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Prosecutors and Justice: Insights from Comparative Analysis

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ARTICLE

PROSECUTORS AND JUSTICE: INSIGHTS FROM
COMPARATIVE ANALYSIS

*Laurène Soubise** & *Alice Woolley***

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I. INTRODUCTION

Prosecutors occupy a special place in American legal ethics scholarship. Their distinct ethical obligation as ministers of justice¹ coupled with their troubling ethical failures in practice,² have inspired cogent analysis and biting criticism.³ For decades American scholars

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1. *Berger v. United States* 295 U.S. 78, 88 (1935).

2. See, e.g., Monroe Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, 52 WASHBURN L.J. 1 (2012); Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL STUD. 943 (2012); Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS. 913 (2012); Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 LOY. U. CHI. L.J. 327 (2014); John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALB. L. REV. 881 (2014).

3. Amongst the many brilliant papers by American scholars, the work of Bruce Green, the late Fred Zacharias and Abbe Smith stand out. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991) [hereinafter Zacharias, *Structuring the Ethics*]; Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993) [hereinafter Zacharias, *Specificity in Professional Responsibility Codes*]; Bruce Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607

have assessed the existence and consequences of deficiencies in prosecutorial conduct, and proposed solutions to encourage better behavior.⁴

Although this obscures the complexity and nuance of any given article, the scholarship tends to advance one (or more) of the following propositions: that prosecutorial misconduct exists and has serious consequences for the justice and fairness of American criminal law;⁵ that the rhetoric surrounding prosecutorial ethics (the “do justice” imperative) ought to be differently articulated, understood or refined;⁶ that prosecutorial misconduct should be more effectively and comprehensively regulated;⁷ and that the structure of prosecutorial

(1992); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355 (2001).

4. For an early assessment, see Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 *GEO. L.J.* 1030 (1967).

5. See, e.g., Freedman, *supra* note 2; Smith, *supra*, note 2; Yaroshesky, *supra*, note 2; Gershman, *supra* note 2; Browning, *supra* note 2.

6. See, e.g., Zacharias, *Structuring the Ethics*, *supra* note 3; Green, *supra*, note 3; Carolyn Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 *AM. CRIM. L. REV.* 1309 (2002) (suggesting that the “do justice” imperative is relatively recent); R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us about a Prosecutor’s Ethical Duty to Seek Justice*, 92 *NOTRE DAME L. REV.* 635 (2006); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695 (2000); Leslie C. Griffin, *The Prudent Prosecutor*, 14 *GEO. J. LEGAL ETHICS* 259 (2001); Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 *GEO. J. LEGAL ETHICS* 309 (2001); Jane Campbell Moriarty, “*Misconvictions*,” *Science, and the Ministers of Justice*, 86 *NEBR. L. REV.* 1 (2007); Alafair S. Burke, *Prosecutorial Agnosticism*, 8 *OHIO ST. J. CRIM. L.* 79 (2010); Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor’s Role*, 47 *U.C. DAVIS L. REV.* 1591 (2014); Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 *N.Y.U. L. REV.* 762 (2016) (playing out a thought experiment on the implications for justice if prosecutors were adversarial rather than ministers of justice); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 *S. CAL. L. REV.* 237 (2017).

7. See, e.g., Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 *GEO. J. LEGAL ETHICS* 461 (2017); Freedman, *supra* note 2; Browning, *supra* note 2; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. REV.* 721 (2001) [hereinafter Zacharias, *Professional Discipline*]; Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 *B.U. L. REV.* 1 (2009) [hereinafter Zacharias & Green, *The Duty to Avoid Wrongful Convictions*]; Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutor’s Ethics*, 55 *VAND. L. REV.* 381 (2002); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, *WISCONSIN L. REV.* 837, 903 (2004) (critiquing the normative idea of prosecutorial neutrality, but also suggesting the need for “a public articulation of clearer first- and second-order principles that can guide prosecutorial decisions”) [hereinafter Green & Zacharias, *Prosecutorial Neutrality*]; Zacharias, *Specificity in Professional Responsibility Code*, *supra* note 3; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, *WISCONSIN L. REV.* 399; (2006); H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct*,

offices and work responsibilities ought to change to encourage more ethical and lawful conduct by prosecutors.⁸

For the most part, the literature focuses on the experiences and challenges of American prosecutors,⁹ assessing the particular sorts of misconduct engaged in by American prosecutors, the norms that govern them, how they are regulated and the structure and culture in which prosecutors work. That focus is neither wrong nor unsurprising. Its effect, however, may be to miss insights that can be gained by looking beyond the American experience. Specifically, if prosecutors elsewhere engage in misconduct, but work in different legal systems and cultures than do American prosecutors, it may be possible to refine the analysis of what it is that causes or can prevent bad behavior by prosecutors.

This Article provides that sort of comparative analysis. It reviews the existence of and context for prosecutorial misconduct in Canada and France, considering both the similarities and differences from the American experience. It observes that in both countries, as in America, prosecutorial misconduct occurs and is a significant problem for the fair and proper administration of criminal justice. The nature of that misconduct is, however, different in some respects from the American experience; in neither Canada nor France can prosecutors use the existence of severe mandatory minimum sentences to coerce plea bargains from a criminal accused. In Canada plea bargaining is an important part of the criminal justice system, but an accused who goes to trial has not traditionally faced materially higher sanctions than an accused who enters a plea before trial. In France, although a formal

Accountability, and a Modest Proposal, 63 CATH. U. L. REV. 51 (2013); Melanie D. Wilson, *Anti-Justice*, 81 TENNESSEE L. REV. 699 (2014) (arguing that lack of public scrutiny leads to prosecutors failing to do justice).

8. Uviller, *supra* note 6; Janet C. Hoefel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENNSYLVANIA ST. L. REV. 1133 (2005); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35 (2009); Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513 (2012); Fish, *supra* note 6; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

9. For exceptions, see ERIK LUNA & MARIANNE WADE, *THE PROSECUTOR IN PERSPECTIVE* (2012); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2010) [hereinafter Luna & Wade, *Prosecutors as Judges*]; Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1 (2012).

“guilty plea” procedure was introduced in 2004,¹⁰ it remains limited to minor and middle-ranking offenses¹¹ and does not lead to a negotiation on charges in practice.¹²

In both countries, as in America, the norms governing prosecutors focus on the prosecutors’ responsibilities to do justice and to ensure a fair trial for an accused. And in both countries, those norms fail to consistently generate conduct by prosecutors that matches those norms and do not provide ways to cogently explain the difference between good conduct by prosecutors and bad.¹³ As well, neither country effectively regulates bad conduct by prosecutors. In Canada, a prosecutor’s failures during a criminal trial may result in a successful application for a mistrial, or even a stay of proceedings, but they are highly unlikely to result in professional discipline for the misbehaving prosecutor.¹⁴ In France, disciplinary proceedings before the *Conseil Supérieur de la Magistrature* (“CSM” or “High Council for the Judiciary”) against public prosecutors are rare, particularly with regards to their behavior during criminal proceedings.¹⁵

Finally, prosecutors in Canada and in France have professional responsibilities and work structures and environments that vary from those in the United States, to a greater (e.g., France) or lesser (e.g., Canada) extent. Canadian prosecutors are not elected. They work as civil servants for either the provincial Attorney General (primarily) or for the federal Public Prosecution Service (secondarily, and mostly in

10. Comparution sur reconnaissance préalable de culpabilité [Procedure on prior recognition of guilt] (“CRPC”) (2004) (Fr.). See Jacqueline Hodgson, *Guilty Pleas and the Changing Role of the Prosecutor in French Criminal Justice*, in ERIK LUNA & MARIANNE WADE, *supra* note 9, at 116–34.

11. In this procedure, the prosecutor can offer a sentence to the defendant if the offense is admitted, but the sentence cannot exceed one year in prison.

12. See Laurène Soubise, *Guilty Pleas in an Inquisitorial Setting – An Empirical Study of France*, 45 *J. L. & Soc’y* 398, 418 (2018).

13. See Alice Woolley, *Reconceiving the Standard Conception of the Prosecutor’s Role*, 95 *CANADIAN B. REV.* 795 (2017).

14. See ALICE WOOLLEY, *UNDERSTANDING LAWYERS’ ETHICS IN CANADA* § 9.86- 9.93. (2d ed. 2017).

15. Disciplinary proceedings were started against a single prosecutor in 2016; two in 2015 (including one for having made discriminatory comments about the travelers’ community during a hearing); and six in 2014. Most disciplinary proceedings concern behaviors independent of any criminal case (i.e., prosecutors committing criminal offences in their private life): *Les compétences disciplinaires du CSM*, CONSEIL SUPERIEUR DE LA MAGISTRATURE, <http://www.conseil-superieur-magistrature.fr/missions/discipline/arborescence-des-decisions-et-avis-disciplinaires> [<https://perma.cc/V5CM-5GSV>].

relation to drug offences). Canadian prosecutors individually and collectively enjoy significant independence. They are largely immune from regulation by provincial law societies, from judicial review of exercises of prosecutorial discretion, or for an action in wrongful prosecution.¹⁶ Courts also defer to decisions made by prosecutors at trial.¹⁷ Canadian prosecutors do, however, receive considerable direction in the form of departmental guidelines, particularly in relation to how they ought to exercise prosecutorial discretion.¹⁸

French prosecutors are not elected either. The French public prosecution service is organized hierarchically with the Minister of Justice, a member of the government, at the top of the pyramid. The primary source of guidance to prosecutors in France is the law, voted upon by Parliament. Government's instructions are also communicated to *procureurs* (French public prosecutors) through circulars issued by the Minister of Justice. In practice, the organization in separate remits allows each *procureur* to work relatively independently on their own files, under the overarching (but relatively distant) authority of the head of each local office.¹⁹

Considering these similarities and differences between the United States, Canada and France suggests to us the following propositions in relation to the American literature on professional misconduct. First, creating appropriate norms around prosecutorial behavior, or refining the norms that currently exist, is unlikely to result in any material shift in how prosecutors behave. In each country, the robust support for prosecutors as quasi-ministers of justice has failed to produce consistently ethical behavior. The behavior of prosecutors routinely fails to match the norms said to govern that behavior. The nature of prosecutorial misconduct in each country—that it exists, but the different shape that it takes—seems logically connected to the substantive criminal law and to the specific duties of prosecutors in each country in relation to enforcing the criminal law. This suggests, in our view, that reforming prosecutorial conduct requires a primary focus

16. For an overview, see *supra* note 14, at §§ 9.7-9.120.

17. See discussion *infra* Part III.

18. See *id.*; see also *e.g.*, R. v. Anderson, [2014] 2 S.C.R. 167, para. 58 (Can.); DEP'T OF JUSTICE, PUBLIC PROSECUTION SERVICE OF CANADA DESKBOOK (2014), available at <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf> [<https://perma.cc/4D5U-3NSH>].

19. Jacqueline Hodgson & Laurène Soubise, *Prosecution in France*, OXFORD HANDBOOKS ONLINE (2016), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-124> [<https://perma.cc/PMP8-HXC7>].

on ensuring that the structure and work responsibilities of prosecutors encourage and incentivize the type of actions we want prosecutors to take (and discourages and disincentives the type of actions we don't want prosecutors to take). Improved professional regulation is part of this structural change. This change may not be possible in practice, as suggested by the unwillingness of any jurisdiction to meaningfully regulate prosecutors, but we do not see any other means to effectively address problems with prosecutorial behavior.

To make this argument, Part II of this Article provides an overview of the nature of prosecutorial misconduct in the United States and scholarly responses to that misconduct. Part III reviews the circumstances and issues related to misconduct by Canadian prosecutors. Part IV sets out the role played by French prosecutors in an inquisitorial system, focusing on the expectations of prosecutors and the gap between those expectations and actual practice. Part V sets out the conclusions that we argue follow from this comparative review and, in particular, what it suggests about how we can best address the cross-national problems of prosecutorial misconduct.

II. AMERICA

Prosecutorial misconduct is a significant issue in American criminal justice.²⁰ While undoubtedly many prosecutors act ethically and responsibly,²¹ American case law and scholarship documents

20. John Browning defines prosecutorial misconduct as “what occurs when a prosecutor deliberately engages in dishonest or fraudulent behavior calculated to produce an unjust result.” Browning, *supra* note 2, at 881. Gershman has a similar view about the importance of prosecutorial intention. See Gershman, *supra* note 2, at 160. However, Gershman also suggests that courts should “presume that a prosecutor’s conduct is planned.” Problematic prosecutorial conduct can, however, be both intentional and unintentional—a prosecutor may simply not perceive the risk of injustice occasioned by a particular decision. Whether or not that prosecutor deserves to be sanctioned is a different question than whether or not the behavior creates a risk of injustice. See generally Alafair Burke, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?: Talking about Prosecutors*, 31 *CARDOZO. L. REV.* 2119 (2010). For the purposes of this Article, our concern is both with the deliberate misconduct identified by Browning, and conduct which *in effect* improperly undermines the fairness of the process or outcome of a criminal trial.

21. Bruce Green has suggested that prosecutor’s offices accept the “do justice” requirement and often adopt “internal guidelines establishing restraints on prosecutorial conduct in addition to those imposed by law or by ethics rules.” Green, *supra* note 3, at 616-17. Elsewhere Zacharias and Green suggest that prosecutors “rarely deserve exclusive or primary blame for the conviction of innocent defendants . . . [but] they invariably play some role in producing them.” Zacharias & Green, *The Duty to Avoid Wrongful Convictions*, *supra* note 7, at

troubling ethical lapses both in commencing and prosecuting criminal trials. In an informal survey of fifty defense lawyers, Abbe Smith discovered that those lawyers describe only between two and fifteen percent of the prosecutors they deal with as *not* “smug, self-important, or lacking in imagination.”²² Peter Joy has observed that “prosecutorial misconduct has proven to be one of the most common factors that causes or contributes to wrongful convictions.”²³ Daniel Epps notes that “[w]hile many prosecutors discharge their duties honorably, too many shirk their ethical duties sometimes doggedly pursuing defendants despite compelling evidence of innocence—and in far too many cases have been responsible for serious injustice.”²⁴

American prosecutors from time to time present false evidence, fail to provide proper disclosure, pose improper questions to witnesses, make improper closing arguments, and misrepresent facts to the court.²⁵ They intimidate witnesses at grand jury investigations, attack witnesses for the defense with the threat of perjury charges, bully witnesses into giving certain kinds of testimony for the prosecution, compel people to drop civil rights suits against the police through the threat of prosecution, use shaming of white collar accused to induce cooperation with the prosecution, and push corporations to give up their employees to avoid criminal prosecution.²⁶ Some American prosecutors engage in inappropriate *ex parte* communications and make improper public statements about on-going litigation.²⁷ They unduly resist post-conviction motions challenging the validity of a conviction.²⁸ Frequently, they use the structure of American criminal

6 and 8. Melanie Wilson has argued that the prosecutors “effectively fulfill” the duty to do justice in charging, trial and sentencing decisions because the “prosecutor’s role is defined adequately and her power constrained sufficiently by outside scrutiny.” Wilson *supra* note 7, at 703-04.

22. Smith, *supra* note 2, at 953-54.

23. Joy, *supra* note 7, at 403. Zacharias and Green suggest that while prosecutors “rarely deserve exclusive or primary blame for the conviction of innocent defendants” but that “they invariably play some role in producing them.” Zacharias & Green, *The Duty to Avoid Wrongful Convictions*, *supra* note 7, at 6, 8.

24. Epps, *supra* note 6, at 765. Zacharias noted “[a]llegations of prosecutorial misconduct abound in the cases and academic literature.” Zacharias, *Professional Discipline*, *supra* note 7, at 725.

25. Freedman, *supra* note 2; Zacharias *Professional Discipline*, *supra* note 7, at 731; Yaroshefsky, *supra* note 2; Hoeffel, *supra* note 8; Smith, *supra* note 3, at 391; Joy, *supra* note 7, at 402-03.

26. Gershman, *supra* note 2.

27. Browning, *supra* note 2. Browning notes a wide range of cases where prosecutors have committed misconduct through technology.

28. Medwed, *supra* note 8.

justice, including its imposition of severe mandatory minimums, as a tool for effectively coercing an accused to accept a plea. As described by Jonathan Rapping:

Today, more than ninety-five per cent of all criminal cases are resolved through guilty pleas. Our legal system, which now leaves so many little option but to plead guilty, has evolved because so many prosecutors take advantage of one or more of the following structural realities: (1) a more expansive criminal code, harsher sentences, and broader criminal liability; (2) excessive bail schemes that often leave poor people with no choice but to accept a plea in exchange for freedom; and (3) overburdened court appointed lawyers who have neither the time nor resources to adequately prepare for trial or advise their clients. For the prosecutor who takes as given the unmanageable number of cases in an underfunded system, and who views his or her obligation as securing as many convictions as possible, taking advantage of these features might seem to be effective law enforcement. But this prosecutor has a misunderstanding of what justice truly means and his or her duty to achieve it.²⁹

And even ethical prosecutors in America can only do as much justice as the American system of criminal justice permits which, as Abbe Smith has cogently argued, may not be enough:

Prosecutors uphold the banishment of a generation of African American men simply by playing their role in the context of today's criminal justice system. The government has devoted an arsenal of resources to a mean-spirited and misguided criminal justice policy that has literally stolen hope for the next generation from entire communities. There is no redemption under this policy, no belief that people who have done wrong could ever rise above their pasts and contribute something of value. There is only the prison cell. It is the role of the prosecutor, the government's lawyer, to carry out these policies.³⁰

29. Rapping, *supra* note 8, at 551. Smith, *supra* note 3, at 391. Richard Uviller notes that, as a prosecutor, the decision to commence or continue with charges was much more difficult to make impartially once trial preparation started: "I was just too zipped, buckled, and helmeted into my flight suit at that point to think about much else than the impending trial mission." Uviller, *supra* note 6, at 1695. Rachel Barkow also discusses how the intersection of prosecutorial decisions and systemic factors creates a real risk for prosecutorial abuse of power. Barkow, *supra* note 8, at 878-83.

30. Smith, *supra* note 3, at 374.

Commentators have not identified an adequate solution to the problem of prosecutorial misconduct—that is, one likely to be both effective and practically possible to implement. As evidenced by President Donald Trump’s pardon of Sheriff Joe Arpaio, not everyone views aggressive and even unlawful efforts to “fight crime” as a social problem that needs solving.³¹ American prosecutors work at the federal, state and county level. Some are elected. Some are civil servants. The circumstances under which prosecutors work, the incentives to which they are subject, and the substantive law they apply, vary considerably.³² No singular response can sufficiently account for that variation and address the different sorts of prosecutorial misconduct that it produces.

With that said, commentators have responded to deficiencies in prosecutorial conduct. Many have discussed issues in the overarching obligation of prosecutors to do justice,³³ the lack of meaningful direction it provides to prosecutors, its inherent vagueness, and the irreducible conflict between the duty as stated and the prosecutor’s obligation as an adversarial advocate.³⁴ Abbe Smith argues that the exhortation to do justice corrupts prosecutorial ethics, encouraging prosecutorial arrogance and abuse of power: “too often righteousness

31. Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Immigration*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html?_r=0 (last visited Nov. 20, 2018).

32. See, e.g., Hoeffel, *supra* note 8, at 1138-39.

33. “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.” *Berger v. United States*, 295 U.S. 78, 88 (1935). The American Bar Association Rule 3.8, Commentary 1 states “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.” MODEL RULES OF PROF’L CONDUCT r. 3.8, cmt. 1 (AM. BAR ASS’N 2018).

34. See, e.g., Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 3, at 250 (“Different prosecutors . . . can justify diametrically opposite conduct as serving justice.”); Green, *supra* note 3, at 616, 622 (“Standing alone, the injunction points in many directions . . . The injunction may even point in contradictory directions.”); Joy, *supra* note 7, at 400, 427; Medwed, *supra* note 8, at 42; Epps, *supra* note 6, at 783 (“This conception of the prosecutorial role has problems. For one, the content of the norm is famously hard to pin down. What does it mean for a prosecutor to “seek justice?”); Rapping, *supra* note 8, at 519 (“This imprecision [in the duty] has left prosecutors to define their role as they see fit.”); Caldwell, *supra* note 7, at 57.

becomes self-righteousness. Too often prosecutors believe that because it is their *job* to do justice, they have extraordinary in-born wisdom and insight. Too often prosecutors believe that they *and only they* know what justice is.”³⁵ It gives prosecutors the “white hat” in the courtroom.³⁶

In response commentators have sought to clarify and improve the “do justice” ethic. Bruce Green and Fred Zacharias in particular, both together and individually have done remarkable work to make sense of the “do justice” obligation and its relationship to the prosecutor’s adversarial advocacy.

Zacharias argued that the obligation to “do justice” can be made coherent if you see it as having two essential elements: an obligation not to prosecute absent a good faith belief in an accused’s guilt and an obligation to “ensure that the basic elements of the adversary system exist” in a criminal trial.³⁷ The obligation is not to ensure that a trial achieves a just outcome, substantively speaking; the obligation is to ensure the accomplishment of the adversarial process on which justice depends. That obligation would give rise to special duties for the prosecutor where there is inadequate defense counsel, where the resources are unequal such that “competent defense attorneys lack the tools to offer a vigorous case, despite their best efforts”³⁸ and where the process fails from, for example, biased or over-reactive tribunals. It also requires the prosecutor to respect limits on some adversarial tactics that do not apply to defense counsel.³⁹ Zacharias noted significant issues with this articulation of the duty but suggested that it “would have some effect on prosecutorial conduct.”⁴⁰

Green has argued that the prosecutor’s obligation to do justice flows from the fact that the prosecutor acts as a proxy for the sovereign, and the sovereign’s interest is in substantive justice. As such, the prosecutor’s duty requires punishing the guilty, avoiding the punishment of the innocent, and ensuring that “people are treated fairly. As the government’s surrogate, the prosecutor’s job is to carry out all

35. Smith, *supra* note 3, at 378.

36. Hoefel, *supra* note 8, at 1140.

37. Zacharias, *Structuring the Ethics*, *supra* note 3, at 50.

38. *Id.* at 84.

39. *Id.* at 66-94.

40. *Id.* at 108.

these objectives and resolve the tension among them.”⁴¹ Green argued that this approach can be reconciled with the prosecutor’s “instinct to do battle;” this reconciliation simply requires that prosecutors restrict that instinct to cases that warrant it, bearing in mind as well other objectives the government ought to pursue.⁴²

Together Green and Zacharias explored the capacity of the principle of neutrality to inform prosecutorial decision-making.⁴³ In their view the principle of neutrality could be further articulated to suggest that prosecutorial decision-making should be non-biased, non-partisan and principled.⁴⁴ They suggested, however, that neither the general concept of neutrality nor these more articulated sub-principles could on their own guide prosecutorial decision-making.⁴⁵ The meaning of the principles and sub-principles is variable and how they fit together uncertain.⁴⁶ They cannot ultimately provide meaningful guidance “for the discretionary decisions that prosecutors routinely must make.”⁴⁷ Green and Zacharias sought “deeper thinking by prosecutors and for a public articulation of clearer first- and second-order principles that can guide prosecutors’ decisions.”⁴⁸

Others have suggested that prosecutor’s overarching duty ought to be “to the truth,”⁴⁹ that the prosecutor’s obligation should be infused with the norms and practices of virtue ethics, in which the focus “is on the character of individual prosecutors making discretionary decisions,”⁵⁰ that it should require prosecutors to suppress constitutionally dubious evidence even where that evidence might be admissible in court,⁵¹ and have even explored the thought experiment that perhaps less injustice would result if prosecutors were consistently adversarial instead of seeking to do justice.⁵²

41. Green, *supra* note 3, at 642.

42. *Id.*

43. Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 7.

44. *Id.* at 852.

45. *Id.* at 860.

46. *Id.* at 903.

47. *Id.* at 837.

48. *Id.*

49. Gershman, *supra* note 6, at 314.

50. Cassidy, *supra* note 6, at 639.

51. Gold, *supra* note 6, at 1660.

52. Epps, *supra* note 6, at 852.

In addition to suggesting changes to how we articulate and understand the general norms governing prosecutorial conduct, scholars have assessed the ability to use regulatory mechanisms to improve prosecutorial conduct. American prosecutors can face consequences for making poor choices in the conduct of a matter—having a conviction overturned, for example—and have been subject to disciplinary proceedings.⁵³ As a general matter, however, the disciplinary rules governing prosecutorial behavior are loosely drafted, generously interpreted and rarely result in professional discipline.⁵⁴ Prosecutors also enjoy immunity from civil liability for many of the decisions made with respect to a prosecution.⁵⁵ Reforms that have been considered include clarifying and providing more precise and useful direction in disciplinary codes,⁵⁶ broadening the scope of civil liability for prosecutors,⁵⁷ creating an independent commission for addressing prosecutorial impropriety,⁵⁸ and using competency provisions in codes of conduct to discipline prosecutors for actions that are reasonably

53. See Zacharias, *Professional Discipline*, *supra* note 7, at 744-45:

This study . . . dispels at least one myth: that prosecutors are never disciplined. Nevertheless, many of the cases are old, making the number of reported cases far from staggering in light of the many prosecutors and criminal cases that exist. Still the body of cases is not entirely negligible. The research suggests at least that, in appropriate cases, courts and disciplinary organizations sometimes have been willing to address prosecutorial misconduct.

He notes that discipline tends to occur for illegal activity, for “procedural and evidentiary misconduct” and for “abusive behavior toward tribunals”). *Id.* at 746. See also Charles Maclean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 25 WASHBURN L. J. 59 (2012),

54. See Zacharias, *Professional Discipline*, *supra* note 7; Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 3; Freedman, *supra* note 2,

55. Green, *supra* note 7, at 483:

At least on the federal level, courts have shown little inclination to encourage civil lawsuits against prosecutors by lowering the bars posed by doctrines of absolute and qualified immunity. On the contrary, Supreme Court decisions have largely protected prosecutors from civil lawsuits arising out of professional misconduct, in part based on the stated assumption that professional discipline will fill the voice

See also, Zacharias & Green, *The Duty to Avoid Wrongful Convictions*, *supra* note 7.

56. Joy, *supra* note 7, at 401; Zacharias, *Specificity in Professional Responsibility Codes*, *supra* note 3. But see Zacharias & Green, *The Duty to Avoid Wrongful Convictions*, *supra* note 7, at 58 (“[I]t is difficult to draft specific rules capturing all risky prosecutorial conduct that, in hindsight, should be deemed improper.”)

57. Green, *supra* note 7, at 483.

58. Caldwell, *supra* note 7.

likely to result in wrongful convictions.⁵⁹ Zacharias and Green have suggested, however, that “[s]tanding alone, the disciplinary process will never adequately hold errant prosecutors accountable for their role in bringing about wrongful convictions.”⁶⁰

Finally, some American scholars have explored the possibility of shifting the structure, culture and work environment of prosecutors to improve prosecutorial conduct. The most significant involve separating the investigative, adjudicative functions from the prosecutor’s role as an advocate:

I believe that for the office of prosecutor faithfully to discharge the incompatible roles of advocate and arbiter, the investigators and adjudicators should be segregated from the advocates. I do not say that the two bands cannot live happily under one roof, both responsible to the same chief. But I do think that those who investigate, assess, and negotiate settlement should belong to a different cadre from those who try the cases that fail to reach accord.⁶¹

Other suggestions include shifting the cultural expectations of prosecutorial offices⁶² and having prosecutor’s offices set out the fundamental norms that ought to govern prosecutorial decision-making.⁶³ Those commenters claim that articulating the “principles and subprinciples of prosecution . . . can make the exercise of discretion more thoughtful, enable well-intentioned prosecutors to reach decisions with reference to impersonal norms, narrow inconsistency within a prosecutor’s office, and facilitate review by supervisory prosecutors.”⁶⁴

59. Zacharias & Green, *The Duty to Avoid Wrongful Convictions*, *supra* note 7. However, Zacharias and Green ultimately conclude that such enforcement is not feasible. Indeed, they question generally “the viability of professional discipline as the principle mechanism for regulating the prosecution corps.” *Id.* at 58.

60. Zacharias & Green, *The Duty to Avoid Wrongful Convictions*, *supra* note 7, at 58-59.

61. Uviller, *supra* note 6, at 1702. *See also* Barkow, *supra* note 8,

62. Rapping, *supra* note 8,

63. Green & Zacharias, *Prosecutorial Neutrality*, *supra* note 7, at 904.

64. Green & Zacharias, *supra* note 7, at 886. *See also* Fish, *supra* note 6, at 270-71: [I]ndividual prosecutors’ choices should be constrained through system-level rules that compel prosecutors to incorporate constitutional rights into their decision making. Such rules can be established at a number of different levels: individual offices, larger prosecution bureaucracies, or state bar associations. They can be implemented in a variety of ways: training prosecutors, imposing internal discipline, centralizing decisionmaking authority, creating positions tasked with protecting constitutional rights, and imposing bar sanctions.

This brief overview indicates that issues with prosecutorial conduct in America arise with respect to both exercises of prosecutorial discretion (charging and plea offers) and the conduct of a matter. The responses to that conduct involve trying to better understand and articulate the norms governing prosecutorial conduct, enhancing regulation of prosecutors, and shifting the culture and structure of prosecutorial work. The next Parts will consider prosecutorial conduct (and misconduct) in Canada and France before turning to what those comparisons reveal about the options for addressing prosecutorial misconduct discussed in the American literature.

III. CANADA

Canadian prosecutors work as civil servants for either the provincial or federal governments, with prosecutorial authority reflecting the division of powers between these two levels of government. Provincial prosecutors prosecute offences committed under the Criminal Code of Canada and provincial statutes,⁶⁵ while federal prosecutors prosecute drug offenses under the Controlled Drugs and Substances Act,⁶⁶ and crimes under other federal statutes such as the Income Tax Act.⁶⁷ As is the case with American prosecutors, Canadian prosecutors exercise prosecutorial discretion to make “decisions regarding the nature and extent of [a] prosecution and the Attorney General’s participation in it.”⁶⁸ This includes the power to

65. See PUBLIC PROSECUTION SERVICE OF CANADA, ANNUAL REPORT, 2011-2012 7 (2012), http://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2011_2012/ar12-ra12.pdf [<https://perma.cc/LSR9-VYX8>].

66. Controlled Drugs and Substances Act, S.C. 1996, c. 19 (Can.).

67. Federal prosecutors also prosecute crimes under the *Criminal Code* in the three territories: the Yukon, Northwest Territories, and Nunavut. See PUBLIC PROSECUTION SERVICE OF CANADA, *supra* note 65, at 4. The reason for the slightly counter-intuitive nature of the division of responsibilities between federal and provincial prosecutors is that under Canadian division of powers the federal government has responsibility for “[t]he Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.” Constitution Act, 1867, 30 & 31 Vict., c 3, 91(27) (U.K.). The provincial government has responsibility for “The administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.” *Id.*

68. *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, para. 47 (Can.); *R. v. Anderson*, [2014] 2 S.C.R. 167, para. 44 (Can.).

enter into plea agreements with the accused.⁶⁹ They have a constitutional obligation to provide full disclosure to the accused, including disclosure of exculpatory information.⁷⁰ They conduct criminal trials in courts structured on an adversarial model. This is the case even in the province of Québec, which uses the civil code rather than common law in civil matters. The trial courts of Québec are adversarial, and matters of criminal law and evidence are governed by the common law. As in the United States, there is no functional separation between prosecutors who exercise discretion about whether to commence or continue a criminal proceeding, and the prosecutors who conduct a criminal trial.

Guidance for and control of prosecutorial decision-making arises from three sources: guidelines published by the provincial or federal department for which the prosecutor works, provincial law society codes of conduct, and case law. Each of the provinces and the federal government publish a policy manual or deskbook that sets out guidelines directing prosecutorial behavior.⁷¹ The policy manuals affirm the overarching duty of Canadian prosecutors to be ministers of justice.⁷² More specifically, the guidelines require that decisions to prosecute be based primarily on whether there is sufficient evidence to justify bringing or continuing proceedings and, secondarily, whether a prosecution is in the public interest.⁷³ The guidelines provide considerable detail about how a prosecutor ought to assess a case in light of these criteria, requiring that the prosecutor's assessment be

69. Anderson, [2014] 2 S.C.R. at para. 45; R. v. Nixon, [2011] 2 S.C.R. 566 (Can.) (holding prosecutorial discretion includes the Crown's power to repudiate a plea agreement).

70. R. v. Stinchcombe, [1991] 3 S.C.R. 326 (Can.).

71. See, e.g., DEP'T OF JUSTICE, *supra* note 18; NEW BRUNSWICK OFFICE OF ATTORNEY GENERAL, PUBLIC PROSECUTION OPERATIONAL MANUAL (2016), available at http://www2.gnb.ca/content/gnb/en/departments/attorney_general/operational_manual.html [https://perma.cc/4P22-9WSP]; ONTARIO MINISTRY OF THE ATTORNEY GEN., ONTARIO CROWN POLICY MANUAL (2017), available at <https://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/> [https://perma.cc/6GUU-G736]; ALBERTA JUSTICE AND SOLICITOR GENERAL, ALBERTA CROWN PROSECUTOR'S MANUAL (2015), available at https://justice.alberta.ca/programs_services/criminal_pros/Publications%20Library%20%20Criminal%20Prosecutions/CrownProsecutorsManual.aspx; BRITISH COLUMBIA PROSECUTION SERV., BRITISH COLUMBIA CROWN COUNSEL POLICY MANUAL (2018), available at <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual> [https://perma.cc/7A6W-2RD6].

72. DEP'T OF JUSTICE, *supra* note 18, §§ 2, 2.1.

73. *Id.* at §2.3.2. For a more detailed discussion of how the guidelines constrain the exercise of prosecutorial discretion, see WOOLLEY, *supra* note 14, at §9.30-§9.36.

“objective” rather than a matter of personal opinion.⁷⁴ The guidelines also address a prosecutor’s conduct of a trial, identifying the prosecutor’s duties, which are the same as those that apply to any trial lawyer.⁷⁵ For example, the *Public Prosecution Service of Canada Deskbook* provides:

In order to maintain public confidence in the administration of justice, Crown counsel must not only act fairly; their conduct must be seen to be fair. One can act fairly while unintentionally leaving an impression of secrecy, bias or unfairness.

Counsel fulfill this duty by:

- making disclosure in accordance with the law;
- bringing all relevant cases and authorities known to counsel to the attention of the court, even if they may be contrary to the Crown’s position;
- not misleading the court;
- not expressing personal opinions on the evidence, including the credibility of witnesses or on the guilt or innocence of the accused in court or in public. Such expressions of opinion are improper;
- not advertent to any unproven facts, even if they are material and could have been admitted as evidence;
- asking relevant and proper questions during the examination of a witness and not asking questions designed solely to embarrass, insult, abuse, belittle, or demean the witness. Cross examination can be skilful and probing, yet still show respect for the witness. The law distinguishes between a cross-examination that is “persistent and exhaustive”, which is proper, and a cross-examination that is “abusive”;
- stating the law accurately in oral pleadings;
- respecting defence counsel, the accused, and the proceedings while vigorously asserting the Crown’s position, and not publicly and improperly criticizing defence strategy;

74. DAVID LAYTON & MICHEL PROULX, *ETHICS AND CANADIAN CRIMINAL LAW* 603 (Toronto: Irwin Law, 2d ed. 2015). See also *Miazga v. Kvello Estate*, [2009] S.C.R. 339, at para. 66 (Can.).

75. See WOOLLEY, *supra* note 14, at §9.97.

- respecting the court and judicial decisions and not publicly disparaging judgments; and
- avoiding themselves engaging in active “judge shopping”.⁷⁶

Prosecutors are also advised of the importance of “fairness, moderation, and dignity” accompanying “vigorous and thorough prosecutions.”⁷⁷

Prosecutors’ obligations under provincial and federal guidelines are purportedly subject to enforcement through internal disciplinary processes, although the nature and extent of that enforcement is unknown.

Law society codes of conduct provide minimal specific direction to prosecutors. The general duty imposed on prosecutors to “act for the public and the administration of justice resolutely and honorably within the limits of the law while treating the tribunal with candor, fairness, courtesy and respect” is nearly identical to the obligations imposed on all lawyers when acting as advocates, except that prosecutors “act for the public and the administration of justice” instead of “represent the client.”⁷⁸ The codes go on to add in the commentary:

When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.⁷⁹

As Woolley has noted elsewhere, however, the duties identified in the commentary “seem largely to be a context-specific iteration of general principles requiring all lawyers to comply with their legal and constitutional obligations.”⁸⁰ Further, provincial law societies almost never discipline prosecutors. Of 2,200 disciplinary decisions issued by

76. DEP’T. OF JUSTICE, *supra* note 18, at §2.3.

77. *Id.* at §2.2.2.

78. FED. OF L. SOCIETIES, MODEL CODE OF PROF’L CONDUCT, r. 5.1-3, 5.1-1. The Federation’s Code has been substantially adopted in all Canadian provinces, including this rule.

79. *Id.* at r. 5.1-3, cmt 1.

80. WOOLLEY, *supra* note 14, at §9.96.

the Law Society of Ontario⁸¹ over a twenty-three year period, only nine involved prosecutors.⁸² Databases containing law society disciplinary decisions reveal only a handful addressing the conduct of prosecutors.⁸³

By far the most significant source of guidance and regulation of prosecutors arises from judicial decisions. Courts have established the overarching duty of Canadian prosecutors, like their American counterparts, to seek justice: “His duty is not so much to obtain a conviction as to assist the judge and jury in ensuring that the fullest possible justice is done;”⁸⁴ “[t]he role of prosecutor excludes any notion of winning or losing.”⁸⁵ As in the United States, that duty is poorly explained, inherently ambiguous and more a source of judicial platitudes than rigorous explanation of a prosecutor’s duties in a criminal trial.⁸⁶

However, courts have attempted to set out a prosecutor’s duties with respect to the conduct of a criminal matter, particularly in relation to disclosure,⁸⁷ making statements to the court (including to a jury),⁸⁸ cross-examining witnesses,⁸⁹ the presentation of evidence,⁹⁰ treatment

81. The Law Society of Upper Canada changed its name in 2017 to the Law Society of Ontario. See Joseph Brean, *Law Society to drop ‘Upper Canada’ from its name after report calls it elitist and offensive*, NATIONAL POST (Sept. 29, 2017), <http://nationalpost.com/news/canada/law-society-to-drop-upper-canada> [https://perma.cc/6SWS-SQCN].

82. Jennifer Paglioro & Jayme Poisson, *Ontario fails to track complaints against Crown attorneys*, TORONTO STAR (Dec. 16, 2014), https://www.thestar.com/news/queenspark/2014/12/16/ontario_fails_to_track_complaints_against_crown_attorneys.html [https://perma.cc/WJW4-HADG].

83. See generally, WOOLLEY, *supra* note 14, at §§9.100, 9.87-9.92.

84. *R. v. Boucher*, [1955] S.C.R. 16, 21 (Can.).

85. *Id.* at 24. See also *R. v. Swietlinski*, [1994] 3 S.C.R. 481, 494-95 (Can.); *R. v. Regan*, [2002] 1 S.C.R. 297, ¶ 155-56 (Can.) (Binnie, J., dissenting on other grounds).

86. See Woolley, *supra* note 13.

87. See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at 2 (Can.).

88. See, e.g., *Boucher*, [1955] S.C.R., at 2384 (Can.); *R. v. Manasseri*, (2016) O.R. 3d 401, ¶ 103-04 (Can. Ont. C.A.).

89. See *R. v. Ahmed*, [2015] O.A.C. 751, para. 39 (Can. Ont. C.A.); *R. v. Lagiaccio*, [1984], 11 C.C.C. 3d 374, 383-84 (Can. Ont. C.A.).

90. See, e.g., *R. v. Cook*, [1997] S.C.R. 1113, 1114-15 (Can.); *R. v. Hillis*, 2016 CanLII 451, para. 20 (Can. Ont.); *R. v. MacInnis*, [2007] 163 C.R.R. 2d 111 (ONSCJ) (Can.); *R. v. Zelitt*, 2003 CanLII 2 (Can. Alta.).

of self-represented accused,⁹¹ jury selection,⁹² consenting to trial by judge alone,⁹³ the handling of witnesses,⁹⁴ the treatment of accused charged from the same incident,⁹⁵ and the Crown's defense of a publication ban.⁹⁶

Despite this, Courts have also made it clear that Canadian prosecutors enjoy considerable independence from judicial oversight. While courts will assess whether a prosecutor's conduct of a matter has undermined trial fairness such that a new trial or other relief for the accused is warranted, they defer to counsel decisions on strategy.⁹⁷ In addition, they will not ordinarily review a prosecutor's exercise of discretion about whether and how to proceed against the accused. A court will only review an exercise of prosecutorial discretion *ex ante* where there has been an abuse of process or, *ex post*, where the tort of malicious prosecution is made out. To be an abuse of process, the prosecutor must have acted in a way "that is egregious and seriously compromises trial fairness and/or the integrity of the justice system."⁹⁸ The accused must establish a "proper evidentiary foundation" for the claim of abuse of process,⁹⁹ and courts will presume that "prosecutorial discretion is exercised in good faith."¹⁰⁰ To establish malicious prosecution, a former accused must show, amongst other things, that the prosecutor "*deliberately* intended to subvert or abuse the office of the Attorney General or the process of criminal justice";¹⁰¹ mere

91. R. v. Burns, [1993] 136 N.B.R. 2d 166 (CACA Can.); R. v. Vu, [2004] O.T.C. 1196 (ONSCJ) (Can.).

92. See, e.g., R. v. Biddle, [1995] S.C.R. 761, para. 50 (Can.) (Gonthier, J., concurring); R. v. Gayle, (2001), O.R. 3d 36 (Can. Ont.); R. v. Bain, [1992] S.C.R. 91, 93-94 (Can.).

93. See, e.g., R. v. Bird, (1996) Alta. L.R. 3d 128 (Can. Alta.), 185 A.R. 201 (QB); R. v. Effert, (2008) Atla. L.R. 4th 200 (Can. Atla.).

94. See R. v. Spackman, 2009 CanLII 37920, 64 (Can. Ont.).

95. R. v. Lacroix, [2007] ONCJ 540 (Can.).

96. R. v. Brown (L.A.), [1988] 126 C.C.C. 3d 187 (Ont. Gen. Div.). For a more detailed discussion of the law governing prosecutors, see Woolley, *supra* note 13, at 800-10.

97. See R. v. Anderson, [2014] 2 S.C.R. 167, para. 60 (Can.). The Supreme Court has held that courts have the power to "penalize counsel for ignoring rulings or orders, or for inappropriate behaviour such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire. Sanctions may include orders to comply, adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings" *Id.* at ¶ 58.

98. See Anderson, [2014] S.C.R., at ¶ 50.

99. See R. v. Nixon, [2011] 2 S.C.R. 566, at ¶ 60 (Can.).

100. Anderson, [2014] S.C.R., at ¶ 55.

101. Miazga v. Kvello Estate, [2009] S.C.R. 339, at ¶ 89 (Can.) (emphasis added).

“incompetence, inexperience, poor judgment, lack of professionalism, recklessness, honest mistake, negligence, or even gross negligence” is insufficient.¹⁰²

Canadian courts have, however, been willing to hold the state liable for violation of an accused’s constitutional rights. Section 24(1) of the Canadian Charter of Rights and Freedoms (“Charter”) permits the Court to grant “such remedy as the court considers appropriate and just in the circumstances” for a violation of a person’s Charter rights or freedoms. In a recent case, Ivan Henry was awarded \$8 million in Charter damages following his wrongful conviction and twenty-seven years imprisonment that resulted from a trial in which the Crown showed a “shocking disregard” for his Charter rights.¹⁰³ In addition, courts have ordered costs against the Crown in response to a Charter violation, Crown misconduct or similarly serious circumstances; to justify costs there must be a “marked and unacceptable departure from the reasonable standards expected of the prosecution’, or something that is ‘rare’ or ‘unique’ that ‘must at least result in something akin to an extreme hardship on the defendant.’”¹⁰⁴

Canadian prosecutors thus have a general duty to seek justice, as well more specified obligations as set out in the federal and provincial policy manuals, and in case law. Prosecutors are, however, subject to next to no risk of personal regulatory consequences, except as may occur outside of the public eye in the form of discipline by their employers.

Nonetheless, Canadian prosecutors do from time to time engage in misconduct. As in the United States, while troubling prosecutorial conduct may not be the sole factor in creating wrongful convictions, it has been a factor in most (and perhaps all) wrongful conviction cases in Canada.¹⁰⁵ Case law also reveals prosecutors who did the following:

102. *Id.* at ¶ 81. “In cases subsequent to *Miazga*, courts have shown themselves reluctant to even hear claims for wrongful conviction, frequently striking them out or dismissing them, often because the claiming party would not be able to establish malice.” WOOLEY, *supra* note 14, §9.59. For a more fulsome discussion of how Canadian courts review prosecutorial discretion, see *id.* at §9.43, §9.59.

103. *Henry v. British Columbia (Attorney Gen.)*, (2016) B.C.S.C. 1038, ¶¶ 472-73 (Can. B.C.); see *Henry v. British Columbia (Attorney Gen.)*, [2015] S.C.R. 214 (Can.).

104. *R. v. Singh*, [2016] ONCA 108, ¶ 38 (Can. Ont. C.A.) (quoting *R. v. Ciarniello*, [2006] O.R. 561 (Can. Ont. C.A.)).

105. See *Miazga*, [2009] S.C.R. 51, at ¶ 89; see also Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings and Recommendations (Dec. 1989) (finding that

failed to satisfy their duty to disclose, sometimes in a serious way;¹⁰⁶ coached their witnesses or asked improper leading questions of their own witnesses;¹⁰⁷ improperly curated evidence (for example, by not calling a witness after it became clear that some of the witness's evidence would help the accused);¹⁰⁸ conducted abusive, belligerent, sarcastic, or demeaning cross-examination or asked questions going to irrelevant or inadmissible matters;¹⁰⁹ and made improper and inflammatory statements or statements which introduced irrelevant or inadmissible issues to the court.¹¹⁰

the prosecutor did not interview witnesses who had given contradictory statements or disclose those statements to the defense); MINISTRY OF THE ATTORNEY GENERAL, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998) (relating to reliance on jailhouse informants, lack of disclosure and prosecutorial tunnel vision); David Asper, "No One's Interested in Something You Didn't Do": Freeing David Milgaard the Ugly Way, in IN SEARCH OF THE ETHICAL LAWYER: STORIES FROM THE CANADIAN LEGAL PROFESSION 55-80 (Adam Dodek & Alice Woolley eds., UBC Press 2016).

106. See, e.g., R. v. Illes, [2008] S.C.R. 57; R. v. Taillefer, [2003] S.C.R. 307; R. v. La, [1997] 2 S.C.R. 680 (Can.); R. v. Wood, (2006) ABCA 343 (Can. Alta. C.A.); R. v. Bain (K.), [2005] 196 O.A.C. 81 (Can. Ont. C.A.); R. v. O'Grady, (1995) 64 B.C.A.C. 111 (Can. B.C. C.A.); R. v. S.E.L., 2012 ABQB 190 (Can. Alta. Q.B.); R. v. MacInnis, [2007] 163 C.R.R. (2d) 111 (Can. Ont. S.C.).

107. See, e.g., R. v. Paquette, (2008) ABCA 49 (Can. Alta. C.A.); R. v. Situ, (2005) ABCA 275 (Can. Alta. C.A.); R. v. Rose, [2001] 153 C.C.C. 3d 225 (Can. Ont. C.A.); R. v. Peruta, [1992] 78 C.C.C. 3d 350 (Can. Quebec C.A.); R. v. Spence, [2011] ONSC 2406 (Can. Ont. S.C.J.).

108. See R. v. Hillis, [2016] ON 451 (Can. Ont. S.C.).

109. See, e.g., R. v. A.G., [2015] ONCA 159, ¶ 43 (Can. Ont. C.A.) (finding cross-examination improper but denying a new trial because "the cross-examination at issue did not result in a miscarriage of justice"); R. v. Gahan, (2014) NBJ No 77 (Can. C.A.); R. v. Bear, (2008) SKCA 172 (Can. Saskatchewan C.A.); R. v. Ellard, (2003) BCCA 68 (Can. B.C. C.A.); R. v. Wojcik, (2002) MBCA 82 (Can. Manitoba C.A.); R. v. Shell, [2002] O.J. No. 3633 (Can. C.A.); R. v. Rose, [2001] 153 C.C.C. 3d 225 (Can. Ont. C.A.); R. v. Henderson, (1999) 44 O.R. 3d 628 (Can. Ont. C.A.); R. v. Riche, (1996) NJ No. 293 (Can. Nfld. C.A.); R. v. Bricker, [1994] 90 C.C.C. 3d 268 (Can. Ont. C.A.); R. v. Walker, [1994] 90 C.C.C. 3d 144 (Can. Ont. C.A.); R. v. Hillier, (1994) 115 Nfld & PEIR 27 (Can. N.L. C.A.); R. v. R. (A.J.), [1994] 94 C.C.C. 3d 168 (Can. Ont. C.A.); R. v. Daly, [1992] 57 O.A.C. 70 (Can. Ont. C.A.) (finding improper cross-examination with sarcasm and editorializing did not warrant new trial); R. v. Logiacco, [1984] 2 O.A.C. 177 (Can. Ont. C.A.); R. v. Stewart, [1991] 43 O.A.C. 109 (Can. Ont. C.A.). See also R. v. Robinson, [2001] 153 C.C.C. 3d 398, ¶ 35 (Can. Ont. C.A.) (noting the cross-examination had many "questions . . . laced with sarcasm and framed in a manner that made it apparent that Crown counsel personally held the appellant in utter contempt . . . [and] an attempt at character assassination"). Robinson subsequently committed an extremely violent sexual assault for which he was convicted. R. v. Robinson, [2006] 212 C.C.C. 3d 439 (Can. Ont. C.A.).

110. R. v. Boucher, [1955] S.C.R. 16, 23 (Can.); R. v. A.T., [2015] ONCA 65 (Can. Ont. C.A.); R. v. Delisle, [2013] QCCA 952 (Can. Que. C.A.); R. v. Mallory, [2007] ONCA 46 (Can. Ont. C.A.); R. v. Carter, (2005) BCCA 381 (Can. B.C. C.A.); R. v. White, [1997] 99 O.A.C. 1 (Can. Ont. C.A.); Hillier, (1994) 115 Nfld & PEIR; R. v. Peruta, [1992] 51 C.A.Q. 79 (Can.

Far less evidence exists to suggest that Canadian prosecutors engage in misconduct in relation to charging or the negotiation of plea bargains. There are some cases that suggest there may be issues of concern. In *Grenier v. R.*, the accused had asked to take a polygraph. Despite the fact that polygraph evidence is inadmissible and of questionable reliability, the prosecutor made a plea offer in which if the accused passed a polygraph the charges would be dropped, but if the accused failed the polygraph he would either have to plead guilty or forego representation by his present counsel.¹¹¹ In *R. v. Delchev* the prosecutor offered a plea to an accused on the condition that the accused both admit that he lied during a preliminary inquiry, and that his lawyer had known that he was lying.¹¹² The Ontario Court of Appeal ordered a new trial in *Delchev* to allow the trial judge to consider whether this was an abuse of process; the Court viewed this conduct as improperly interfering with the relationship between the accused and his counsel. In general, however, there are fewer opportunities for Canadian prosecutors to abuse the plea bargaining process than exist in the United States. Very few crimes in Canada attract significant mandatory minimum sentences and there is no death penalty.¹¹³ When, for example, Canada introduced new mandatory minimum penalties for drug offences where an aggravating factor was present (for example, where it involved a weapon, violence or a youth) the mandatory minimum penalties range from nine months to three years.¹¹⁴ While this gives the prosecutor some leverage, it is not particularly consequential. In addition, while legal aid in Canada is not as well funded as it used to be, and the right to counsel is not as robustly protected as would be ideal, a person accused of a serious crime is still likely to be represented by competent counsel.¹¹⁵ Bail is also relatively

Que. C.A.); *R. v. Suarez-Noa*, [2015] ONSC 3823 (Can. Ont. S.C.); *R. v. Sun*, [2002] O.J. No. 2166 (Can. Ont. S.C.J.); *R. v. Griffin*, [1993] O.J. No. 2573, ¶¶ 25-31 (Can. Ont. C.J. Gen. Div.); *R. v. Porter*, [1992] O.J. No. 2931 (Can. Ont. C.J. Gen. Div).

111. For reasons that seem unconvincing, the Court did not find this to be improper conduct. *Grenier v. R.*, (2014) NB 68 (Can. N.B. Q.B.). For a discussion of the case, see Woolley, *supra* note 13.

112. See *R. v. Delchev*, [2015] ONCA 381, ¶ 67 (Can. Ont. C.A.).

113. See 6.2 *Mandatory Minimum Penalties for Particular Drug Offences Under the Controlled Drugs and Substances Act*, PUB. PROSECUTION SERV. OF CANADA (Mar. 1, 2014), <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfp/fps-sfp/tpd/p6/ch02.html> [<https://perma.cc/UAT4-EDFP>].

114. *Id.*

115. See *R. v. Rowbotham*, [1994] 2 S.C.R. 463 (Can. Ont. C.A.).

easier to obtain in Canada, and the Supreme Court of Canada has imposed strict limits on the time the Crown can take in bringing a matter to trial before charges will be thrown out (although being in remand in Canada could still incentivize an accused to agree to a plea).¹¹⁶

Plea bargaining is a robust part of Canadian criminal justice, but an accused who goes to trial cannot risk the sorts of consequences suffered by American accused like Weldon Angelos, a petty marijuana dealer sentenced to fifty-five years' incarceration.¹¹⁷ A Canadian prosecutor lacks the systemic power of an American prosecutor in relation to plea negotiations.

That is not to suggest that Canada's criminal justice system is free of systemic injustice. Canada incarcerates indigenous people at a rate far in excess of non-indigenous peoples.¹¹⁸ Marie Manikis has argued that Canadian prosecutors ought to, as a matter of professional duty, be required to prosecute cases in light of law that ameliorates the sentences of indigenous offenders.¹¹⁹ The less punitive nature of Canadian criminal law simply softens the impact of that injustice relative to America.

IV. FRANCE

The French criminal justice system is rooted in the inquisitorial model of criminal procedure.¹²⁰ Under this model, a neutral judicial

116. See, e.g., *R. v. Cody*, [2017] 1 S.C.R. 659 (Can.); *R. v. Antic*, [2017] S.C.R. 509 (Can.) (explaining requirements for judicial interim release); *R. v. Jordan*, 2016 S.C.R. 631 (Can.).

117. See Luna & Wade, *Prosecutors as Judges*, *supra* note 9, at 1422. The one place where a prosecutor would have some serious leverage is if an accused committed multiple homicides, given that Canadian law now permits consecutive mandatory minimum sentences (i.e., a potential mandatory sentence of seventy-five years for a triple homicide).

118. *Backgrounder: Aboriginal Offenders – A Critical Situation*, OFF. OF THE CORRECTIONAL INVESTIGATOR (Sept. 16, 2013), <http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20121022info-eng.aspx> [<https://perma.cc/UYE6-GEJF>].

119. See Marie Manikis, *Towards Accountability and Fairness for Aboriginal People: The Recognition of Gladue as a Principle of Fundamental Justice That Applies to Prosecutors*, 21 CANADIAN CRIM. L. REV. 173 (2016).

120. The terms 'inquisitorial' and 'adversarial' are imperfect and some scholars have criticized the extensive use of these categories in comparative criminal justice. See, e.g., Máximo Langer, *The Long Shadow of the Adversarial and Inquisitorial Categories*, in THE OXFORD HANDBOOK OF CRIMINAL LAW (Markus D. Dubber & Tatjana Hörnle eds., 2014), available at <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199673599.001.0001/oxfordhb-9780199673599-e-39> [<https://perma.cc/CU5E-CCPP>];

officer is tasked with carrying out an official investigation into the crime to establish the truth. By contrast, in the adversarial model, each party conducts its own inquiry and presents its findings to a passive adjudicator.¹²¹ Inquisitorial roots explain the normative claims underpinning the role of public prosecutors in French criminal procedure. The *juge d'instruction* (the investigative judge) is usually presented as the paradigmatic example of the neutral judicial officer in the French inquisitorial procedure: Article 81 of the *Code de procédure pénale* (Code of Criminal Procedure) (“CPP”) states that the *juge d'instruction* “undertakes in accordance with the law any investigative step he deems useful for the discovery of the truth. He seeks out evidence of innocence as well as guilt.”¹²² Yet, in practice, less than two percent of cases are dealt with in this way.¹²³ The vast majority of cases are nowadays investigated by the police under the supervision of another judicial officer, the public prosecutor.

Procureurs belong to the *magistrature* (the French career-trained judiciary) along with trial judges and *juges d'instruction*. *Magistrats* can and do switch between roles throughout their career. As *magistrats*, French public prosecutors are required to act in and uphold the public interest. When supervising police investigations, *procureurs* must therefore ensure that evidence of innocence as well as guilt is collected. Furthermore, they have an important role as guarantors of individual freedoms as they supervise the period of police detention, called the *garde à vue* (“GAV”). This role flows from Article 66 of the Constitution which proclaims: “No one shall be arbitrarily detained. The judicial authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by

John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737, 737–64 (2005). However, the traditional distinction remains useful to explain fundamental differences between legal cultures as each system remains rooted in its own tradition, even though no system is a pure representation of one model or the other.

121. See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 UNIV. PA. L. REV. 506–89 (1973).

122. Code de procédure pénale [C. com] [Criminal Procedure Code], art. 81 (Fr.).

123. Calculated as a percentage of cases proceeded with by public prosecutors (i.e. including prosecutions and alternatives to prosecution), 16,772 cases out of 1,110,952 were sent to the *juge d'instruction* (around 1.51%, or 2.89% of prosecuted cases) in 2015. See LES CHIFFRES-CLÉFS DE LA JUSTICE 2016, MINISTÈRE DE LA JUSTICE 14 (2016), available at http://www.justice.gouv.fr/art_pix/stat_CC%202016.pdf [<https://perma.cc/2XP4-EVWZ>].

statute.”¹²⁴ The *Conseil constitutionnel* (French constitutional court) has repeated on a number of occasions that the “judicial authority” included both judges and public prosecutors.¹²⁵

Ethical rules compiled by the High Council for the Judiciary apply to both judges and prosecutors. Paragraph C.41 insists on the impartiality that should characterize *procureurs*’ decisions: “[i]n all their professional activities and particularly when directing investigations and supervising police officers’ activities, prosecutors shall endeavor to objectively seek evidence that will establish the truth,”¹²⁶ which clearly excludes seeking to obtain a conviction at all costs.

These normative claims also form part of the rhetoric used by public prosecutors themselves to describe their role. A public prosecutor Soubise interviewed for her doctoral study¹²⁷ described his role as such: “We must be impartial and I lay claim [*je revendique*]¹²⁸ to the *procureur*’s impartiality up until the moment he stands up to speak at trial . . . where he asks for a sentence, where he asks for the defendant to be found guilty and to be sentenced.”¹²⁹

Crucially, the status of *magistrat* afforded to *procureurs* has practical consequences on French criminal procedure. Most importantly, the role of the defense lawyer is greatly diminished, in comparison to its Anglo-American counterparts.¹³⁰ Since the

124. 1958 CONST. art. 66 (Fr.).

125. See Conseil Constitutionnel [CC] [Constitutional Court] decision No. 93-326 DC, du 11 août 1993, Jan. 4, 1993, at ¶ 5 (Fr.), available at www.conseil-constitutionnel.fr/decision/1993/93326dc.htm [https://perma.cc/C5CR-FW45]; Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2004-492 DC du 2 mars 2004, Mar. 2, 2004, at ¶ 98 (Fr.), available at www.conseil-constitutionnel.fr/decision/2004/2004492dc.htm [https://perma.cc/TKW9-LQJJ]; Conseil Constitutionnel [CC] [Constitutional Court] decision No.2010-14/22 QPC du 30 juillet 2010, July 30, 2010, at ¶ 26 (Fr.), available at www.conseil-constitutionnel.fr/decision/2010/201014_22qpc.htm [https://perma.cc/W797-5TWK].

126. Compendium of the Judiciary’s Ethical Obligations, ¶ C.41 (2010) (Fr.).

127. Soubise observed the work of *procureurs* at a medium court center for two months in 2013 and carried out semi-structured interviews with nine prosecutors for her 2016 doctoral study. Soubise coded her interviews with the letters “FR” for France and a number.

128. “Je revendique” can be translated in several ways: to claim or to lay claim to, but also to demand something and/or to affirm/assert it.

129. Interview respondent FR8.

130. See JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE 102 (Hart Publishing 2005); Daniel Soulez-Larivière, *Le problème du ministère public français*, AJ PÉNAL 112 (2011); Stewart Field & Andrew West, *Dialogue and the Inquisitorial Tradition: French*

investigation is supervised by a *magistrat* and is supposed to have collected both incriminatory and exculpatory evidence, its findings are perceived as particularly trustworthy. According to inquisitorial principles, there is no need for a parallel investigation by the defense, as would be expected in an adversarial system. The case file forms the centerpiece of the trial: it is read by trial judges prior to the hearing and judges use the evidence included in the file as a basis to question the defendant. It is rare for witnesses to be called at the trial since their statements can simply be read from the file.¹³¹ It is particularly difficult for defense lawyers to challenge the results of the judicial inquiry, given their perceived bias in favor of their client, as opposed to the supposedly neutral judicial investigation.¹³²

The role of ensuring a fair and accurate assessment of guilt theoretically played by *procureurs* justified, until recently, the fact that defense lawyers were not permitted to advise suspects at the police station or to attend police interrogations. Since due process rights of suspects were supposed to be guaranteed by the prosecutor, there was no need—the argument went—for defense lawyers. The participation of defense lawyers in pre-trial investigations has slowly developed, in particular due to the influence of the European Court of Human Rights (“ECtHR”).¹³³

Their status of *magistrats* also justifies the central role played by *procureurs* in French criminal procedure. Not only do they decide whether to and on what charge to prosecute a case, but they can also divert the case to an alternative to prosecution or choose which procedural pathway (e.g., guilty plea, speedy on-file procedure, traditional trial, etc.) to use. In recent years, their status as a *magistrat* has justified the transfer of powers from judges to *procureurs* in order

Defence Lawyers in the Pre-Trial Criminal Process, 14 CRIM. L. F. 261, 216-316 (2003); Stewart Field, *Judicial Supervision and the Pre-Trial Process*, 21 J. L. SOC. 119, 119-35 (1994).

131. A different procedure applies for serious crimes, such as rape and homicide. Cases involving defendants accused of those serious offenses are heard by the *Cour d'assises*, the only criminal court involving a jury of citizens in the French legal system. Unlike in less serious cases, witnesses are called before the *Cour d'assises*.

132. See Jacqueline Hodgson, *The Role of the Criminal Defence Lawyer in an Inquisitorial Procedure: Legal and Ethical Constraints*, 9 LEGAL ETHICS 125-44 (2006); Field & West, *supra*, note 130 at 296-97.

133. See JODIE BLACKSTOCK ET AL., *INSIDE POLICE CUSTODY: AN EMPIRICAL ACCOUNT OF SUSPECTS' RIGHTS IN FOUR JURISDICTIONS* (2014); Dimitrios Giannouloupoulos, “*North of the Border and Across the Channel*”: *Custodial Legal Assistance Reforms in Scotland and France*, CRIM. L. REV. 369, 369-84 (2013).

to speed up the criminal justice process. The *ordonnance pénale* is a procedure in which the judge makes a decision purely on the prosecution papers, without a hearing, effectively giving *procureur* an adjudicating function in practice.¹³⁴ Two new procedures, such as the *composition pénale* (introduced in 1999) and the *comparution préalable sur reconnaissance de culpabilité* (“CRPC”) (introduced in 2004), even give *procureurs* sentencing powers as they can offer a sentence to defendants who have admitted their guilt.¹³⁵ All these new procedures require the validation of a judge, but the checks have been described as “succinct” by researchers.¹³⁶ However, some French scholars have defended these new procedures on the grounds that the prosecutor is a *magistrat* and, as such a “natural defender of freedoms, just like judges.”¹³⁷

The French criminal justice system, along with other inquisitorially based systems, is classically described as relying on internal bureaucratic accountability to keep public officials, such as *procureurs*, in check.¹³⁸ The Ministry of Justice issues circulars which define its prosecution priorities or its interpretation of new law. The implementation of these national policies is ensured by the centralized hierarchy of the French public prosecution service, with the Minister of Justice at the top. However, the hierarchical organization of the

134. It should be noted, however, that these new procedures have resulted in formal agreements between judges and prosecutors on the type of cases which should be dealt with by *ordonnance pénale*, *composition pénale* or CRPC. This includes an agreement on the kind of sentence that is appropriate in these cases. Thus, although judges have lost decision-making power, they have regained some of it ahead of the decision to prosecute. See, e.g., S. Grunvald, *Les choix et schémas d'orientation*, in 4 LA REPOSE PENALE DIX ANS DE TRAITEMENT DES DELITS 109–10 (J. Danet ed., 2013); Vanessa Perrocheau, *La Composition Pénale et La Comparution Sur Reconnaissance de Culpabilité: Quelles Limites à l'omnipotence Du Parquet?*, in 1 DROIT ET SOCIÉTÉ 55 (2010); Jean Danet & Sylvie Grunvald, *Brèves Remarques Tirées d'une Première Évaluation de La Composition Pénale*, in AJ PENAL 196 (2004); Jean-Daniel Régnauld, *Composition Pénale: L'exemple Du Tribunal de Cambrai*, in AJ PENAL 55 (2003).

135. See generally Laurene Soubise, *Guilty Pleas in an Inquisitorial Setting – An Empirical Study of France*, J. L. & SOC'Y, 398, 398–426 (2018).

136. Claire Saas, *De la composition pénale au plaider-coupable: le pouvoir de sanction du procureur*, REV. SCI. CRIM. & COMP. L. 827, 827–43 (2004).

137. Jean Pradel, *Défense du plaider de culpabilité. À propos du projet de loi sur les évolutions de la criminalité*, SEMAINE JURIDIQUE, 169, 169–71 (2004).

138. For a classic account, see MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986); see also Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH & LEE L. REV. 1587, 1587–620 (2010).

French prosecution service is characterized by a system of loyalty and trust rather than strict orders demanding disciplined obedience. Moreover, ministerial circulars often limit themselves to broad principles and relatively vague targets, allowing for wide prosecutorial discretion in practice.¹³⁹

Although the professional ethos and ethical rules emphasize a neutral attitude for prosecutors, the behavior of prosecutors in practice does not match these aspirations. Empirical research has showed that the relationship between police investigators and *procureurs* is characterized by mutual trust, rather than by checks and close monitoring. Mouhanna noted the strong interdependence which exists between police investigators and *procureurs*.¹⁴⁰ Public prosecutors are largely office-based and therefore depend on the police for any information, while police officers need *procureurs* as the police's own legal powers are limited.¹⁴¹ Mouhanna thus observed a relationship of trust between police and prosecutors, based on a shared objective of putting together procedurally strong cases, i.e., legally solid cases which cannot be taken apart by defense lawyers.¹⁴² The importance of trust has been reinforced by the introduction of *traitement en temps réel* (real time processing) where *procureurs* receive reports from police investigators over the phone.¹⁴³ In Soubise's own research, one *procureur* confirmed the importance of trust in supervising police investigations:

A lot of things are actually based on trust. Phone duty has taken such proportions, that it's obvious that it cannot be managed without trust. If every time we have a case, we ask for the file to be sent to us by post, so that we can check what's in it, because we don't trust the officer who is reporting to us, it becomes unmanageable!¹⁴⁴

139. See Hodgson & Soubise, *supra* note 19.

140. See generally Christian Mouhanna, *Les relations police-parquet en France: un partenariat mis en cause?*, 58 DROIT SOCIÉTÉ 505 (2004).

141. For instance, although police officers can decide to detain a person at the police station, the *procureur* can order her immediate release or refuse to extend the detention period over twenty-four hours.

142. CHRISTIAN MOUHANNA, *POLICES JUDICIAIRES ET MAGISTRATS : UNE AFFAIRE DE CONFIANCE* (2001); Mouhanna, *supra* note 140.

143. BENOIT BASTARD & CHRISTIAN MOUHANNA, *UNE JUSTICE DANS L'URGENCE: LE TRAITEMENT EN TEMPS REEL DES AFFAIRES PENALES* (2007).

144. Interview respondent FR2.

Procureurs are therefore primarily concerned with the formal conformity of the case file to due process safeguards, rather than their actual application. For instance, they can check that the police have properly recorded that they have informed the suspect of his rights, but they do not check how and in which circumstances this notification has been done.

Furthermore, Hodgson found that a crime control perspective often infused *procureurs*' understanding of "the public interest." For instance, she observed that *procureurs* frequently extend the police detention period over twenty-four hours to put pressure on suspects to confess.¹⁴⁵ This was confirmed by Soubise's own, more recent, observations where a *procureur* told the police that he was going to extend the police detention while commenting "you need to work him up. . . . Carry on questioning him late tonight and early tomorrow morning."¹⁴⁶ In another case where the police carried out an illegal house search in which they seized a computer, the *procureur* considered trying to keep the computer as evidence, in the hope that the defense would not raise the illegality of the search before deciding to return the computer to the suspect and ask whether he would agree to let the police examine it.¹⁴⁷ This behavior is clearly at odds with the image of neutral judicial officer linked to the status of *magistrat* and suggests that defense of the defendant's interests is actually seen as the responsibility of the defense lawyer, rather than that of the prosecutor. It is interesting to note that the *procureur* decided to act in conformity with the ethos of *magistrats* in the end, although it remains unclear whether this could partly be explained by the presence of the researcher, as well as a trainee *magistrat* at the time.

Although these examples suggest a conviction mindset, there is little evidence that French prosecutors engage in similar misconduct to that of American or Canadian prosecutors. Several reasons can account for that. First, *procureurs* have different powers from adversarial prosecutors. Although they can require the police to interview a particular witness, all witness statements are automatically added to the case file and prosecutors do not have the possibility to select witnesses whose accounts fit the prosecution case. Similarly, French prosecutors do not have the power to select the evidence which should be disclosed

145. Hodgson, *supra* note 10 at 171–77.

146. Case F-47 (on file with author).

147. Case F-49 (on file with author).

to the defense as the dossier of evidence must be disclosed in full. As witnesses are often absent from court, witness coaching or aggressive cross-examination are unlikely to be an issue either. The interrogation of the defendant (or any other witness present) is principally conducted by the trial judge and prosecutors can merely ask additional questions afterwards. However, French public prosecutors have been disciplined for making inflammatory or racist statements to the court, for instance by linking the belonging of the defendant to the travelers' community to a criminal lifestyle.¹⁴⁸

Second, although *procureurs'* decisions are recorded on file—mostly by the police who note that they are acting in accordance with the *procureur's* instructions—there is no recording of the reasons that have led to the decision. This absence of reasons is in line with the dominant perception in French legal culture that the application of the law is an objective task leading to a logical conclusion and, therefore, there is no need to detail the reasoning behind it,¹⁴⁹ but it is also an obstacle to any in-depth review of *procureurs'* decisions. Audits therefore remain rare in the French criminal justice system and have been limited to miscarriages of justice, such as the Outreau case in which thirteen out of seventeen defendants were acquitted (seven in first instance and six on appeal) in 2004-05, after having spent several years in pre-trial detention. A working party was immediately set up by the Ministry of Justice,¹⁵⁰ followed by a parliamentary inquiry.¹⁵¹ Since serious and complex cases such as Outreau are dealt with through the *instruction* procedure, the reports and ensuing public debates mainly focused on the work of the *juge d'instruction* in the case, rather than the *procureur*. The reports into the Outreau scandal blamed the prosecutor for failures which amounted to negligence rather than willful misconduct. The prosecutor in the case was not sanctioned.

148. See *P082*, CONSEIL SUPERIEUR DE LA MAGISTRATURE (Oct. 13, 2015), www.conseil-superieur-magistrature.fr/missions/discipline/p082 [https://perma.cc/7ZYP-UWPW]; *P052*, CONSEIL SUPERIEUR DE LA MAGISTRATURE (Jan. 27, 2006), www.conseil-superieur-magistrature.fr/missions/discipline/p052 [https://perma.cc/K68L-QJH5].

149. See JOHN BELL, *FRENCH LEGAL CULTURES* (2001); JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE 21-25* (2005); CHRISTOPHE MINCKE, *EFFICACITE, EFFICIENCE ET LEGITIMITE DEMOCRATIQUE DU MINISTERE PUBLIC: QUAND L'ARBRE CACHE LA FORET* (2002).

150. MINISTERE DE LA JUSTICE, *RAPPORT DU GROUPE DE TRAVAIL CHARGE DE TIRER LES ENSEIGNEMENTS DUE TRAITEMENT JUDICIAIRE DE L'AFFAIRE DITE 'D'OUTREAU'* (2005).

151. PHILIPPE HOUILLON, *ASSEMBLEE NATIONALE*, No. 3125 (June 6, 2006).

Crucially, the non-partisan gathering of evidence by the police under the authority of the *procureur* is one of the main safeguards of inquisitorial systems against miscarriages of justice. Although defense lawyers have been progressively granted a greater role in investigations, they are still largely unable to compensate for the conviction mindset of the *procureur* and the resulting imbalance in the investigation. There is indeed limited opportunity in French criminal procedure to test the evidence presented in the dossier as the result of the judicial investigation. Yet, the CSM refuses to examine the way prosecutors carry out their duty to conduct an impartial investigation: “the determination by the *procureur* of the tasks to be completed during the preliminary investigation comes under his discretionary powers and cannot constitute a disciplinary fault, as long as it does not demonstrate negligence of a particular gravity or the will to harm the rights of the parties.”¹⁵²

The status of *magistrat* performs a crucial legitimizing role for *procureurs* as guarantors of society’s interests, but the sufficiency of that perspective is being challenged. The ECtHR ruled that the *procureur* could not be the “competent legal authority” or the “other officer authorized by law to exercise judicial power” referred to in the first and third paragraphs of Article 5 of the European Convention of Human Rights (“ECHR”)¹⁵³ because they do not “offer the requisite guarantees of independence from the executive and the parties, which precludes [their] subsequent intervention in criminal proceedings on

152. See *P058*, CONSEIL SUPERIEUR DE LA MAGISTRATURE (July 18, 2008), www.conseil-superieur-magistrature.fr/missions/discipline/p058 ([<https://perma.cc/NC7W-DA47>]).

153. European Convention of Human Rights, art. 5, ¶ 1(c); ¶ 3 (1950):

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: . . . (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

behalf of the prosecuting authority.”¹⁵⁴ The ECtHR rulings were followed by the *Cour de cassation*¹⁵⁵ who recognized that the *procureur* was not a judicial authority within the meaning of Article 5, section 3 of the ECHR.¹⁵⁶ Despite being anticipated,¹⁵⁷ these decisions were described as a “judicial earthquake,”¹⁵⁸ a “storm,”¹⁵⁹ or the “sound of the death knell” for the French prosecutor.¹⁶⁰

The idea of a split of the *magistrature* into two separate professional bodies for judges and public prosecutors seems to be gaining momentum as a 2010 study found that a majority of defense lawyers, but also of judges, wished for a split of the *magistrature*.¹⁶¹ The same research found that *procureurs* were for the most part opposed to this, fearing an “Anglo-Saxon” drift, where prosecutors

154. *Medvedyev & Others v. France*, 2010-III Eu. Ct. H.R. ¶ 124; see *Moulin v. France*, App. 37104/06, ¶ 59 (2010) (ECtHR) available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-101876%22%5D%7D> [<https://perma.cc/96KH-CDRM>]; *Medvedyev & Others v. France*, App No. 3394/03, ¶ 61 (2008) (ECtHR.), available at <http://hudoc.echr.coe.int/eng?i=001-87369> [<https://perma.cc/QP3E-DQ5J>].

155. The *Cour de cassation* is the highest court in the French judiciary. It is not a third level of jurisdiction as it does not rule on the merits of a case. When decisions are referred to the *Cour de Cassation*, the Court is merely required to decide whether the law has been correctly applied by the lower courts based on the facts.

156. Cour de cassation [Cass.] [supreme court for judicial matters] crim., Dec. 15, 2010, Bull. crim., no. 207 (Fr.).

157. Already in 2003, Renucci warned that the *procureur* might not meet the requirements detailed in ECtHR case-law to be the “other officer authorized by law to exercise judicial power” referred to in the third paragraph of Article 5 of the ECHR. See Jean-François Renucci, *Le procureur de la République est-il un magistrat au sens de l’article 5, § 3, Conv. EDH?*, RECL. DALLOZ 2268 (2003); Jean-François Renucci, *Le procureur de la République est-il un “magistrat” au sens européen du terme?*, in LIBERTES, JUSTICE, TOLERANCE : MELANGES EN HOMMAGE AU DOYEN GERARD COHEN-JONATHAN VOL. II. 1345 (2004). His concern was later shared by Jean-Paul Jean who argued that this called in favor of a strengthening of the prosecutorial independence in France. See Jean-Paul Jean, *Le ministère public entre modèle jacobin et modèle européen*, REV. SCI. CRIMINELLE 670 (2005).

158. Jean-François Renucci, *Un séisme judiciaire : pour la Cour européenne des droits de l’homme, les magistrats du parquet ne sont pas une autorité judiciaire*, RECL. DALLOZ 600 (2009).

159. Jean-Pierre Marguénaud, *Tempête sur le Parquet*, REV. SCI. CRIMINELLE 176 (2009).

160. Frédéric Sudre, *Le glas du parquet*, SEM. JURID. 2277 (2010).

161. See PHILIP MILBURN, KATIA KOSTULSKI & DENIS SALAS, LES PROCUREURS, ENTRE VOCATION JUDICIAIRE ET FONCTIONS POLITIQUES 147-48 (2010); see Bertrand Louvel, First President of the Cour de Cassation, L’évolution de l’environnement institutionnel du magistrat, Speech (Sept. 21, 2015), available at https://www.courdecassation.fr/publications_26/discours_publications_diverses_2039/discours_2202/premier_president_7084/ouverture_cadej_ebm_21.09.15_32569.html [<https://perma.cc/YZ99-8MS6>] (remarking on his regret regarding the confusion between judicial and executive functions represented by the French *parquet*).

would be reduced to the role of public accusers. They felt that their status of *magistrat* was essential to defend their position.¹⁶² Jean-Claude Marin, the *Procureur Général* for the *Cour de cassation*,¹⁶³ also defended the status of public prosecutors as judicial officers, comparing their role to that of their foreign counterparts, in a 2016 speech to the Ecole Nationale de la Magistrature: “The French prosecutor is not solely a prosecuting authority, limiting her role to that of the accusing party in the criminal trial.”¹⁶⁴ In particular, he underlined the importance of the role of prosecutors in supervising police investigations, by contrast with “many countries, in particular Anglo-Saxon, where the police carry out their investigations in a very autonomous manner.”¹⁶⁵

In reaction to the ECtHR decisions, recent legislative acts seem like attempts by the French legislator to win back the status of judicial officer for the *procureur*. Thus, the Act of July 25, 2013 amended Article 31 of the CPP which now proclaims that “the *procureur* exercises the prosecution function and enforces the law *in conformity with the principle of impartiality which apply to him*.” The Act of June 3, 2016 carried on the trend with the second paragraph of the new Article 39-3 of the CCP which provides that the *procureur* “ensures that [police] investigations aim to the discovery of the truth and seek evidence of innocence as well as guilt.” Both amendments underline the neutrality of the *procureur*’s function in supervising the police investigation and in deciding whether to prosecute or not. However, it is unlikely that these new legislative rules will have much impact in practice. As we have seen, both ethical rules and the professional ethos of *magistrats* already defined a neutral role for French public prosecutors, but it has failed to translate into practice.

162. MILBURN, KOSTULSKI & SALAS, *supra* note 161, at 149–51.

163. The *Procureur Général* of the *Cour de cassation* does not prosecute cases. Her most important task is to ensure a harmonized interpretation of the law and that the case-law of the Court and all lower courts is consistent. The *Procureur général* acts as public prosecutor only in the *Cour de justice de la République*, competent to hear criminal cases against ministers for offences committed in carrying out their duties.

164. Jean-Claude Marin, Attorney General of the Cour de Cassation, L’indépendance statutaire du parquet est-elle compatible avec la définition d’une politique pénale nationale, Speech (Sept. 29, 2016), available at <https://www.courdecassation.fr/IMG/JC%20MARIN%20-%20CADEJ%20-%202016.pdf> [<https://perma.cc/RQ5P-PBBG>].

165. *Id.*

Although legal and ethical rules insist on the duty for prosecutors to act impartially, case law traditionally refuses to apply the principle of impartiality to public prosecutors, further underlining the ambivalence of their role. The *Cour de cassation* thus decided that the *procureur* “whose role is to support the prosecution [and who] does not take part in the judgment of the accused” does not come under the provisions of Article 6 of the ECHR which guarantees the right to a fair trial, including the right to be tried by an independent and impartial tribunal.¹⁶⁶ Even after the recent amendment of Article 31 of the CPP, the *Cour de cassation* found that the ground based on the perceived partiality of the public prosecutor in a specific case is ineffective, because the *procureur* does not decide on the validity of a criminal accusation.¹⁶⁷

The French criminal justice system is not a pure representation of the inquisitorial model. Whilst the functions of investigation, prosecution and trial used to be concentrated in the hands of a single person, the *lieutenant criminel*,¹⁶⁸ some elements of party contest have been introduced over the past centuries, such as the office of the public prosecutor and the defense lawyer. However, the three functions remain linked ideologically and structurally through the common professional body of the *magistrature*. As a result, public prosecutors carry out an ambivalent role: representing society, they are tasked with enforcing the criminal law against suspected offenders, whilst protecting the rights of those same people. In practice, French public prosecutors have been unable to discharge these competing roles effectively and have increasingly emphasized their role in ensuring convictions over protecting the rights of an accused.

V. COMPARISONS AND OBSERVATIONS

Prosecutors in America, Canada and France are all subject to the seek justice imperative;¹⁶⁹ in all three jurisdictions the expectation of prosecutors is that they will not seek simply to convict or to “win,” but

166. *Cour de cassation* [Cass.] [supreme court for judicial matters] crim., Dec. 10, 1986, Bull. crim., no. 370 (Fr.); see André Giudicelli, *Principe d'impartialité : comment l'appliquer au ministère public ?*, 2017 REV. SCI. CRIMINELLE 81, 81–84 (2017).

167. *Cour de cassation* [Cass.] [supreme court for judicial matters] crim., Mar. 9, 2016, Bull. crim., no. 14-86.7957 (Fr.).

168. Hodgson, *supra* note 10 at 68.

169. See *supra*, notes 30, 73-83, 118 and accompanying text.

will rather take some responsibility for the fairness of the process and the accuracy of the verdict.¹⁷⁰ The duty in France is articulated and understood differently because of the inquisitorial system of justice, whereas the Canadian duty mirrors almost exactly its American counterpart in seeking to reconcile the dual role of prosecutors in deciding whether the evidence and the public interest warrant pursuing a matter, and in acting as an adversarial advocate in a criminal trial. As in the United States, the Canadian duty is not clearly articulated, and its precise implications for what a prosecutor ought to do remain unclear. In France, the duty is more clearly expressed as the duty to conduct an impartial investigation and therefore to ensure the collection of evidence of innocence as well as guilt. However, the enforcement of this duty in practice remains problematic.

All three jurisdictions have issues with prosecutors who fail to live up to the seek justice norms to which they are subject.¹⁷¹ Better evidence for the existence and significance of prosecutorial misconduct exists in Canada and the United States than in France. In both Canada and the United States prosecutors have contributed to wrongful convictions, and act in ways that undermine the fairness and accuracy of trials.¹⁷² In France, there has been limited research on the role of prosecutors in miscarriages of justice. As in many jurisdictions, miscarriages of justice in France tend to be detected for the most serious crimes, such as rape and homicide. Since those crimes are investigated by an investigative judge (leaving the public prosecutor with a limited role), reviews of the criminal justice process following these wrongful convictions tend to focus on the judge rather than the prosecutor. At the same time, the evidence in France supports the suggestion that French prosecutors engage in acts contrary to their role, failing in particular to properly oversee and control criminal investigations.

There is no data about the relative prevalence of misconduct in Canada as compared to the United States. The comparatively sparse commentary on prosecutors in Canada could suggest that prosecutorial misconduct occurs less frequently in Canada; however, that sparsity could be a product of the deficiencies in Canadian scholarship on legal

170. *See supra*, notes 30, 73-83, 118 and accompanying text.

171. *See supra*, notes 20-30, 33-36, 105-16, 140-47 and accompanying text.

172. *See supra*, Parts II and III.

ethics,¹⁷³ and Canada's relatively small population, rather than a reflection of prosecutorial probity. Having said that, the nature and extent of prosecutorial misconduct does vary between the jurisdictions. There is relatively little evidence, for example, that Canadian prosecutors take advantage of systemic factors to coerce plea agreements from an accused.¹⁷⁴ Indeed, the lack of severe mandatory minimums, the representation of accused in serious cases, the requirement to bring a trial forward in a reasonable time, and the easier availability of judicial interim release makes it very difficult for a Canadian prosecutor to coerce a plea agreement, even were they so inclined.¹⁷⁵

The structures in which prosecutors work vary between the jurisdictions, to a lesser (e.g., Canada) and greater (e.g., France) extent.¹⁷⁶ Canadian prosecutors are never elected, but like their American counterparts they have responsibility for both decisions about whether and how to proceed in a matter, and for conducting a trial within an adversarial system.¹⁷⁷ French prosecutors are appointed judicial officers with a similar status as judges. They are responsible for supervising the police investigation and ensure the non-partisan collection of evidence in the case dossier which will become the centerpiece of any subsequent trial.

The regulation and oversight of prosecutors across all jurisdictions suffers from material gaps.¹⁷⁸ In all three jurisdictions the guidance given to prosecutors by regulatory bodies is relatively minimal.¹⁷⁹ All Canadian prosecutors can access policy manuals or guidebooks published by their employers on which they can rely, and which may shape the cultures of prosecutorial offices.¹⁸⁰ In addition, case law guides American and Canadian prosecutors regarding their

173. Adam Dodek, *Canadian Legal Ethics: A Subject in Search of Scholarship*, 50 U. TORONTO L.J. 115 (2000); Adam Dodek, *Canadian Legal Ethics: Ready for the Twenty-First Century at Last*, 46 OSGOODE HALL L.J. 1 (2008).

174. *See supra*, notes 111-17 and accompanying text.

175. *Id.*

176. *See supra*, notes 53-61, 65-104, 120-139 and accompanying text.

177. *See supra*, Part III.

178. *See supra*, 53-60, 68-102, 122-139 and accompanying text.

179. *See supra*, Parts II-IV.

180. Some American prosecutors also have policy manuals, although by no means all. It should be noted that even with policy manuals and guidebooks, practices can vary between different prosecutor offices in Canada. *See* Glen Luther, *The Frayed and Tarnished Silver Thread: Stinchcombe and the Role of Crown Counsel in Alberta*, 40 ALBERTA L. REV. 567 (2002).

prosecutorial duties—identifying behavior that is properly characterized as misconduct and the constraints that apply to prosecutors in the conduct of a trial. At the same time, however, courts grant both Canadian and American prosecutors almost unfettered independence in relation to their decisions about whether and in what way to bring forward a prosecution, and they also defer to prosecutors on matters of trial strategy. In France, the main source of prosecutorial guidance is the Code of Criminal Procedure, complemented by circulars from the Ministry of Justice, as well as broad ethical guidelines from the Higher Council for the Judiciary. However, although *procureurs* are theoretically accountable to their hierarchy and, ultimately, to parliament through the Minister of Justice, they enjoy a wide degree of discretion and rarely have to give reasons for their decisions in practice. Importantly, in no jurisdiction do prosecutors risk meaningful personal consequences when they engage in misconduct.¹⁸¹

What follows from these comparative observations in relation to the proposals for addressing prosecutorial misconduct that arise in the American literature—reforming the “do justice” imperative, improving regulation of prosecutors or changing the structure or culture in which prosecutors work?¹⁸²

In our view, looking at the United States, Canada and France suggests that structural and systemic factors have the most significant impact on the nature and extent of prosecutorial misconduct. While misconduct occurs in all three jurisdictions, both the similarities and the differences in that misconduct seem directly related to similarities and differences between how prosecutors work in the different jurisdictions. Canadian and French prosecutors are less likely to abuse decisions on whether and how to proceed against a criminal accused because doing so is not usually possible. On the other hand, both American and Canadian prosecutors do from time to time engage in unduly adversarial conduct in a trial. That seems likely to reflect their shared structural obligation to act as adversarial advocates; if we want prosecutors to be adversarial advocates, it is unsurprising that, from time to time, some of them will take that obligation too far. In France, in conformity with the inquisitorial tradition, more weight is attached

181. Subject to the caveat that it is at least theoretically possible that prosecutors in Canada and France who commit misconduct lose their job or suffer other work-related consequences.

182. See *supra*, notes 33-61 and accompanying text.

to the pre-trial phase where the evidence should be collected in a non-partisan manner. At trial, the judge plays an active role in interrogating the defendant and any potential witnesses based on the dossier of evidence, leaving only a peripheral role to the *procureur* and, therefore, more limited opportunity for prosecutorial misconduct to have a serious impact on the outcome. For French prosecutors, the issues arise in the area where they have relatively unfettered power—the supervision of an investigation.

If we want to change prosecutorial behavior to a significant extent, we need to change the structural factors that produce the behavior we do not want. This may include measures suggested by American scholars around separating the prosecutorial and adversarial function from Canadian and American prosecutors, permitting some judicial review of prosecutorial decision-making in Canada and America, but also working towards improving the justice of the criminal law for which prosecutors are responsible. In France, the most productive changes are likely to be ones which reduce or check the power of prosecutors in relation to the supervision of investigations—that is, which discourage the uncritical acceptance by French prosecutors of improper investigatory practices. These changes may not be realistically likely to be adopted, but the comparative experience between America, France and Canada suggests that it is in structural reforms that prosecutorial misconduct can be addressed.

The comparisons offer less clear support for the importance of culture to shaping prosecutorial decisions. All Canadian prosecutors have guidelines and policy manuals, and in general the professional culture of Canadian lawyers is different from the United States, tending to be somewhat less focused on the unqualified virtues of zealotry.¹⁸³ Yet Canadian prosecutors still commit professional misconduct. The nature and extent of that misconduct may be less significant and consequential than that which occurs in the United States, but we do not have data to support that conclusion. It may also be that the guidelines given to all Canadian prosecutors with respect to the exercise of prosecutorial discretion support prosecutors in not engaging in misconduct when exercising that discretion. We suspect, however, that the systemic factors are far more significant in preventing that behavior. Although strong inquisitorial expectations shape the role

183. See Alice Woolley, *Integrity in Zealotry: Comparing the Standard Conceptions of the Canadian and American Lawyer*, 9 CAN. J. L. & JURIS. 61 (1996).

of the French prosecutor in theory, research has shown that *procureurs* often share the police crime control objectives in practice, putting the fairness of the French criminal process at risk, given the limited role afforded to defense lawyers. It may be that cultural initiatives could shift the attitudes of French prosecutors favoring crime control, but it is unclear how, absent a structural shift, that change could be accomplished. In our view, reforms directed at improving prosecutorial culture are unlikely to be particularly effective in changing prosecutorial behavior unless coupled with structural reforms.

With respect to regulatory responses, the current absence of meaningful regulation, when combined with the observation that structural factors materially affect prosecutorial conduct, suggests that improving how we regulate prosecutors may be effective in improving prosecutorial behavior. It is hard not to see *some* regulatory response as being better than next to none. Meaningful regulation in the form of clear rules, real consequences for violation of the rules, or—more importantly—adopting innovative forms of compliance regulation for prosecutorial offices may have a meaningful positive impact on prosecutorial behavior. On the other hand, the cross-jurisdictional unwillingness to regulate prosecutors may also suggest, as Green and Zacharias noted,¹⁸⁴ that more rigorous regulation is not realistically likely to be pursued. Neither courts nor regulators in any jurisdiction have shown much enthusiasm for addressing prosecutorial misbehavior through regulatory means.

Finally, with respect to reforms focused on the “do justice” norm, while no jurisdiction articulates that norm particularly well, the fact that all three jurisdictions rely on it, yet have material deficiencies in prosecutorial conduct, makes us skeptical about the capacity for a better articulated norm to, on its own, change prosecutorial behavior. As acknowledged, the norms as currently stated do not provide especially useful direction to prosecutors and, in Canada and the United States at least, suffer from internal incoherence and deep ambiguity. The various proposals for better articulating what that norm means and requires would inarguably improve its capacity for shaping prosecutorial behavior (although which approach was adopted would require normative choices to be made, since the proposals do not all run in the same direction). At the same time, no honest prosecutor could claim that the behavior documented in case law and studies of prosecutorial

184. Zacharias & Green, *The Duty to Avoid Wrongful Convictions*, *supra* note 7, at 58-59.

behavior is consistent with the “do justice” ethic, however inadequately that ethic has been expressed. The things prosecutors sometimes do in Canada, the United States and, to a lesser extent, in France involve trying to win at all costs, denying procedural rights to the accused and tilting the scales of justice in favor of conviction; acting, in other words, entirely contrary to what a prosecutor would do if they were seeking justice. This suggests, in our view, that more carefully or deeply explaining the “do justice” ethic will not, without more, meaningfully affect prosecutorial behavior. Structural and regulatory changes are what is required.

Our comparative analysis thus concludes on a somewhat gloomy note—the most effective changes are likely to be structural and regulatory, but they are also the least likely to be pursued. Changes that may be less difficult to achieve, to culture or to how we articulate governing norms, are the least likely to have any effect on prosecutorial behavior.

VI. CONCLUSION

No group of lawyers has higher ambitions, yet so significantly and frequently fails to achieve them, than criminal prosecutors. Prosecutors in America, Canada, and France seek to do justice but, albeit in different ways, do not. Can we do better? American academic literature has set out different paths for reform—through shifts to the structure, regulation, culture or norms governing American prosecutors. The comparative analysis of this paper, which considers the similarities and differences between the norms, behavior and work environment of American, Canadian, and French prosecutors, provides some insights into the merits of those proposed reforms. The question going forward will be whether any of these jurisdictions will be willing to embrace reform, particularly the sorts of reforms most likely to create better behavior by prosecutors. Ensuring prosecutors accomplish justice requires something different than telling them to be just: it requires making justice likely in light of the substantive norms of the criminal law and the structural design of the criminal justice system. A criminal justice system that punishes unjustly, or grants prosecutors unchecked power, will not reliably accomplish any sort of justice.