliance with these ethical standards."[74] Thus, even the atypical resort to disciplinary proceedings may have an impact on prosecutors, as well as give the public an appreciation of their ethical responsibilities that rarely appear in the popular media. At a minimum, it also signals to prosecutors that the ethical rules matter, even if typically honored in the breach, when the defendant's innocence is a realistic possibility. In other words, the ethics-lite approach to prosecutorial misconduct sometimes packs an unexpected punch.

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71. Press Release, Nat'l Dist. Att'ys Ass'n, There Is Not an Epidemic of Rogue Prosecutors in America: A Statement to Americans by the National District Attorneys Association (June 17, 2007), http://www.ndaa.org/newsroom/pr_duke_case_june_17_07.html.

72. *Id.*; *see also* Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L. Rev. 1453, 1473–85 (2007) (discussing the ethical questions that DNA evidence poses to prosecutors with particular reference to the Duke lacrosse case).

73. Press Release, Nat'l District Att'ys Ass'n, National District Attorneys Association's President Mathias H. Heck, Jr., Issues Statement Concerning the North Carolina-Duke Case (Apr. 16, 2007), http://www.ndaa.org/newsroom/pr_duke_case_07.html.

74. *Id.*

III. DO THE ETHICAL RULES PROHIBIT THE USE OF JAILHOUSE INFORMANTS AND DISHONEST EXPERTS, AND EVEN IF THE ANSWER IS YES, CAN A CONVICTION BE REVERSED FOR VIOLATING THAT ETHICAL OBLIGATION?

A. *The Obligation to Seek Justice*

Berger v. United States[75] is always the starting point for any discussion of prosecutorial ethics. While some claim *Berger*'s vague ethical standard is simply aspirational, *Berger* recognizes that prosecutors' fealty to justice includes a duty to avoid conduct likely to result in wrongful convictions:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[76]

The Court also chastised the trial judge for not taking stronger measures to deter the prosecutor's trial tactics.[77] *Berger* is still frequently cited,[78] typically in hortatory form. Expanding on *Berger*'s theme, Justice Douglas's dissenting opinion in *Donnelly v. DiChristoforo*[79] asserted, "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial."[80]

More recently, *Banks v. Dretke*[81] reiterated,

> We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." . . . Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct . . . should attract no judicial approbation.[82]

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75. 295 U.S. 78 (1935), *overruled on other grounds by* Stirone v. United States, 361 U.S. 212 (1960).
76. *Berger*, 295 U.S. at 88.
77. *Id.* at 85.
78. *See, e.g.*, United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993).
79. 416 U.S. 637 (1974).
80. *Id.* at 648–49 (Douglas, J., dissenting).
81. 540 U.S. 668 (2004).
82. *Id.* at 696 (citations omitted).

Banks also alluded to the ethical dimensions of prosecution when it further advised that "[t]he prudence of the careful prosecutor should not . . . be discouraged."[83] In *United States v. LaPage*,[84] the U.S. Court of Appeals for the Ninth Circuit reminded prosecutors that they have "a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials."[85] The court explained "perjury pollutes a trial, making it hard for jurors to see the truth."[86] Similarly, Judge Alex Kozinski, in *United States v. Kojayan*,[87] explained the role prosecutorial ethics play in the criminal justice system as follows:

> The overwhelming majority of prosecutors are decent, ethical, honorable lawyers who understand the awesome power they wield, and the responsibility that goes with it. But the temptation is always there: It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win.[88]

Therefore, he explained that "[o]ne of the most important responsibilities of the United States Attorney and his senior deputies is ensuring that line attorneys are aware of the special ethical responsibilities of prosecutors, and that they resist the temptation to overreach."[89] Commentators also have recognized *Berger*'s importance in obtaining fair trials. For example, Professor Bennett L. Gershman characterized *Berger*'s duty as including "the avoidance of conduct that deliberately corrupts the truth-finding process," referring to *Berger*'s depiction of the prosecutor's conduct as an "evil influence" that was "calculated to mislead the jury."[90] *Berger*'s exhortation that prosecutors should take the high road is also critical because of their many undefined or ambiguous ethical responsibilities.[91] Indeed, Professor Bruce A. Green has complained that the ethics rules binding prosecutors are "woefully incomplete."[92] Moreover, the admonition to do justice may have a different meaning at trial than at the charging phase, due to the potentially conflicting obligation of prosecutors

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83. *Id.* (citing Kyles v. Whitley, 514 U.S. 419, 440 (1995)).
84. 231 F.3d 488 (9th Cir. 2000).
85. *Id.* at 492.
86. *Id.*
87. 8 F.3d 1315 (9th Cir. 1993).
88. *Id.* at 1324.
89. *Id.*
90. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 Geo. J. Legal Ethics 309, 317 (2001) [hereinafter Gershman, *The Prosecutor's Duty*] (quoting Berger v. United States, 295 U.S. 78, 85 (1935)).
91. *See, e.g.*, Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 445 (1992) (discussing that standards for prosecutors are "often so nebulous as to be unenforceable"); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. Ill. L. Rev. 1573, 1596; Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 Fordham Urb. L.J. 553 (1999).
92. Green, *supra* note 91, at 1597.

to be advocates in an adversarial system of justice, as well as ministers of justice.[93]

B. *The Specific Ethical Rules and Standards*

The ethical rules governing the solicitation and presentation of jailhouse informants and dishonest experts are equally abstract. Model Rule 3.8 is the only rule that specifically addresses the special responsibilities of a prosecutor.[94] Yet the text of that Rule does not address these topics. Only the comments accompanying the Rule mention the overarching principle of prosecutorial ethics, describing the prosecutor's role as that of "a minister of justice and not simply that of an advocate," including "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[95] Similarly, the ABA's Criminal Justice Standards on the Prosecution Function provide that the "duty of the prosecutor is to seek justice, not merely to convict."[96] The NDAA has also published Prosecution Standards that exhort prosecutors always to be "vigilant when the accused may be innocent."[97] There is also a U.S. Attorneys' Manual,[98] as well as regulations governing federal prosecutors, who are now subject to state ethical rules.[99]

Several of the rules directed to all lawyers are relevant to solicitation and presentation of jailhouse informants and dishonest experts, though none are ultimately up to the task of providing prosecutors with bright lines about their specific obligations concerning these highly suspect witnesses. For example, Rule 8.4 states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.[100] It is also professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."[101] Yet the comments to this rule give no hint of its potential reach in the context of prosecutorial obligations concerning the employment of witnesses who may be lying. Practically, the rule is unlikely to provide additional constraints to the existing directives that prohibit all lawyers from knowingly "mak[ing] a false statement of fact or law to a tribunal" or

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93. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 89 (1991) ("Although prosecutors may aggressively advocate their interpretations of the evidence, they share a responsibility for assuring that the evidence itself is of the type jurors in the adversary system may rely on.").

94. Model Rules of Prof'l Conduct R. 3.8 (2003).

95. *Id.* R. 3.8 cmt. 1.

96. Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-1.2(c) (3d ed. 1993).

97. National Prosecution Standards § 68.4 (Nat'l Dist. Att'ys Ass'n, 2d ed. 1991); *see also id.* § 1.1 ("[T]he primary responsibility of a prosecutor is to see that justice is accomplished.").

98. *See generally* U.S. Dep't of Justice, U.S. Attorneys' Manual (2006), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ [hereinafter USAM].

99. *See* Citizens Protection Act (McDade Amendment), 28 U.S.C. § 530(B) (1998).

100. Model Rules of Prof'l Conduct R. 8.4(c).

101. *Id.* R. 8.4(d).

"offer[ing] evidence that the lawyer knows to be false."[102] "Knowing" in this context is defined differently than belief,[103] setting a high barrier to applying the rule.

Similarly, a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[104] The Rules make no mention of the propriety of compensating cooperating witnesses. Indeed, an attorney who specializes in complex criminal litigation interprets the comments to the ABA Criminal Justice Standards as "appear[ing] to prohibit compensation in the form of lenient treatment in exchange for cooperation, at least where the cooperation is on a matter unrelated to the cooperator's criminal exposure."[105] Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has called paying for testimony a breach of prosecutorial ethics, "irregular and, in fact, unlawful in federal trials," while recognizing that "immunity from prosecution, a lighter sentence, placement in a witness-protection program, and other breaks are lawful coin in this realm."[106] Judge Frank Easterbrook has also noted that the "exchange of money for information may be a regrettable way of securing evidence, but it is common."[107]

As the courts are loath to find that jailhouse informants are government agents, it is not always clear when dealing with jailhouse informants triggers Model Rule 4.2's prohibition of contact with represented witnesses.[108] The Department of Justice has detailed rules governing the use of confidential informants (CI),[109] but they define a CI as an informant from whom the government expects or intends to obtain additional useful and credible information regarding felonious activities in the future.[110] Thus, unless a CI is placed in the defendant's cell, these policies would not cover most jailhouse informants who simply claim the good fortune of having obtained a one-time confession. However, the U.S. Attorneys' Manual specifically addresses the use of individuals in custody for

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102. *Id.* R. 3.3(a)(1), (3).

103. *Compare id.* R. 1.0(f) (stating that "knowingly" requires actual knowledge), *with id.* R. 1.0(a) (stating that "belief" denotes supposing the fact to be true).

104. *Id.* R. 3.4(b).

105. Harris, *supra* note 8, at 7 (citing Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-3.1 cmt. (3d ed. 1993)).

106. Mataya v. Kingston, 371 F.3d 353, 359 (7th Cir. 2004) (citations omitted). *See generally* Barry Tarlow, *RICO Report: Can Prosecutors Buy Testimony?*, Champion, May 2005, at 55 [hereinafter Tarlow, *Buy Testimony*].

107. Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994).

108. *See, e.g.*, United States v. LaBare, 191 F.3d 60, 65–66 (1st Cir. 1999) (holding that a jailhouse informant is not a government agent, despite entering into a cooperation agreement to inform and having his cell block switched, because the target was not identified). *See generally* Barry Tarlow, *RICO Report: Silence May Not Be Golden, Jailhouse Informers and the Right to Counsel*, Champion, Oct. 2005, at 58, 63–64 [hereinafter Tarlow, *Silence*].

109. John Ashcroft, The Attorney General's Guidelines Regarding the use of Confidential Informants (2002), *available at* http://www.usdoj.gov/olp/dojguidelines.pdf.

110. *Id.* at 2.

investigative purposes.[111] Federal permission to use jailhouse informants requires federal prosecutors to provide details as to "[w]hether or not the cooperating individual is represented by counsel and, if so, an acknowledgement by the agency that the counsel concurs with his or her client's participation in this activity," as well as "[w]hether or not the cooperating individual is facing pending criminal charges."[112] In addition, the request must include an acknowledgement by the agency that the planned operation does not violate the attorney general's "Contact with Represented Persons" guidelines[113] with regard to either the cooperating individual or any target(s) or other persons to be contacted during this operation.[114] However, the contact rule only governs communications with represented persons about the subject matter for which they are represented.

A weakness of the federal informant policies is that they give little ethical guidance to prosecutors about how to determine whether to employ an informant. Instead, most of the detail relates to procedure after an informant is designated. Professor David A. Sklansky has condemned the Department of Justice's failure to include the degree of confidence that the witness will testify honestly in its criteria for evaluating plea agreements for cooperating defendants.[115] According to Sklansky, the current criteria send a clear message "that credibility is important solely for determining how helpful the cooperation will be; the concern is less with truth than with forensic efficacy."[116] Surprisingly, neither the ABA nor the NDAA Standards provide any guidance concerning the employment and use of jailhouse or other informants, a significant gap that leaves prosecutors to their discretion concerning the very topic that begs for supervision from their most experienced colleagues. It is clear that both standards should be revised to include informants.

Barry Tarlow, a well-respected criminal defense attorney, has written about his success in deterring introduction of jailhouse informant testimony. Tarlow sends the prosecutor a letter signed by the client, which summarizes the evidence available in the public record, describes the propensity of jailhouse informants to fabricate confessions, and indicates that the

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111. USAM, *supra* note 98, § 9-21.050 (requiring the approval of the Office of Enforcement Operations), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/21mcrm.htm#9-21.050.

112. U.S. Dep't of Justice, Criminal Resource Manual § 703(12) (1997), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00703.htm [hereinafter Criminal Resource Manual].

113. *See* USAM, *supra* note 98, § 9-13.200, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.200 (encouraging consultation with professional responsibility officers). *See generally* Criminal Resource Manual, *supra* note 112, § 296(D), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00296.htm.

114. Criminal Resource Manual, *supra* note 112, § 703(15).

115. David A. Sklansky, *Starr,* Singleton, *and the Prosecutor's Role*, 26 Fordham Urb. L.J. 509, 529, 537–39 (1999) (arguing for more serious consideration of prosecutorial ethics by scholars).

116. *Id.*

information has been reviewed by the client, highlighting the suspect nature of any later jailhouse confession.[117] Tarlow also reminds the prosecutor of "his ethical duty not to communicate, either directly or indirectly through an informer, with the defendant without defense counsel's consent."[118] In other words, a lawyer may not make a communication prohibited by this Rule through the acts of another.[119]

Similarly, little specific guidance is directed to the use of experts. The Prosecution Function Standards state that a prosecutor "should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject,"[120] and "should not pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert will give or the result in the case."[121] The payment of experts is approved in comment 3 to Model Rule 3.4, which indicates that compensation of experts is typically permitted, unless the expert has been offered a contingency fee.[122] Professor Jane Campbell Moriarty views experts from the FBI crime lab as neither "independent" nor "impartial," since they assist only law enforcement.[123] Professor Gershman further suggests that the symbiotic nature of the relationship between prosecutors and their experts makes it almost certain that scripting and coaching occurs frequently.[124] In a system where most forensic laboratories are operated by law enforcement, it is difficult to suggest that an expert's employment by a law enforcement agency makes his or her testimony ethically suspect in the abstract. In specific cases, however, the interaction between law enforcement and the expert will undoubtedly render the opinion suspect. Indeed, it might be warranted to shift the burden to the prosecution to demonstrate such testimony satisfies the ethical rules rather than to assume that it does.

Finally, the Criminal Justice Section of the ABA is currently considering two new sections to Rule 3.8, which would specifically address the obligations of prosecutors in cases that raise the specter of wrongful conviction. Even if adopted, these sections focus on cooperation in obtaining postconviction relief, not the solicitation of evidence prior to trial or its offer during trial.[125]

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117. *See* Tarlow, *Silence*, *supra* note 108, at 69.

118. *Id.*

119. *See* Model Rules of Prof'l Conduct R. 8.4(a) (2003).

120. Standards for Criminal Justice: Prosecution Function and Defense Function Standard 3-3.3(a) (3d ed. 1993). The NDAA does not have a similar rule.

121. *Id.* § 3-3.3(b).

122. *See* Model Rules of Prof'l Conduct R. 3.4 cmt. 3 (2003).

123. Moriarty, *supra* note 12, at 24.

124. Gershman, *Misuse of Scientific Evidence*, *supra* note 10, at 31.

125. Proposed Model Rule 3.8(g) would govern cases where there is "a reasonable probability that [a convicted defendant] did not commit the offense," while Rule 3.8(h) would govern cases involving "clear and convincing evidence" of a wrongful conviction. The provisions are based on revisions adopted by local bar associations in New York. *See* Comm. on Prof'l Responsibility, *Proposed Prosecutorial Ethics Rules*, 61 Record 69 (2006), *available at* http://www.nycbar.org/Publications/record/vol_61_no_1.pdf.

C. *The Case Law*

There is a dearth of cases directed specifically at the ethics of using jailhouse informants and dubious experts when no *Brady* claim is involved. Cases generally discussing Rule 3.8 recognize that a prosecutor's conduct need not violate a defendant's constitutional right to subject the prosecutor to discipline.[126] Disciplinary complaints usually are filed alleging violations of the specific mandates contained in the ethical rules. Penalties are rarely, if ever, meted out for violations of broad aspirational goals or ambiguous rules. In contrast, the criminal case law focuses on whether the defendant's conviction should be overturned, which depends on the violation of constitutional constraints that often overlap with ethical precepts. As a result, the discussion of ethics is folded into the constitutional analysis, making it sometimes difficult to determine if a higher ethical duty is overlooked because of its irrelevance to the ultimate determination. The overlap can be seen in such cases as *Mooney v. Holohan*,[127] which recognized that contriving "a conviction through the pretense of a trial which in truth is but used as a means of . . . deliberate deception of court and jury by the presentation of testimony known to be perjured . . . is . . . inconsistent with the rudimentary demands of justice,"[128] and results in a violation of due process. Later cases held that a prosecutor must correct false evidence whenever it appears.[129]

However, if no prejudice occurs, such as when the jury knows the witness was inconsistent and other evidence supports the verdict, the conviction will be affirmed, even in the presence of the ethical violation.[130] Thus, the answer to whether a freestanding ethical obligation requires a reversal is a resounding no, even when it is clear that a specific obligation, rather than merely an aspirational precept, is violated. In a heartfelt dissent in *Darden v. Wainwright*,[131] Justice Harry Blackmun protested such a result concerning improper jury selection in a capital case: "I believe this Court must do more than wring its hands when a State . . . permits prosecutors to pervert the adversary process."[132] Because the need to

126. See cases cited in Ctr. for Prof'l Responsibility, Am. Bar Ass'n, Annotated Model Rules of Prof'l Conduct 395–96 (5th ed. 2003).

127. 294 U.S. 103 (1935).

128. *Id.* at 112.

129. *See, e.g.*, Napue v. Illinois, 360 U.S. 264, 269–70 (1959); United States v. Alli, 344 F.3d 1002, 1007 (9th Cir. 2003) (holding that, regardless of any objection by defense counsel and the full disclosure of *Brady/Giglio* evidence, prosecution must step forward and correct known false or misleading statements in open court). *See generally* Tarlow, *Buy Testimony*, *supra* note 106.

130. *See, e.g.*, Morris v. Ylst, 447 F.3d 735-36, 744 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 957 (2007).

131. 477 U.S. 168 (1986).

132. *Id.* at 206 (Blackmun, J., dissenting); *see also* United States v. Elias, 285 F.3d 183, 186–87, 192 (2d Cir. 2002) (affirming conviction where prosecutorial misconduct was alleged in closing argument because the jury would have likely convicted without the remarks, although the primary witness was a jailhouse informant with "a prodigious criminal

demonstrate a reversible constitutional error downplays the significance of ethical references, the force of any stinging rebuke to prosecutors in such decisions is lost. In other words, if the conviction is confirmed, a prosecutor who only cares about winning might view the ethical reproach from the perspective of no harm, no foul—particularly when no disciplinary sanctions are imposed.

In a few cases, the ethical and legal violations are sufficient to withstand the harmless error standard of review or claimed lack of prejudice or materiality. For example, Judge Trott has written two widely quoted opinions about the duty of a prosecutor who suspects perjury.[133] Though much of his discussion involved lying informants who were not necessarily jailhouse informants, his words apply even more forcefully in our context. In Judge Trott's view, the "freestanding *ethical* and constitutional obligation of the prosecutor as a representative of the government to protect the integrity of the court and the criminal justice system, [is] established in *Mooney* and *Berger*."[134] Moreover, he explained that the prosecutor's duty requires action when put on notice of the "real possibility of false testimony."[135]

In *Northern Mariana Islands v. Bowie*, Judge Trott noted that the duty to act "is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts."[136] The *Bowie* court, deeming investigation of a witness's credibility to be a routine prosecutorial task, held that due process demanded that the prosecutor "guard against the corruption of the system caused by fraud on the court by taking whatever action is reasonably appropriate given the circumstances of each case."[137]

Similarly, in *United States v. Bernal-Obeso*, Judge Trott aptly described the responsibilities of prosecutors who employ cooperating witnesses:

> By definition, criminal informants are cut from untrustworthy cloth and must be . . . carefully watched by the government . . . to prevent them from falsely accusing the innocent . . . and from lying under oath in the courtroom . . . . Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. By its actions, the government can either contribute to or eliminate the

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record—including numerous armed robberies, several carjackings and attempted murders, and two arsons—[who] once gave perjured testimony in an attempted murder trial").

133. *See generally*, Northern Mariana Islands v. Bowie, 243 F.3d 1109 (9th Cir. 2001); United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993). These opinions are discussed by Barry Tarlow in *RICO Report, The Highwayman Visits the Marianas: Informers Beware*, Champion, May 2006, at 58.

134. *Bowie*, 243 F.3d at 1122 (emphasis added).

135. *Id.* at 1118.

136. *Id.*

137. *Id.* at 1125.

> problem. Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery.[138]

Walker v. City of New York[139] "illustrates the disastrous consequences that can follow when this responsibility is not met."[140] The prosecutors in *Walker* persisted in prosecuting a defendant, lying and concealing evidence in the process, even though they were aware of his probable innocence. *Walker* actually involved a civil suit brought pursuant to § 1983 that was permitted to proceed on the theory that the municipality failed to train its officers not to commit perjury in order to obtain conviction, and failed to train its assistant district attorneys in their *Brady* obligations.[141]

D. *The Prudent Prosecutor*

In *United States v. Agurs*,[142] the Supreme Court counseled that "the prudent prosecutor will resolve doubtful questions in favor of disclosure,"[143] concerning its examination of when exculpatory evidence must be disclosed. One commentator has argued that this suggests ethical prosecutors should "resolv[e] uncertainties in favor of protecting the constitutional rights of the criminal defendant."[144] Taking this view would arguably render many of the decisions to utilize jailhouse informants and dishonest experts unethical even under the present ethical rules. For example, Professor Gershman concludes that the extensive documentation of wrongful convictions should prompt prosecutors to assume the role of informal gatekeepers to screen doubtful cases from the jury.[145] He warns that prosecutors should not assume witnesses are telling the truth or that the forensic evidence is accurate.[146] This is particularly true of jailhouse informants' confessions, which are made "under the most incredible circumstances but are presented at trial to look like public-spirited citizens doing their duty to truth and justice."[147]

This cautious perspective reveals the ethical quagmire surrounding the use of jailhouse informants as witnesses. Obviously, the long history of lying jailhouse informants puts prosecutors on notice that jailhouse

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138. *Bernal-Obeso*, 989 F.2d at 333–34.

139. 974 F.2d 293 (2d Cir. 1992).

140. United States v. Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993).

141. *Walker*, 974 F.2d at 301; *see also* Goldstein v. City of Long Beach, 481 F.3d 1170, 1171 (9th Cir. 2007) (denying absolute immunity in a § 1983 action to prosecutors who failed to institute an information-sharing system regarding jailhouse informants and failed to adequately train or supervise deputies regarding the use of informants). The *Goldstein* suit was brought after a defendant was released for wrongful conviction of murder. *Id.*

142. 427 U.S. 97 (1976).

143. *Id.* at 108.

144. Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 Hous. L. Rev. 1337, 1356 (2004).

145. Gershman, *The Prosecutor's Duty*, *supra* note 90, at 341.

146. *Id.* at 342.

147. *Id.* at 346.

informants may not be truthful.[148] The Center on Wrongful Convictions identifies an 1819 case as the first documented wrongful conviction. The case involved a cell mate who claimed the defendant confessed and who was given his freedom in exchange for the testimony that led to a death sentence. In a fortuitous twist of fate, the alleged victim turned up alive before the execution.[149] Yet courts have taken a hands-off attitude toward this type of dubious testimony. The courts generally consider the issue to be one of credibility for the jury, rather than admissibility, unless the perjury is undeniable or *Brady* disclosure obligations are implicated. Thus, prosecutors are rarely taken to task for their rampant employment of jailhouse informants in otherwise weak cases. On the other hand, although arguing for a cautious approach reflects the real danger that jailhouse informant testimony is a tissue of lies, it is unlikely that 100% of the jailhouse informants are lying, even if the literature suggests that the majority are. Somewhat like the blue bus and rodeo hypotheticals that evidence professors pose to students concerning the use of naked probabilities in deciding cases,[150] the underlying issue is which side, the prosecution or the defense, should bear the burden of demonstrating that this particular informant is telling the truth.

The litany of evils associated with the unfettered use of jailhouse informants includes claims that the testimony is perjured, that the prosecutor knows it is false and violated his *Brady* disclosure obligations, that the use of the jailhouse informant was a backdoor violation of Model Rule 4.2 and *Massiah v. United States*, that the corroboration of the jailhouse informant was insufficient, and that the cautionary instruction was not given or was inadequate.[151] In contrast, the benefit of jailhouse informant testimony is the potential of a hard-to-win conviction that will stand despite the claimed defects. Of course, the decades of litigation that will inevitably follow the successful introduction of jailhouse informant testimony may serve as a constant reminder that more investigation might have provided clearer evidence of guilt or innocence, and ultimately proved less costly and more professional. In this context, it is critical to adopt ethical rules that act as a yellow light, cautioning prosecutors to stop and think before risking a disaster. Not only should restricting the use of

148. *See* Bloom, *supra* note 8, at 22–24.

149. Northwestern, *supra* note 1, at 2.

150. The blue bus hypothetical assumes the only evidence that the defendant's bus injured the plaintiff is that it owns a majority of the blue buses in town and that the plaintiff was injured by a blue bus. The rodeo hypothetical assumes that a random member of the audience at a rodeo is sued for not paying his ticket in a situation where the majority of spectators had not. *See, e.g.*, Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. Rev. 385, 395–97 (1985); Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. Rev. 949, 986 (2006).

151. Massiah v. United States, 377 U.S. 201, 204 (1964) (holding that after a defendant is indicted and has retained counsel, incriminating statements elicited by government agents in the absence of counsel are inadmissible). A minority of states have enacted a corroboration requirement. *See* ABA Report, *supra* note 7, at 70.

jailhouse informant testimony in a principled manner be an acceptable goal for ethical prosecutors, it should also be a welcome one.

Given the empirical data suggesting that jailhouse informants are untrustworthy, prudence would dictate that the burden of proving the jailhouse informant's truthfulness should be on prosecutors as a matter of ethical practice, not simply admissibility. Prosecutors know the previous history of the informant, as well as the benefits either offered to or reasonably assumed by the jailhouse informant, and have a better ability to corroborate and to test veracity, even if by methods not admissible at trial.[152] Thus, it logically follows that prosecutors should have the ethical obligation to refrain from using this type of witness unless they can affirmatively show that the particular jailhouse informant is truthful. Judge Trott would even require that jailhouse confessions be considered "false until the contrary is proved beyond a reasonable doubt,"[153] a much more stringent test than the standard generally employed for such preliminary factual determinations concerning the admissibility of evidence.[154] Such heightened scrutiny ensures that prosecutors cannot avoid their obligation by "remaining willfully ignorant of the facts."[155] Even with these restrictions, prosecutors would still be able to employ jailhouse informants when the need is great and the factors support a reasonable belief that the jailhouse informant is telling the truth. But this type of review would sound the death knell for the unfettered use of jailhouse informants.

Not only would this interpretation better ensure the integrity of criminal trials, but it also undoubtedly would reduce the numerous complaints that too many prosecutors are violating their *Brady* obligations concerning jailhouse informants, whether by inadvertence or design. Thus, ethical practice would benefit, the reputation of prosecutors would be enhanced, and a significant cause of wrongful convictions would be greatly diminished. However, the current rules do not appear to mandate such an interpretation. Therefore, assuming appropriate *Brady/Napue*[156] disclosures and no overt indication of fabrication, the solicitation and presentation of jailhouse informant testimony is currently not likely to be a per se, or arguably not even a specific, ethical violation. Even under the prudent prosecutor approach it would not be a per se ethical breach, though prosecutors could be more readily shown to have ethical feet of clay in specific cases. Therefore, a revision to the rules, and to the ABA and

152. For example, prosecutors routinely use polygraphs for investigative purposes, although the evidence is not typically admissible at trial. In this regard, a finding that the jailhouse informant is lying should disqualify him because the risk he is actually lying is so great. In contrast, a finding of *truthfulness* should not automatically qualify the jailhouse informant in light of other factors, such as a previous perjury conviction or lack of strong corroboration.

153. Trott, *supra* note 24, at 1394.

154. *See* Fed. R. Evid. 104(a).

155. Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1118 (9th Cir. 2001).

156. Napue v. Illinois, 360 U.S. 264 (holding that a prosecutor must correct false testimony that affects the witness's credibility).

NDAA Standards should be adopted that would require prosecutors to refrain from introducing the testimony of jailhouse informants unless they can point to specific factors justifying the truthfulness of the particular witness. In addition, the establishment of explicit criteria, and an internal review process to approve the use of jailhouse informants should be required. The Los Angeles district attorney's office dramatically cut its use of jailhouse informants by adopting such an approach, without an outright ban on such witnesses.[157]

Moreover, as Judge Trott has often reminded prosecutors, one of the perils of using seamy witnesses is that they will also color the jury's view of the prosecutor and his or her case. This suggests both that the prosecutor should corroborate everything these witnesses say and, in some cases, simply use the jailhouse informant as an investigative source to develop better evidence for trial.[158] Of course, this is a tactical, rather than ethical, reason for taking the high road. However, it points out that prosecutors may be unnecessarily putting their reputations on the line when they mindlessly offer jailhouse informant testimony. Can anyone doubt that the prosecutor who called eight jailhouse informants to testify to the defendant's confessions at one preliminary hearing[159] had crossed the ethical line? Is it really arguable that prosecutors do not know that jailhouse informants who repeatedly claim they obtained confessions are likely to be fabricating? Clearly, the prophylactic value of self-regulation is a significant advantage to an ethical, rather than a legal, approach to the admission of jailhouse informant testimony. Leaving the decision to judges who apply evidentiary rules that favor admissibility has not enhanced the reputation of either prosecutors or more generally the criminal justice system.

Similarly, regarding the testimony of experts, Professor Michael J. Saks argues that if prosecutors are only prohibited from offering evidence known to be false, attorneys would be rewarded for not learning anything about the underlying basis of the expertise.[160] Because this would conflict with the obligation of prosecutors to do justice, Saks posits that before introducing expert testimony, the prosecutor should be required to have reasonable good faith belief that he or she could make a well-grounded showing that the expertise satisfies the "relevant validity criteria."[161] However, it has also

157. *See* CCFAJ Report, *supra* note 7, at 3; *see also infra* notes 244–54.

158. *See* Trott, *supra* note 24, at 1382, 1394, 1425.

159. County of L.A., Cal., 1989–90 Los Angeles Grand Jury: Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County 38 (1990) [hereinafter Grand Jury Report], *available at* http://www.ccfaj.org/documents/reports/jailhouse/expert/1989-1990%20LA%20County%20Grand%20Jury%20Report.pdf.

160. Saks, *supra* note 12, at 427; *see also* David S. Caudill, *Advocacy, Witnesses and the Limits of Scientific Knowledge: Is There an Ethical Duty to Evaluate Your Expert's Testimony?*, 39 Idaho L. Rev. 341, 347–48 (2003) (discussing whether there is a duty to confirm suspicions that the expertise is false).

161. Saks, *supra* note 12, at 428.

been suggested that "[a]ny analysis of the ethical responsibilities of lawyers to evaluate their expert's testimony must take into account the complexities and uncertainty of scientific knowledge."[162] Again, the question arises as to whether the expert's pattern of finding questionable results should put the prosecutor on notice of the likely falsity of the evidence. For example, the investigation of the failings of the Houston laboratory found that the serology work that the crime lab performed during the 1980 to 1992 period was "generally unreliable," with errors in twenty-one percent of the serology cases reviewed that related to a defendant who is currently in prison.[163] The report concluded that "[t]his is an extraordinarily high and extremely disturbing proportion of cases in which to find problems of this magnitude."[164] The report also referenced that DNA was analyzed "under conditions that made the risk of an injustice intolerably high."[165]

For our purposes, the question is whether such poor results were known by prosecutors. The data indicates a willful blindness to the inaccuracy of the expert testimony being offered in criminal cases. Professor Gershman argues that "many prosecutors are fully aware that . . . laborator[ies] have been engaging in a long-standing practice and pattern of misconduct."[166] Thus, he finds the claim of ignorance of the misconduct by prosecutors "often is plainly incredible,"[167] and should not provide an excuse when prosecutors regularly use scientific experts who are "notorious for incompetence and dishonesty."[168] I agree that willful blindness should not provide an ethical pass. However, I do not believe that the current language of the rules satisfactorily covers this type of misconduct. Therefore, the rules or standards should be modified to provide that a clear pattern of inaccurate laboratory results is adequate to supply knowledge that the testimony in an individual case is likely to be false or misleading.

IV. CURRENT CONSTITUTIONAL JURISPRUDENCE DOES NOT ENCOURAGE HIGH STANDARDS OF ETHICAL BEHAVIOR

A. *The Constitutional Framework for Reversals and Monetary Relief*

Currently, neither the constitutional framework for obtaining reversals of criminal convictions, nor any potential civil remedies provides sufficient incentives for prosecutors to be prudent when they consider employing jailhouse informants or dishonest experts. Unfortunately, the Supreme Court has been a significant part of the problem, not the solution. In order

162. Caudill, *supra* note 160, at 353.

163. Michael R. Bromwich, Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room 114 (2004), *available at* http://www.hpdlabinvestigation.org/reports/070613report.pdf.

164. *Id.*

165. *Id.* at 151.

166. Gershman, *Misuse of Scientific Evidence*, *supra* note 10, at 26–27.

167. *Id.* at 26.

168. *Id.* at 27.

for the jury-based system to remain afloat, finality of judgments is a clear necessity. Yet DNA testing has recently disabused the system from its notion that there is no legitimate way to second-guess the accuracy of the jury's verdict.[169] The finality doctrine helps explain the restrictions on habeas corpus litigation, presumptions on appeal that favor jury verdicts, and the general requirement that reversals are saved for errors that are material, prejudicial, and not harmless,[170] except in rare instances when the error is so basic that it is considered structural. Moreover, due process and other constitutional rights tend to provide a floor dictating what is minimally acceptable, rather than a ceiling covering what would be desirable. For example, even the introduction of perjured testimony does not automatically require a new trial.[171] Thus, while claims of prosecutorial misconduct are common, reversals are not assured, even when the conduct is clearly unethical. Arguably, this appellate reality encourages winning at any cost, because ethics do not appear to affect outcomes at the courthouse, let alone at the polling place, where Michael Nifong was reelected prior to being disbarred. Practically, prosecutors who overreach in order to obtain convictions have little fear from the courts other than a proverbial slap on the wrist in a judicial opinion, which in current practice may not even lead to a disciplinary investigation. Therefore, it should come as no surprise that the Center for Public Integrity has discovered that some prosecutors are recidivists when it comes to ethical misconduct, even when repeatedly chastised in written decisions.[172]

Calderon v. Thompson is a jarring example of the irrelevancy of ethics rules to the outcome of litigation.[173] The Supreme Court reversed the Ninth Circuit's recall of a death penalty mandate, finding no miscarriage of justice, despite the Ninth Circuit's questioning as to whether Thomas Martin Thompson was deprived of due process of law:

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169. *See generally* Raeder, *supra* note 11.

170. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 296 (1999) ("[P]etitioner has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely."); *see also* Bennett L. Gershman, *The Gate Is Open but the Door Is Locked—Habeas Corpus and Harmless Error*, 51 Wash. & Lee L. Rev. 115, 124 (1994); Lynn Damiano, Note, *Taking a Closer Look at Prosecutorial Misconduct: The Ninth Circuit's Materiality Analysis in* Hayes v. Brown *and Its Implications for Wrongful Convictions*, 37 Golden Gate U. L. Rev. 191 (2006) (discussing materiality in the context of federal habeas litigation).

171. *See, e.g.*, United States v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991). *Wallach* held that whether a new trial will be required depends on the materiality of the perjury to the jury's verdict and the extent to which the prosecution was aware of the perjury. *Id.* If it is established that the government knowingly permitted the introduction of material false testimony reversal is "virtually automatic." *Id.* If the government was unaware of a witness's perjury, however, a new trial is warranted only if "the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." *Id.*

172. Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?*, Ctr. for Pub. Integrity (2003), http://www.publicintegrity.org/pm/default.aspx?act=main.

173. Calderon v. Thompson, 523 U.S. 538 (1998).

> [A] serious question exists as to whether Thompson was deprived of due process of law by the prosecutor's presentation of flagrantly inconsistent theories, facts, and arguments to the two juries that separately heard Thompson's case and that of his co-defendant, David Leitch. While the district court concluded that no constitutional violation occurred, our review of the record persuades us that the prosecutor's tactics may well have resulted in Thompson's receiving a fundamentally unfair trial. These tactics, including the use of the two highly dubious jailhouse informants, appear to compound the constitutional violations that flow from defense counsel's ineffective performance.[174]

Although Justice Anthony Kennedy rejected claims that the impeachment of the jailhouse informants would have changed the result, the amazing aspect of the Supreme Court's decision is that neither the majority opinion nor the dissent made any mention of the prosecutor's misconduct. However, this misconduct resulted in the original death penalty sentence, since the inconsistent theory argued at the accomplice's trial with different jailhouse informants would have precluded its imposition in Thompson's case.[175] Instead, the decision appeared to focus on the issue of guilt, rather than penalty. The defendant was executed on July 14, 1998.[176] Ironically the Supreme Court of California, where the case arose, explicitly held that the tactic of arguing inconsistent theories to different juries violated due process in 2005.[177] If such practices do not even merit mention by the Supreme Court in the death penalty context, it is difficult to imagine that an overzealous prosecutor would be dissuaded from unethical conduct by the Court's present mode of constitutional analysis.

Similarly, in determining the due process boundaries governing the introduction of perjurious testimony, Professor Stephen A. Saltzburg has argued that the Court seems to have forgotten the line of cases that would reverse for false witness testimony, without requiring a showing of perjury.[178] In his view, "the Supreme Court's line-drawing between perjury and false testimony perpetuates injustice and provides little incentive for prosecutors . . . to offer truthful testimony."[179] Both courts and prosecutors appear to downplay the possibility of perjury by jailhouse informants. For example, the Supreme Court of California rejected the claim that the admission of unreliable or perjurious jailhouse informant testimony violated

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174. Thompson v. Calderon, 120 F.3d 1045, 1050 (9th Cir. 1997).

175. *See* Jack Call, *Legal Notes, Judicial Control of Jailhouse Snitches*, 22 Just. Sys. J. 73, 74–75 (2001).

176. *Id.* at 75.

177. *In re* Sakarias, 106 P.3d 931, 941–42 (Cal. 2005), *cert. denied*, 546 U.S. 939 (2005); *cf.* Bradshaw v. Stumpf, 545 U.S. 175 (2005) (holding that the prosecutor's inconsistent theories did not void a guilty plea where the identity of the triggerman was not relevant to the convicted charge, but finding remand necessary concerning their impact on death penalty sentencing).

178. Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 Fordham L. Rev. 1537, 1557–60 (2000).

179. *Id.* at 1538–39.

due process,[180] even though the case originated in Los Angeles which had widely publicized problems with fabricated jailhouse informant testimony during the time frame of the murder trial in question. The Court's response was that such testimony was not inherently unreliable; the defendant had an opportunity to cross-examine the informant at trial, and the Court found his claim of improper procedures for securing jailhouse informant testimony to be speculative on the record.[181] In contrast, in *United States v. Wallach*,[182] clear evidence of perjury resulted in a reversal, where the informant was the centerpiece of the case and the prosecutor had evidence that indicated he "consciously avoided recognizing the obvious—that is, that [the informant] was not telling the truth."[183] Even here, the reversal was based on the prosecutor's rehabilitation of the witness, which violated clear constitutional doctrine, as opposed to his mere presentation of the evidence.

A brief review of the case law also reveals that Sixth Amendment challenges to jailhouse informants are unlikely to succeed.[184] The current legal approach virtually ensures continuing reliance on their testimony by prosecutors, since credibility is viewed as a matter for the jury, rather than as a bar to its admission. In *United States v. Henry*,[185] the defendant's Sixth Amendment right to counsel was violated when a paid informant residing in the same cell block as the defendant was encouraged by the prosecution to be alert for any statements made by the defendant.[186] The conviction was reversed because the confession was viewed as deliberately elicited, despite the government's warning that the informant should not initiate any conversation, because the informant indicated the confession was a product of his conversation with the defendant.[187] Adherence to this strict view of governmental intervention appeared to reduce the ease with which law enforcement could rely on jailhouse informants. However, *Kuhlmann v. Wilson*[188] retreated from *Henry*, holding that the Sixth Amendment does not forbid admission of the accused's statements to a jailhouse informant who is placed in close proximity but makes no effort to stimulate conversations about the crime charged.[189] The court explained,

> [A] defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took

180. People v. Jenkins, 997 P.2d 1044, 1117–18 (Cal. 2000).
181. *Id.* at 270–71.
182. 935 F.2d 445 (2d Cir. 1991).
183. *Id.* at 457 (reversing a conviction because a cooperating witness was not a jailhouse informant).
184. *See generally* Tarlow, *Silence*, *supra* note 108.
185. 447 U.S. 264 (1980).
186. *Id.* at 273–74.
187. *Id.* at 271.
188. 477 U.S. 436 (1986).
189. *Id.* at 460.

> some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.[190]

Thus, as long as jailhouse informants remain listening posts, the confession is not constitutionally defective. In addition, if the jailhouse informant is an entrepreneur who approaches the government after, rather than before, the confession, government involvement will be lacking. As a result, even solicited confessions would be admissible.

The Court's jurisprudence concerning civil liability for unethical overreaching also gives prosecutors little incentive to adhere to the highest ethical standards. *Imbler v. Pachtman*[191] provides absolute prosecutorial immunity for presentation of evidence. While *Buckley v. Fitzsimmons*[192] granted prosecutors only qualified immunity for investigative functions, which included obtaining a dishonest expert prior to bringing charges,[193] the *Buckley* decision is unlikely to have an impact, since most jailhouse informants and experts are consulted after indictment. Generally, prosecutorial functions such as the initiation and pursuit of a criminal prosecution, the presentation of the state's case at trial, and other conduct that is intimately associated with the judicial process are insulated from liability by absolute immunity.[194] *Kalina v. Fletcher*[195] reiterated *Buckley*'s view that "'acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.'"[196] In addition, *Kalina* stressed the unsolved nature of the crime as the reason for *Buckley*'s qualified immunity since "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested."[197] Immunity also extends to state common law tort claims as well as to constitutional claims.[198]

The Court has consistently protected prosecutors from claims that they presented fabricated evidence and dishonest experts at trial. *Imbler* included a claim that the prosecutor had offered false testimony and

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190. *Id.* at 459.

191. 424 U.S. 409, 429 (1976), *cited with approval in* Burns v. Reed, 500 U.S. 478, 485–86 (1991) (distinguishing the investigative function of prosecutors, such as advising the police, for which only qualified immunity applies).

192. 509 U.S. 259 (1993).

193. *See id.* at 273–74.

194. *Id.* at 272.

195. 522 U.S. 118 (1997) (preparing and filing charging documents is protected by absolute immunity, but executing certification for determination of probable cause is only protected by qualified immunity).

196. *Id.* at 126 (quoting *Buckley*, 509 U.S. at 273).

197. *Buckley*, 509 U.S. at 273.

198. *See Kalina*, 522 U.S. at 124–25.

suppressed exculpatory evidence,[199] while *Buckley* alleged that the prosecution had sought out and hired an expert "who was well known for her willingness to fabricate unreliable expert testimony."[200] Ultimately, it is not realistic to seek damages for the introduction of even admittedly perjured testimony by jailhouse informants. For example, in *McGhee v. Pottawattamie County*, absolute immunity protected prosecutors from a § 1983 action that was brought by individuals whose murder convictions had been vacated.[201] Despite allegations that prosecutors presented coerced and fabricated jailhouse informant testimony at trial, the court viewed the presentation of evidence as part of the prosecutor's function as an advocate and therefore held that these acts were entitled to absolute immunity.[202]

Professor Fred C. Zacharias suggests that "*Imbler*'s premise is not realistic" because the absence of disciplinary enforcement undercuts one of the rationales for prosecutorial immunity posed by *Imbler*.[203] In other words, *Imbler* assumes that prosecutors are subject to "professional discipline by an association of [their] peers.[204] However, *Imbler*'s immunity analysis also rested on weightier concerns about the effect that qualifying a prosecutor's immunity would have on the "broader public interest."[205] For example, qualified immunity "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[206] The real goal is "protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties and the interest in enabling him to exercise independent judgment when 'deciding which suits to bring and in conducting them in court.'"[207] *Kalina* made clear "it is the interest in protecting the proper functioning of the office, rather than the interest in protecting its occupant, that is of primary importance."[208] Absolute immunity "is not grounded in any special 'esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself.'"[209] Therefore, suggestions that absolute immunity should be rejected in favor of qualified immunity for functions related to trial are unlikely to succeed.

Even if the alleged misconduct is arguably investigative, it will not necessarily survive summary judgment or a motion to dismiss. When the

199. *See* Imbler v. Pachtman, 424 U.S. 409, 416 (1976).
200. *Buckley*, 509 U.S. at 262.
201. McGhee v. Pottawattamie County, 475 F. Supp. 2d 862 (S.D. Iowa 2007).
202. *See id.* at 897–99; *accord* Yarris v. County of Delaware, 465 F.3d 129, 139 (3d Cir. 2006).
203. Zacharias, *supra* note 59, at 777.
204. *Imbler*, 424 U.S. at 429.
205. *Id.* at 427.
206. *Id.* at 427–28.
207. Kalina v. Fletcher, 522 U.S. 118, 125 (1997) (quoting *Imbler*, 424 U.S. at 424).
208. *Id.*
209. *Id.* at 127 (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)).

Supreme Court remanded *Buckley* to the U.S. Court of Appeals for the Seventh Circuit, Judge Easterbrook dismissed the claim that the prosecution bought the testimony of two codefendants, which was covered by absolute immunity, since he held that this practice did not violate the Constitution.[210] Cases where prosecutors concealed the payment at trial were distinguished from this claim that the bought evidence was presented at trial.[211] Similarly, the claim concerning expert shopping was rejected because "[n]either shopping for a favorable witness nor hiring a practitioner of junk science is actionable, although it may lead to devastating cross-examination if the judge permits the expert witness to testify."[212] In other words, procuring the fabricated expert testimony was separated from its use at trial, which would be actionable, though subject to immunity.[213] Moreover, Judge Easterbrook, in recognizing the controversial nature of the proposed expert's testimony about boot marks, remarked that "[n]one of the many courts that considered Robbins's testimony suggested that the prosecutor committed misconduct by seeking her out and proffering her conclusions."[214] This implies that he clearly did not view expert shopping or presenting her decidedly questionable evidence as an ethical breach, let alone one of constitutional dimension. Instead, it is simply part of the adversarial process, where prosecutors can offer problematic evidence and let judges decide whether the evidence should be admitted, so long as the prosecutors do not know the evidence is false.[215]

Of course, *Buckley* was atypical in that the expert was procured prior to filing the action and never actually testified, although the defendant was incarcerated for several years awaiting the trial that never happened.[216] In most cases, the fraudulent expert will testify but ironically will also be employed after indictment, which results in the prosecutor's defense of absolute immunity. The U.S. Court of Appeals of the Second Circuit has disagreed with *Buckley*, holding in *Zahrey v. Coffey*[217] that any resulting deprivation of liberty as traceable to the original procurement of the false testimony is actionable.[218] Similarly, in *Goldstein v. City of Long Beach*,[219] a § 1983 action was brought alleging the failure to institute an information-sharing system regarding jailhouse informants and failing to adequately train or supervise deputies regarding them.[220] The Ninth Circuit held that only qualified, rather than absolute, immunity existed in this setting.[221] Of

210. Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994).
211. *Id.*
212. *Id.* at 796.
213. *See id.* at 796–97.
214. *Id.* at 796 n.1.
215. *See* Model Rules of Prof'l Conduct R. 3.3(a)(3) (2003).
216. *Buckley*, 20 F.3d at 795–96.
217. 221 F.3d 342 (2d Cir. 2000).
218. *See id.* at 348–55.
219. 481 F.3d 1170 (9th Cir. 2007).
220. *Id.* at 1171.
221. *See id.* at 1173–76.

course, to defeat qualified immunity, even in the absence of good faith, the constitutional right had to have been clearly established at the time of the alleged violation.[222] Thus, the road to civil recovery is long and tortuous, and does not necessarily provide enough incentive to prosecutors to change their practices.

In contrast, when prosecutors take their ethical responsibilities seriously, constitutional doctrine may not help them when they claim retaliation for refusing to acquiesce to what they believe is misconduct. The recent whistle-blower case, *Garcetti v. Ceballos*,[223] sends exactly the wrong message to ethical prosecutors.[224] Deputy District Attorney Richard Ceballos brought a § 1983 lawsuit for adverse employment action because he recommended dismissal of a case on the basis of purported governmental misconduct.[225] At the behest of the defense counsel, Ceballos reviewed the affidavit that police had used to obtain a critical search warrant.[226] After concluding it was inaccurate, Ceballos wrote a memo and recommended dismissal.[227] When his supervisor proceeded with the prosecution, Ceballos told her that he believed his memo was exculpatory material that should be given to the defense.[228] Ceballos claimed that he was then ordered to write a new memorandum that contained only the deputy sheriff's statements. Instead, Ceballos proposed to turn over the existing memorandum with his own conclusions redacted as work product, which he did. Ceballos was called as a defense witness, and again alleged he was told he would suffer retaliation if he testified that the affidavit contained intentional fabrications.[229] After the trial court rejected the defense challenge, Ceballos was denied a promotion and reassigned.[230] The Court recognized that exposing government "misconduct is a matter of considerable significance"[231] and referred to the California Rules of Professional Conduct, concerning the duty not to bring cases unless supported by probable cause, as well as to *Brady v. Maryland*,[232] concluding that "[t]hese imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions."[233]

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222. *See, e.g.*, *Zahrey*, 221 F.3d at 355–56.
223. 126 S. Ct. 1951 (2006).
224. *See generally* Bruce A. Green, *Prosecutors' Professional Independence*, Crim. Just., Summer 2007, at 4.
225. *Garcetti*, 126 S. Ct. at 1955–56.
226. *Id.* at 1955.
227. *Id.* at 1955–56.
228. *Id.* at 1955–56, 1959.
229. *Id.* at 1956.
230. *Id.*
231. *Id.* at 1962.
232. 373 U.S. 83 (1963).
233. *Garcetti*, 126 S. Ct. at 1962.

However, the Court's holding suggests that the exact opposite will occur, since *Garcetti* denied First Amendment protection to public employees who make statements pursuant to their official duties, thereby holding that such employees are not insulated from employer discipline.[234] Ironically, if the prosecutor first shares his concerns in a public forum, rather than through an internal memo, the First Amendment would have been implicated. Again, my focus is not on the validity of the underlying constitutional analysis in this case, but rather its impact on prosecutors who want to do the right thing and are willing to stand up to pressure from superiors or office culture to ignore looking too closely at favorable witnesses who may not be telling the truth. The message delivered by *Garcetti* is to be a good soldier and use the weapons at your disposal without worrying that you will be shot down in court. Implicit in this approach is that you are more likely to be ambushed by friendly fire, unless you keep your head down and act like a team player.

Given the present constitutional analysis, it appears obvious that courts cannot solve the problems posed by questionable witnesses such as jailhouse informants and dishonest experts.[235] Resort to supervisory powers to exclude evidence obtained through violations of disciplinary rules is also unlikely when no constitutional violation exists, because such powers are rarely invoked.[236] Similarly, relying on purely evidentiary doctrines has not slowed the flow of unreliable witnesses. As a result, it is time to reinvigorate the ethical approach to prosecutorial practices, even though it is unlikely that this shift will be accompanied by any attempt to create an "ethics police." Yet shining a light on questionable ethical practices, focusing on ethical training, and drafting rules and standards that provide more specificity for dealing with common witness problems is clearly better than simply wringing one's hands.

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234. *Id.* at 1960.

235. Constitutional doctrine has also proved unhelpful in eliminating other causes of wrongful convictions, such as eyewitness testimony and false confessions. *See generally* Christopher Slobogin, *Toward Taping*, 1 Ohio St. J. Crim. L. 309 (2003); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol. Pub. Pol'y & L. 765 (1995); Gary L. Wells, What Is Wrong with the *Manson v. Braithwaite* Test of Eyewitness Identification Accuracy? (n.d.) (unpublished manuscript, on file with the Iowa State University Department of Psychology), *available at* http://www.psychology.iastate.edu/faculty/gwells/Mansonproblem.pdf.

236. *Compare* United States v. Hammad, 858 F.2d 834, 840–42 (2d Cir. 1988) (indicating that the court has discretion to suppress, but finding an exclusionary remedy inappropriate), *with* United States v. Scrushy, 366 F. Supp. 2d 1134, 1141 (N.D. Ala. 2005) (finding that "Eleventh Circuit law is clear that an ethical breach cannot be the basis for exclusion of evidence"). *See generally* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2679 (2006) (holding that the U.S. Supreme Court lacks supervisory powers to suppress evidence in state courts); Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 Geo. J. Legal Ethics 1083 (1994).

V. REINVIGORATING THE ETHICAL APPROACH TO EVIDENCE

As Professor Zacharias has pointed out, professional code "can identify moral issues, promote moral introspection by lawyers about appropriate conduct, influence judicial standards, and facilitate communication within the bar."[237] Lack of enforcement suggests that more specificity in ethical obligations is necessary.[238] More than ten years ago, one commentator noted that entrusting prosecutors to use their individual discretion in handling informants results in their not being instructed as to when rewards may be too enticing, and establishes "systemic support for the informant to maximize the benefit at any cost."[239] The problem is exacerbated because prosecutors as well as police often lack guidelines as to handling informants. Moreover, individual members of law enforcement agencies may actually encourage informants to lie.[240] Self-regulation by prosecutors of jailhouse informants can work, even though it has been argued that policy guidelines may require subjective evaluations that would render them unenforceable as ethical norms.[241]

Prosecution screening of jailhouse informants is critical.[242] The chapter of the ABA report on wrongful convictions that addressed jailhouse informants stated that "[t]he first (and perhaps the most important) check on unreliable testimony by informants is the prosecutor."[243] The most thorough review of use of informants was a lengthy grand jury investigation in Los Angeles undertaken as a result of the startling revelations of Leslie Vernon White, who admitted to multiple acts of perjury as a jailhouse informant, while demonstrating the ease with which a false confession could be devised without ever having spoken to the defendant.[244] The report lambasted the district attorney's office for ethical laxity, decrying "its deliberate and informed declination to take the action necessary to curtail the misuse of jail house informant testimony."[245] This prompted the office to enact detailed restrictions on the use of such witnesses, based in part on its ethical obligations.[246]

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237. Zacharias, *supra* note 59, at 771–72.

238. *E.g.*, *id.* at 776; Flowers, *supra* note 19, at 927.

239. Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 Hastings Const. L.Q. 81, 102 (1994).

240. *See, e.g.*, *id.* at 99, 102; Ted Rohrlich, *Jailhouse Informant Says He Lied at 3 Murder Trials*, L.A. Times, Nov. 5, 1989, at A1 (detailing testimony by jailhouse informant that "he lied at . . . murder trials at the urging of police").

241. *See* Cassidy, *supra* note 22, at 660.

242. *See, e.g.*, Steven M. Cohen, *What Is True? Perspectives of a Former Prosecutor*, 23 Cardozo L. Rev. 817, 827–28 (2002).

243. ABA Report, *supra* note 7, at 67.

244. Grand Jury Report, *supra* note 159.

245. *Id.* at 6.

246. *See* L.A. County Dist. Att'y's Office, Legal Policies Manual 187–90 (2005) [hereinafter Legal Policies Manual], *available at* http://www.ccfaj.org/documents/reports/jailhouse/expert/LACountyDApolicies.pdf.

The stringent restrictions on the use of jailhouse informants adopted in the wake of the 1989 grand jury investigation has significantly decreased their use in Los Angeles, though practice in other parts of California is uneven.[247] The policy requires prosecutors to present strong corroborative evidence beyond the fact that the informant appears to know details of the crime thought to be known only to law enforcement.[248] Prior approval must be obtained from a jailhouse informant committee headed by the chief assistant district attorney.[249] Finally, a central index of jailhouse informants is maintained, and detailed records are required to be kept and preserved.[250] The California Commission on the Fair Administration of Justice was informed that the jailhouse informant committee "rarely approves the use of in-custody informants as witnesses. None has been approved during the past twenty months, and only twelve in the past four years. Throughout the 1990s, the annual number of approvals averaged less than six."[251] In addition to the office's policy restrictions, interviews of in-custody informants by attorneys or investigators from the district attorney's office must be recorded, and training is given to deputies about the risks associated with using jailhouse informants.[252] Los Angeles's policy also makes it a continuing responsibility of all deputy district attorneys to ensure that any attempt to falsify evidence is made known to the prosecutors considering the use of the informant.[253] The policy of the California Department of Justice Division of Criminal Law also lists passing a polygraph test as a factor in determining whether to employ a jailhouse informant.[254]

The Canadian experience with wrongful convictions by jailhouse informants recently prompted the Canadian Association of Chiefs of Police to adopt stringent policies similar to those in Los Angeles, aimed at police and prosecutorial use of jailhouse informants. The Canadian policy also includes a recommendation to vigorously prosecute in-custody informers who give false evidence to deter other jailhouse informants.[255] Most law enforcement agencies in the United States have yet to adopt such policies. Ironically, one of the few jailhouse informants in the United States to have been tried and convicted of perjury is the same self-identified perjurer,

247. *See* CCFAJ Report, *supra* note 7, at 3–5.
248. *See* Legal Policies Manual, *supra* note 246, at 187–90.
249. *See id.* at 187.
250. *Id.* at 189–90.
251. CCFAJ Report, *supra* note 7, at 3.
252. *Id.*
253. Legal Policies Manual, *supra* note 246, at 188–89.
254. Cal. Dep't of Justice, Div. of Criminal Law, Jailhouse Information Policy 1 (n.d.), *available at* http://www.ccfaj.org/documents/reports/jailhouse/expert/CA%20AGs%20policy.pdf (last visited Nov. 21, 2007).
255. Canadian Ass'n of Chiefs of Police, Resolutions Adopted at the 101st Annual Conference 8–9 (2006), *available at* http://www.cacp.ca/english/resolutions/RESOLUTIONS%202006/PackageAdopted.pdf.

Leslie Vernon White,[256] who was the original whistle-blower in the Los Angeles jailhouse informant scandal that revealed the complicity of law enforcement and prosecutors in furthering their lies. Some might cynically see this as payback for revealing the seamier side of informant practices, since one of the complaints in the Los Angeles grand jury report was that informants were never prosecuted for falsifying evidence even when there was no doubt about the lies.[257] However, it would have been hard to ignore his admission to fabricating evidence in twelve previous cases.

Turning to the admission of dubious experts, Professor Moriarty recognizes that the Model Rules only reach false evidence, not unreliable evidence, which prosecutors may feel is an evidentiary decision to be left to judicial discretion.[258] Therefore, she argues that the prosecutor's special obligation to do justice requires additions to the ethical rules concerning the prosecutor's duty not to introduce evidence that he or she knows or reasonably should know is unreliable.[259] For this purpose, she defines unreliable broadly, requiring "that a reasonable person has a factual basis to believe that the proposed evidence is incorrect, inaccurate, incomplete, misleading . . . or without solid foundation."[260] I also support the imposition of greater obligations concerning the presentation of expert evidence, but think that the proposed definition of unreliability is too sweeping because merely having a factual basis seems a very low standard to meet and arguably could be satisfied if even one court excluded such evidence. Given that this is an ethical not an evidentiary decision, a more realistic approach might be to take the opposite perspective—that the prosecutor should only introduce evidence when he or she has a factual basis to objectively believe it is reliable. This would also appear to satisfy Professor Saks's suggestion that a reasonable good faith belief should be required that the party introducing the expert could make a well-grounded showing that the expertise satisfies the admissibility standard.[261]

Yet who is the reasonable person being used as the focal point of the analysis? The fact that many prosecutors, as well as defense counsel, other lawyers, and judges have little grounding in science is especially telling when a dispute arises over whether the science is fraudulent. Asking a prosecutor to be judge and jury of a technique that his expert says yields reliable results may ultimately prove unrealistic. Therefore, each prosecutorial office should be required to adopt written policies governing the introduction of forensic and other expert testimony. At a minimum, prosecutors presenting specific expertise would be required to obtain training. A procedure should also be established to have one or more

256. *See* Ted Rohrlich, *Jail Informant Owns Up to Perjury in a Dozen Cases*, L.A. Times, Jan. 4, 1990, at A24.

257. Grand Jury Report, *supra* note 159, at 90.

258. *See* Moriarty, *supra* note 12, at 30.

259. *See id.*

260. *Id.* at 29.

261. *See* Saks, *supra* note 12, at 428.

prosecutors with experience in forensic or social science evidence to review the introduction of evidence whose reliability has been questioned. This approach would assist prosecutors in determining such issues as whether a factual basis exists for reliability of a technique or the probability of a random match. Even such a relatively light requirement might generate controversy. For example, in referring to trace evidence or psychological syndromes, experts often say that the evidence is "consistent with" the defendant being the source of the specimen or the child being a victim of abuse. Yet such consistency is often not quantified or even quantifiable.

If the prosecution requires the expert to testify to any potentially fatal weakness in the reliability of the evidence, I think it goes too far to suggest that prosecutors violate their ethical obligation if they offer the expertise. Of course, the judge could still decide to exclude the evidence as misleading, unreliable, or unduly prejudicial in the specific case. In other words, if inflated claims are not made, the issue should be for the judge, not the prosecutor. However, when the particular expertise has been subject to repeated reliability attacks, the prudent prosecutor should use the most reliable scientific evidence at his or her disposal and this should be required by appropriate rule or policy. For example, given the large number of wrongful convictions based on hair analysis, a prudent prosecutor should not introduce hair analysis unless its result has been confirmed by mitochondrial DNA. If it has, I see no reason to prohibit opinion evidence based on microscopic analysis so long as it does not include statistics with no foundation. On the other hand, if the mitochondrial DNA excludes the defendant, an ethical prosecutor should not introduce any contrary opinion based on microscopic analysis because it would be inaccurate, and therefore violate the current ethical standards.

Finally, although a self-regulatory body, such as the Federal Office of Professional Responsibility, may be viewed as providing relatively weak enforcement of ethical violations,[262] its very existence has symbolic value. The fact that no prosecutor wants to be investigated will always have some deterrent value. The NDAA, which has created a Center for Prosecutorial Ethics, is the obvious choice as the architect of such an organization, and should investigate the feasibility of creating a self-regulatory body for state prosecutors. While resistance to such a suggestion would no doubt be substantial, if limited to examining cases in which courts found defendants were wrongfully convicted, local prosecutorial offices would be less likely to view it as an unfettered "ethics police." The selling point of such a commission would be that it provides prosecutors with the ability to engage in hindsight analyses of what went wrong in individual cases to strengthen

262. *See, e.g.*, Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 Cornell J.L. & Pub. Pol'y 167 (2004); Ross, *supra* note 20, at 890 (observing that the U.S. Department of Justice Office of Professional Responsibility is "perceived by experts to engage in little more than 'whitewashes,' particularly when they fail to take action, even in light of public findings by judges, against acts of misconduct by prosecutors").

future ethical prosecutions, but is not subject to pressure by groups outside of the prosecutorial community. The body would function in the same manner as innocence commissions long used in Canada. Despite the cogent arguments of Barry Scheck and others involved in innocence litigation,[263] reception in the United States to the idea of independent innocence commissions has been extremely hostile.[264] If prosecutors truly do not want to convict the innocent, this should provide a way to improve ethical practice as well as to address the underlying causes of wrongful convictions. Limiting the review to prosecutors would minimize the current major criticism by prosecutors that other stakeholders in the criminal justice system are simply using such investigations to mask their real agenda, which is to find and expose alleged wrongdoing by prosecutors. It is time for prosecutors to take a more proactive stance to curtail practices that contribute to wrongful convictions. Strengthening their ethical policies will remind prosecutors about the values that first attracted them to public service, and help to allay the cynicism of those who think that obtaining convictions is the only raison d'être of their calling.

CONCLUSION

My focus on jailhouse informants and dishonest experts is an outgrowth of my interest in innocence litigation. The causes of wrongful convictions are many, as are the potential solutions. Constitutional doctrine does not currently appear designed to correct the failures that result in wrongful convictions. Therefore, I have posed an alternative ethical framework that will lessen the introduction of questionable witnesses, while giving prosecutors the power to enhance their reputations as ministers of justice. Moreover, this shift should not unduly impact their ability to win cases, although learning to live with more rules and policies may take some getting used to by prosecutors whose offices have previously scrutinized their dismissals of questionable cases more than their use of questionable witnesses.

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263. *See generally* Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 Cal. W. L. Rev. 333 (2002); Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 Judicature 98 (2002); Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 Am. U. Int'l L. Rev. 1241 (2001); David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. Ill. U. L. Rev. 91 (2000).

264. Recently, North Carolina created an Innocence Inquiry Commission to review claims of innocence based on new evidence that has not previously been presented. *See generally* Jerome M. Maiatico, Note, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 Duke L.J. 1345 (2007); *cf.* Medwed, *supra* note 57, at 177 & nn.268–70 (discussing institutional and political barriers deterring prosecutors from accepting claims of innocence).