

# EVERYBODY TALKS ABOUT PROSECUTORIAL CONDUCT BUT NOBODY DOES ANYTHING ABOUT IT: A 25-YEAR SURVEY OF PROSECUTORIAL MISCONDUCT AND A VIABLE SOLUTION

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*Prosecutors are entrusted with the essential task of prosecuting criminal cases against alleged lawbreakers, but for the most part they are able to commit misconduct without consequence. The Author's initial proposal in a previous article was to hold prosecutors accountable via an administrative agency. Due to concerns about the fiscal and political viability of this proposal, this Article utilizes findings from a twenty-five year-survey of prosecutorial misconduct to craft a Prosecutorial Review Panel, which would identify the proper discipline and administer it based on findings of misconduct by appellate courts.*

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## I. INTRODUCTION

Prosecutors, whom we trust to carry out the demanding and essential business of prosecuting the People's case against alleged law-breakers, are free to commit misconduct with impunity.<sup>1</sup> They suffer no disciplinary repercussions for their misdeeds.<sup>2</sup> The only adverse consequence facing an erring prosecutor is the extremely rare prospect of having a conviction overturned due to his misconduct. Even then the prosecutor will not be subject to any sanction: no citation for contempt, no suspension of license, no civil liability, no fine, not even so much as a censure.<sup>3</sup>

In an earlier article entitled *The Prosecutor Prince*,<sup>4</sup> I proposed the creation of an independent commission empowered to investigate claims of alleged prosecutorial misconduct, which would also mete out discipline should the claims be warranted.<sup>5</sup> As set forth in that article, the

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1. See H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 86 (2013).

2. *Id.* at 55.

3. *Id.* at 83.

4. Caldwell, *supra* note 1.

5. See *id.* at 98–101.

commission would be modeled after California's Judicial Panel, which has proven effective in dealing with instances of judicial misconduct.<sup>6</sup>

The purpose of this Article is not to once again make the case that prosecutorial misconduct is prevalent and represents a stain on the American justice system—that purpose has been thoroughly accomplished in the earlier article and by countless others.<sup>7</sup> Rather, the twofold purpose of this Article is to revise the earlier proposal to make it more fiscally and politically viable,<sup>8</sup> and to use the findings from our recently completed twenty-five-year survey of prosecutorial misconduct as support for the revised proposal.<sup>9</sup>

In offering the earlier proposal, there was a concern that the responsibility for identifying prosecutors' misconduct would prove too daunting a task for an administrative agency.<sup>10</sup> This concern led to considering the viability of using the findings from appellate opinions as the initial screening mechanism identifying misconduct. I reasoned that once misconduct was identified, the proposed agency could go about the business of determining whether and what type of discipline was appropriate.<sup>11</sup>

I directed a team of law student research assistants to examine every California Supreme Court criminal appellate decision over the past twenty-five years in order to ascertain if these decisions and their findings regarding prosecutorial misconduct claims would prove practical as the initial screening method. The students were instructed to study how often claims of prosecutorial misconduct were made, the nature of the claims, how often the court found the claims to be misconduct, and how often misconduct was found to be prejudicial and therefore sufficient to merit reversal. Finally, the students were instructed to identify any instances where the reviewing court meted out any sanctions to the offending prosecutor or to his agency.<sup>12</sup>

I was convinced that our efforts would result in five findings: (1) appellate review of prosecutorial misconduct claims would prove sufficient to identify most acts of misconduct; (2) prosecutorial misconduct would be alleged in a significant number of appeals; (3) the court would find that the majority of claims did not constitute misconduct; (4) in the cases in which misconduct was identified, the court would find the misconduct "harmless" or nonprejudicial, thus not compromising the trial or result-

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6. *Id.* at 93.

7. *Id.* at 88. *See, e.g.*, KATHLEEN M. RIDOLFI & MAURICE POSSLEY, NORTHERN CALIFORNIA INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 (2010); David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011).

8. *See infra* Part IV.

9. *See infra* Part III.

10. Caldwell, *supra* note 1, at 98–99.

11. *See infra* Section V.D.

12. *See infra* Part II.

ing verdict; and (5) there would be little-to-no mention by the court of sanctions against a prosecutor or his agency for acts of misconduct.

Part II sets forth an overview of the initial proposal and the concerns generated by that proposal. Part III details the particulars of the survey of twenty-five years of California Supreme Court criminal opinions, including how we broke down the categories of claims, how we evaluated the claims, and the results of the survey. Part IV includes conclusions drawn from the survey. In Part V, I present my revised proposal for a Prosecutorial Review Panel (“PRP”) based on the results of the survey. In Part VI, I examine the fiscal and political viability of the revised proposal. Part VII lays out the drawbacks of my proposal, and in Part VIII, I offer my conclusion.

## II. PREVIOUS PROPOSAL

My previous article, *The Prosecutor Prince*,<sup>13</sup> suggested the creation of a specific prosecutorial oversight board, designed to identify, investigate, and, if warranted, mete out some manner of discipline.<sup>14</sup> The first tiered response in the earlier proposal was to be a screening committee designed to receive all initial reports of alleged prosecutor misconduct.<sup>15</sup> This three-member committee—comprised of a retired judge, a retired criminal attorney, and a lay person; all selected by the governor or the Chief Justice of the California Supreme Court—would hear all initial allegations of misconduct.<sup>16</sup> The committee would also be charged with ensuring that all due process concerns were met, including timely provision of notice to the prosecutor in question, and assigning counsel if necessary.<sup>17</sup> If two of the three members of the screening committee believed there was error by a preponderance of the evidence, the allegation would be sent to the full commission for further investigation and hearing.<sup>18</sup>

The second tier would require the attention of the entire commission, comprised of a larger and more diverse body including experts in the criminal justice field and laypersons, and would enlist a special prosecutor to investigate and eventually attempt to prove the claim of misconduct.<sup>19</sup> At this later stage, the special prosecutor would be required to convince two-thirds of the commission, by clear and convincing evidence, that such misconduct occurred.<sup>20</sup> If the requisite majority agreed with the special prosecutor, the commission would decide the severity of the misconduct by concluding whether the error was deliberate or inadvertent, and then whether there was a reasonable probability that the misconduct

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13. Caldwell, *supra* note 1.

14. *Id.* at 99–101.

15. *Id.* at 99–100.

16. *Id.* at 99.

17. *Id.* at 101.

18. *Id.* at 99.

19. *Id.* at 100.

20. *Id.* at 99.

affected the underlying case.<sup>21</sup> Based on these findings, the commission would determine the proper sanction, which could include public reprimand, fines, suspension, or disbarment (among other penalties).<sup>22</sup> Once the decision had been rendered, the public would be made aware of any disciplinary action against the erring prosecutor.<sup>23</sup>

It is against the backdrop of this earlier proposal that I undertook the survey below, which ultimately led to the revised proposal set forth in Part V.

### III. THE TWENTY-FIVE-YEAR SURVEY

#### A. *Why Only California Supreme Court Cases*

The initial plan going into this ambitious undertaking was to examine every appellate decision involving criminal cases rendered by the California Supreme Court and California's Court of Appeals in the past twenty-five years. I believed twenty-five years of appellate decisions would suffice to test my hypothesis that appellate opinions could efficiently act as a screening mechanism for prosecutorial misconduct claims. The project as initially envisioned, however, proved too overwhelming. The number of criminal appeals reviewed annually by the California Supreme Court and California Court of Appeals from 1989 to 2014 was greater than 5,000.<sup>24</sup> I then settled on the more reasonable task of reviewing only California Supreme Court opinions involving appeals from criminal convictions. While the sample size was considerably reduced, I believe it sufficient in that over the past twenty-five years the court reviewed 815 criminal cases, which included 553<sup>25</sup> death penalty appeals.<sup>26</sup>

In working through 815 of the Court's criminal opinions spanning twenty-five years, a number of considerations were taken into account. I did not examine *habeas corpus* cases, as I reasoned that the direct appeals of capital cases and appeals to the California Supreme Court from the California Court of Appeals most precisely set forth claims of prosecutorial misconduct.<sup>27</sup> Additionally, given the quantity of opinions, the number of claims made, the occasionally ambiguous nature of some of the court's rulings on some claims, and the duplicitous nature of some of the claims,<sup>28</sup> I knew I could not determine the precise number or nature

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21. *Id.*

22. *Id.*

23. *Id.* at 101.

24. *See, e.g.*, JUD. COUNCIL CAL., 2013 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2002–2003 THROUGH 2011–2012, at 66 (2013), <http://www.courts.ca.gov/documents/2013-Court-Statistics-Report.pdf> (listing the total number of adult criminal appeals filed in the California Court of Appeal in 2011 that resulted in a written opinion as being over 200).

25. *See infra* Part IV and accompanying text.

26. *See infra* Part IV and accompanying text.

27. *See infra* Subsection III.D.1.

28. *See, e.g., infra* Subsections III.D.1.a, II.D.1.f.

of claims raised, nor ascertain any unqualified disposition of them.<sup>29</sup> For instance, I found that on numerous occasions identical claims arose in a particular segment of the same trial.<sup>30</sup> In such instances, when the court found each claim meritless, I opted to lump the claims together as one.

Some may argue that the survey was skewed because it focused only on California Supreme Court cases, which are composed primarily of capital cases and represent only a small percentage of all California prosecutions.<sup>31</sup> Furthermore, it may be argued that such cases, especially capital cases, are nonrepresentative of criminal cases in general; by virtue of their complexity, capital cases have an additional penalty phase, as well as a host of other unique features.<sup>32</sup> To an extent, this criticism is valid—our survey is a relatively small slice of all criminal appeals. Misconduct is misconduct, however, from the most basic prosecutions for misdemeanors of disturbing the peace to serial killer capital cases. Further, since the prosecutors assigned to capital cases are typically the elite trial lawyers in their respective counties, one would expect high-caliber efforts relatively free of misconduct. Finally, by focusing on California Supreme Court cases, we have definitive rulings on what constitutes prosecutorial misconduct, as defined and explained by the state's top court.

The purpose of the survey was not to simply count and categorize claims of prosecutor misconduct, but rather to meet two specific goals. First was to gain insight on the relative frequency of misconduct claims, their nature, and the court's disposition of the claims. While we have previously called for remedial action regarding prosecutorial misconduct, our support for such action was primarily anecdotal.<sup>33</sup> With the support of our survey, I believe the call for some manner of solution is merited. The second goal was to evaluate whether appellate opinions could be used to target misconduct claims and initiate the prosecutorial review process. Given how the court painstakingly evaluated such claims, their review is sufficient to accomplish the initial identification phase of my proposal. Moreover, with this latter realization, a more feasible proposal to cope with prosecutorial misconduct was realized.

### B. *Categories of Misconduct Claims*

As I supervised the study, each claim of misconduct that a defendant raised was included in one of thirteen categories. These categories of misconduct were based on judicial precedent, state legislation, and rules of evidence and procedure. In any given trial, there could be multiple claims of a single category, or one claim from multiple categories. The

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29. See, e.g., *infra* Subsections III.D.1.a, II.D.1.f.

30. For instance, during a single closing argument there might arise three claims that the prosecutor misstated evidence. See, e.g., *People v. Tully*, 282 P.3d 173 (Cal. 2012).

31. See *infra* Subsection III.D.1.

32. See, e.g., *infra* Subsection III.D.1.

33. See Caldwell, *supra* note 1, at 55–56.

strategy was to tally the total number of claims made and the court's disposition of the claims, without regard to the seriousness of the claimed offense.

Prior to setting forth the thirteen categories of misconduct, I note that, while most of the claims neatly fell into identifiable categories, some were problematic because they fell into overlapping categories.<sup>34</sup> For instance, since there is a category for eliciting improper testimony during direct and cross examination and another category for improperly disparaging the accused and his counsel during opening and closing argument, in such instances I opted (perhaps arbitrarily) to categorize such claims as more properly fitting within the eliciting improper testimony category.<sup>35</sup>

### C. *Evaluating the Misconduct Claims*

I then broke down the court's evaluation of the claims into seven groups. The first was "claim waived, no misconduct."<sup>36</sup> Even though the claim was only first raised on appeal, and therefore had not been preserved by a timely objection at trial, the court opined that the misconduct claim was meritless.<sup>37</sup> The court's analysis, while unnecessary, proved instructive in assessing the court's evaluative analysis of other misconduct claims.<sup>38</sup>

The second group of findings consisted of "claims waived without comment as to misconduct." Unlike the first category, here the court simply found the claim first raised on appeal was waived as a result of a failure to object at trial and did not offer further insight as to the claim itself.<sup>39</sup> Consequently, there was no finding as to whether the conduct involved misconduct.

Group three, labeled "no misconduct," included claims that were preserved at the trial level but which the court ultimately found lacked merit. As will be evident when the breakdown of all claims is set forth, this grouping comprised the greatest number of dispositions by the court in assessing misconduct claims.<sup>40</sup>

The fourth group consisted of claims that were waived, but also found to be "nonprejudicial misconduct." As in the first group, even though these claims were waived, the court went on to opine that they constituted prosecutorial misconduct, but found the misconduct to be

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34. See *infra* Subsections III.D.1.b, III.D.1.f.

35. See *infra* Subsection III.D.1.b.

36. See, e.g., *People v. McDowell*, 279 P.3d 547, 579 (Cal. 2012).

37. *Id.*

38. See *infra* Part III. Even though this analysis of claims was located in the dictum of the court's decision, these cases help to establish a basic framework for later cases.

39. See *infra* Part III.

40. See *infra* Part III. With the exception of the twelfth category "Voir Dire," the "No Misconduct" group had the highest results. In the "Voir Dire" category, the "No Misconduct" group had only one less instance than the "Non-Prejudicial Misconduct" group.

harmless or nonprejudicial when assessed in the context of the entire trial.<sup>41</sup> This group, similar to category one involving waived claims, proved instructive in understanding when and how prosecutors had engaged in misconduct.

Group five consisted of nonprejudicial misconduct. In slight contrast to the previous category, the claims in this category were not waived but were found to be harmless misconduct, thus not impacting the verdict.

The sixth group consisted of “prejudicial misconduct.” This group constituted misconduct claims severe enough to have affected the outcome of the trial, which resulted in reversal of a guilt phase conviction, or in some capital cases, reversal of a death-penalty verdict.<sup>42</sup>

The last group reflects findings of “plain error.” When courts review conduct not objected to at trial, they apply the “plain error” standard. This standard requires the presence of error, plainly recognizable, which affected substantial rights of the accused.<sup>43</sup> Courts will intervene only if the conduct “so poisoned the well that the trial’s outcome was likely affected.”<sup>44</sup> In making a finding of plain error as to prosecutors’ conduct, courts typically consider a number of factors, including, but not limited to, whether the prosecutor acted in bad faith, the frequency and deliberateness of the comments, and the strength of the case against the defendant.<sup>45</sup>

#### D. Results of Study

##### 1. *Improper Comments During Opening Statements and Closing Arguments*

This broad area includes those claims arising during opening statements and closing arguments that are not specifically covered in one of the other categories. This Section includes claims such as misstating evidence at closing argument, referencing inadmissible evidence during opening statement, inviting jurors to speculate, calling for community retribution, commenting on post-arrest silence, and invoking religious references.

While opening statements are generally limited to discussing evidence that will be produced at trial, there is, of course, significant leeway as long as the advocate refrains from referencing evidence that has been

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41. See *infra* Part III.

42. See *infra* Section III.D. These misconduct actions centered on the prosecutors’ comments concerning the accused, his lawyer, and defense witnesses during closing argument.

43. *United States v. Taylor*, 54 F.3d 967, 977 (1st Cir. 1995); see also *People v. Walsh*, 861 P.2d 1107, 1176–77 (Cal. 1993).

44. *Taylor*, 54 F.3d at 977.

45. *United States v. Pires*, 642 F.3d 1, 14 (1st Cir. 2011).

excluded during *in limine* motions.<sup>46</sup> In contrast, closing arguments are a much more free-wheeling affair.<sup>47</sup> Nonetheless, there are some identifiable limitations, such as the prohibition on referring to matters excluded from evidence<sup>48</sup> and misstating evidence.<sup>49</sup> It is clear misconduct for a prosecutor to argue facts or inferences that are not based on evidence presented or to suggest versions of events that are known to be false.<sup>50</sup> A prosecutor may not mischaracterize evidence that has been presented<sup>51</sup> or, while appealing to a jury, invite them to speculate or abdicate their legal responsibilities.<sup>52</sup>

For example, it is not misconduct for a prosecutor to suggest that a defendant was lying in giving testimony when the prosecution has presented specific evidence contradicting the defendant's version of events.<sup>53</sup> Furthermore, where co-defendants had all agreed and testified that a particular individual was the shooter in a murder, it was not misconduct for a prosecutor to state that "everyone here expects you to find him guilty and find the charges true."<sup>54</sup>

Survey results:

Claims Waived, No Misconduct – 32.

Claims Waived, Without Comment – 24.

No Misconduct – 74.

Claims Waived, Nonprejudicial Misconduct – 4.

Misconduct, Nonprejudicial – 38.

Misconduct, Prejudicial – 1.

Plain Error – 0.

The survey revealed over 160 prosecutorial misconduct claims falling into this category. Misconduct was found in forty-three of the claims. While only one of the claims was deemed sufficiently prejudicial to warrant reversal, there remained forty-two other instances where California's highest court found that prosecutors committed misconduct in offering their opening statements or closing arguments. While the prosecutor who precipitated the lone reversal may be singled out as err-

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46. *People v. Martinez*, 224 P.3d 877, 911 (Cal. 2010); *People v. Romero*, 56 Cal. Rptr. 3d 678, 690 (Cal. Ct. App. 2007).

47. Generally, in closing arguments, counsel is permitted to discuss all aspects of the proceedings that were not barred by a court order, ethical obligations, or any right of the accused protected by the federal or state constitution. See L. TIMOTHY PERRIN ET AL., *THE ART & SCIENCE OF TRIAL ADVOCACY* (2nd ed. 2011).

48. *United States v. Blueford*, 312 F.3d 962, 968 (9th Cir. 2002); *United States v. Small*, 74 F.3d 1276, 1282–83 (D.C. Cir. 1996).

49. *United States v. Valentine*, 820 F.2d 565, 570 (2d Cir. 1987).

50. *Blueford*, 312 F.3d at 968; *Small*, 74 F.3d at 1280.

51. *Valentine*, 820 F.2d at 570.

52. *People v. Gamache*, 227 P.3d 342, 368, 372 (Cal. 2010).

53. *People v. Huggins*, 131 P.3d 995, 1018–19 (Cal. 2006).

54. *Gamache*, 227 P.3d at 369.

ing,<sup>55</sup> the other forty-two erring prosecutors saw their convictions affirmed with no adverse consequences for their misconduct.

a. Misstating the Law

A high percentage of the cases analyzed in this survey were capital cases, and, as such, involved more complicated legal instruction than “typical” criminal prosecutions. The survey revealed that most claims arising from this category occurred during penalty-phase closing arguments. Claims arose when prosecutors argued that an absence of mitigating circumstances was an aggravating circumstance or that jurors should not consider mitigating circumstances in deciding between the death penalty and life without the possibility of parole. In closing arguments, prosecutors will often state the rules of law that are applicable and provide an explanation to help the jurors understand key concepts.<sup>56</sup> It is misconduct, however, for a prosecutor to mischaracterize the law or in any way mislead the jurors regarding the burden of proof.<sup>57</sup>

For example, it is misconduct for a prosecutor to tell jurors that they may substitute their own subjective standard of behavior for the “reasonable person” standard in a murder trial.<sup>58</sup> Likewise, it is misconduct for a prosecutor to suggest that in determining intent beyond a reasonable doubt, jurors could only ever expect to find circumstantial evidence.<sup>59</sup>

Survey results:

Claims Waived, No Misconduct – 19.

Claims Waived, Without Comment – 6.

No Misconduct – 41.

Claims Waived, Nonprejudicial Misconduct – 3.

Misconduct, Nonprejudicial – 11.

Misconduct, Prejudicial – 2.

Plain Error – 0.

Of the 112 claims of prosecutorial misconduct in this category, the court found sixteen to have merit, including two claims found to be prejudicial. In those two cases, the Court reversed the death sentences as unconstitutional, finding in one instance that the prosecution misled the jury about its responsibility for making the decision as to whether defendant lived or died,<sup>60</sup> and in the other case, that the prosecution mis-

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55. *People v. Hill*, 952 P.2d 673, 664–78 (Cal. 1998).

56. See *PERRIN ET AL.*, *supra* note 47.

57. *Hill*, 952 P.2d at 688–89.

58. *People v. Mendoza*, 171 P.3d 2, 14 (Cal. 2007).

59. *Hill*, 952 P.2d at 688.

60. *People v. Farmer*, 765 P.2d 940, 968 (Cal. 1989) (Eagleson, J., concurring).

led the jury to believe that the absence of evidence of statutory mitigating factors provided additional factors in aggravation.<sup>61</sup>

b. Eliciting Improper Testimony

Whether on direct examination of a prosecution witness or the cross-examination of a defense witness, it is misconduct for a prosecutor to “intentionally elicit inadmissible testimony” through examination of witnesses.<sup>62</sup> In analyzing a prosecutor’s conduct, courts will not find reversible error if questions were made in good faith but resulted in a witness presenting inadmissible evidence.<sup>63</sup>

This category includes eliciting improper opinions, unduly inflammatory testimony, testimony that runs afoul of *Griffin* concerns,<sup>64</sup> testimony disparaging the defendant or his counsel, improper victim-impact testimony and improper testimony related to the defendant’s future dangerousness,<sup>65</sup> or lack of remorse.<sup>66</sup> This broad area spills into several categories covered elsewhere. To avoid double counting, when the questioned testimony arose during an examination, it was included here and not in the other categories.

Survey results:

Claims Waived, No Misconduct – 30.

Claims Waived, Without Comment – 8.

No Misconduct – 64.

Claims Waived, Nonprejudicial Misconduct – 2.

Misconduct, Nonprejudicial – 38.

Misconduct, Prejudicial – 0.

Plain Error – 0.

Even when a prosecutor runs afoul of a motion *in limine*, the court is hesitant to find prejudicial misconduct. In *People v. Mason*, a capital murder case, the prosecution, during cross-examination, referred to defendant’s successful motion *in limine* to exclude evidence of two firearms that arresting officers had found in his hotel room.<sup>67</sup> With full knowledge of the defense’s successful motion, the arresting officer had not mentioned that the guns were among the items found in defendant’s possession.<sup>68</sup> The court felt the prosecution was entitled to have the apparent discrepancy and the ruling explained to the jury in some appropriate

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61. *People v. Edelbacher*, 766 P.2d 1, 31 (Cal. 1989).

62. *People v. Sims*, 64 Cal. App. 3d 544, 554 (Cal. Ct. App. 1976).

63. *People v. Stokely*, 266 Cal. App. 2d 930, 935 (Cal. Ct. App. 1968).

64. *See infra* Subsection III.D.1.d.

65. *See infra* Subsection III.D.1.j.

66. *See infra* Subsection III.D.1.h.

67. *People v. Mason*, 802 P.2d 950, 971–72 (Cal. 1991).

68. *Id.* at 972–73.

fashion, and that it was unlikely the jurors drew the inference that the defendant was trying to keep the truth from the jury.<sup>69</sup> Even though the prosecution encroached on grounds excluded prior to the trial, the court found any impropriety in eliciting that information was not prejudicial.

c. *Brady* Violations

Prosecutors have a clear constitutional duty to disclose to the defense any evidence favorable to the defendant that is material either to guilt or sentencing.<sup>70</sup> Misconduct occurs when “[t]he evidence [that is] favorable to the accused, either because it is exculpatory, or because it is impeaching [is] suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”<sup>71</sup> Evidence is considered material if a reasonable probability exists that it could have changed the outcome of the proceeding.<sup>72</sup> Favorable and material evidence with a reasonable probability of effecting the outcome of the trial must be disclosed “30 days prior to trial, ‘unless good cause is shown why a disclosure should be denied, restricted or deferred.’”<sup>73</sup> The timing of a disclosure that results in prejudice may be a factor in deciding whether the prosecution “suppressed” evidence.<sup>74</sup> The duty to disclose material evidence exists independent of whether the defense has specifically requested it.<sup>75</sup> Violation of this duty is misconduct regardless of whether the prosecutor was acting in good faith.<sup>76</sup>

Survey results:

Claims Waived, No Misconduct – 1.

Claims Waived, Without Comment – 1.

No Misconduct – 33.

Claims Waived, Nonprejudicial Misconduct – 0.

Misconduct, Nonprejudicial – 6.

Misconduct, Prejudicial – 2.

Plain Error – 0.

Of the forty-two *Brady* claims, the Court found misconduct in eight cases. Perhaps the reason for the relatively small number of claims is that discovery issues are typically resolved at the trial level. Discovery issues generally pivot on whether the particular material is discoverable.<sup>77</sup> Of the eight instances of prosecutor misconduct, only two were found to be

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69. *Id.* at 971–73.

70. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

71. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

72. *United States v. Scarborough*, 128 F.3d 1373, 1376 (10th Cir. 1997).

73. *People v. Williams*, 315 P.3d 1, 47 (Cal. 2013).

74. *United States v. Delgado-Marrero*, 744 F.3d 167, 198–99 (1st Cir. 2014).

75. *United States v. Agurs*, 427 U.S. 97, 106–07 (1976).

76. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

77. *United States v. Bagle*, 473 U.S. 667, 682 (1985).

prejudicial. In one case, the prosecutor refused to disclose discovery of rebuttal evidence.<sup>78</sup> In the other, the court held that the prosecution withheld information from a confidential informant that would have supported the petitioner's claim to have acted under a drug cartel's death threats against him and his family in his killing of victims.<sup>79</sup>

d. *Griffin* Error

The United States Supreme Court in *Griffin v. California* held that it is a violation of an accused's Fifth Amendment right to comment on his choice to remain silent.<sup>80</sup> An example of this includes, "He can't even face you, this defendant, who commit[ed] these two brutal, senseless murders."<sup>81</sup> To state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf may also constitute misconduct.<sup>82</sup> A prosecutor's statement that, "if he were to . . . take the stand and say he was sorry, which you didn't see," does not refer "simply" to the defendant's failure to tell the truth; it clearly refers to the defendant's failure to take the stand at the penalty phase.<sup>83</sup>

This survey, relying on the holding of the California Supreme Court in *People v. Hovey*, expanded the *Griffin* prohibition to include claims about comments on the defendant's failure to call witnesses or present a defense.<sup>84</sup> For instance, a prosecutor's comment that the defense had failed to call any person other than the defendant who would testify as to the defendant's whereabouts was held to be misconduct.<sup>85</sup> It was not misconduct, however, where the prosecutor, in his rebuttal argument, observed that the People had provided a "rational explanation" for why the defendant was seen with a handgun at the times of the various robberies and then asked rhetorically, "Where was [the defense counsel's] rational explanation? How does he explain away the evidence . . . ?"<sup>86</sup> Similarly, where the defendant presented evidence of childhood trauma, arguing that it pushed him towards violence, the prosecutor did not commit a *Griffin* error when he commented on the defendant's failure to produce evidence of other violent acts.<sup>87</sup>

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78. *People v. Gonzalez*, 135 P.3d 649, 663 (Cal. 2006).

79. *In re Bacigalupo*, 283 P.3d 613, 616 (Cal. 2012).

80. *Griffin v. California*, 380 U.S. 609, 615 (1965).

81. *People v. Verdugo*, 236 P.3d 1035, 1066 (Cal. 2010).

82. *People v. Brady*, 236 P.3d 312, 341 (2010); *People v. Brown*, 73 P.3d 1137, 1167 (Cal. 2003); *People v. Bradford*, 939 P.2d 259, 322 (Cal. 1997); *People v. Murtishaw*, 631 P.2d 441, 460 (Cal. 1981).

83. *People v. Boyette*, 58 P.3d 391, 438 (Cal. 2002).

84. *People v. Mayfield*, 852 P.2d 331, 344 (Cal. 1993); *People v. Hovey*, 749 P.2d 776, 792 (Cal. 1988).

85. *People v. Thomas*, 281 P.3d 361, 396 (Cal. 2012).

86. *People v. Medina*, 906 P.2d 2, 37 (Cal. 1995).

87. *People v. Kelly*, 800 P.2d 516, 538 (Cal. 1990).

Survey results:

Claims Waived, No Misconduct – 11.

Claims Waived, Without Comment – 8.

No Misconduct – 37.

Claims Waived, Nonprejudicial Misconduct – 0.

Misconduct, Nonprejudicial – 8.

Misconduct, Prejudicial – 0.

Plain Error – 0.

In one capital prosecution, the prosecutor committed misconduct during closing argument by commenting on the defendant's demeanor in the courtroom, suggesting that he had been affecting a pleasant attitude to deceive the jury.<sup>88</sup> Commenting on a defendant's courtroom demeanor during the guilt phase of a capital trial is improper unless such comment is simply that the jury should ignore a defendant's demeanor.<sup>89</sup>

e. Disparaging and Opprobrious Comments

While prosecutors are allowed wide latitude during closing arguments, there are limits on disparaging the accused, his lawyer, and defense witnesses.<sup>90</sup> Courts will not find misconduct "so long as the [prosecutor's] beliefs expressed are based on the evidence presented."<sup>91</sup> Prosecutors are prohibited from impugning the integrity of or making any other form of personal attack on the defense counsel.<sup>92</sup> There are, however, limited exceptions based on the specifics of a case. For example, a prosecutor's comment that the defense counsel was a "spin doctor" was fair where there was a huge disparity between the evidence presented and the manner in which the defense counsel characterized it.<sup>93</sup> Even with these exceptions, it is generally improper for the prosecutor to "accuse defense counsel of fabricating a defense,"<sup>94</sup> and prosecutors may not make statements asserting that defense counsel sought to deceive the jury.<sup>95</sup>

Prosecutors have comparable responsibilities regarding their characterization of defendants. In general, while prosecutors are not limited

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88. *People v. Boyette*, 58 P.3d 391, 425 (Cal. 2002).

89. *People v. Heishman*, 753 P.2d 629, 662–63 (Cal. 1988) ("[P]rosecutorial references to a non-testifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character.").

90. See *PERRIN ET AL.*, *supra* note 47, at 496–97.

91. *People v. Cook*, 139 P.3d 492, 526 (Cal. 2006).

92. *People v. Cash*, 50 P.3d 332 (Cal. 2002).

93. *Cook*, 139 P.3d at 526. See also *People v. Bemore*, 996 P.2d 1152, 1175 (Cal. 2000).

94. *Bemore*, 996 P.2d at 1175.

95. *People v. Cummings*, 850 P.2d 1, 45–46 (Cal. 1993)

to “Chesterfieldian politeness,”<sup>96</sup> they are held to a standard of respect and must abstain from all offensive personality.<sup>97</sup> As a general rule, prosecutors must refrain from attempting to impugn the integrity of expert witnesses. While courts frown upon name-calling and rude comments—as it demeans the office of a prosecutor—they will not typically hold this to be reversible error.<sup>98</sup> Prosecutors may make observations about a defendant’s courtroom demeanor and suggest that the jury take it into consideration at the sentencing phase.<sup>99</sup> It is not misconduct, however, to question “an opponent’s expert witness about payment for services or about the expert’s testimony in prior cases involving similar issues.”<sup>100</sup> Even where a prosecutor stated that the defense’s expert witness was a “prostitute,” this was not so prejudicial that prompt admonition could not cure the offense.<sup>101</sup> Courts usually find misconduct only in serious cases, such as the case of a prosecutor who made twenty-two acrimonious comments with respect to the defense counsel and claimed that not only was he misleading the jury as to the facts and the law, but that he was “dishonest,” “tricky,” generally disreputable, and blasphemous (asking them how Jesus Christ would vote if he were on the jury).<sup>102</sup>

Survey results:

Claims Waived, No Misconduct – 19.

Claims Waived, Without Comment – 13.

No Misconduct – 57.

Claims Waived, Nonprejudicial Misconduct – 0.

Misconduct, Nonprejudicial – 6.

Misconduct, Prejudicial – 0.

Plain Error – 0.

Of the ninety-five claims that prosecutors engaged in disparaging comments about the accused or his lawyer, six were found to be misconduct. The relatively scant number of misconduct findings reflects the wide leeway courts grant prosecutors during closing arguments.<sup>103</sup>

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96. The California Supreme Court first used the term “Chesterfieldian politeness” in the context of the permissible scope of closing argument in *People v. Bandhauer*, 426 P.2d 900 (Cal. 1967). The term itself is a reference to Philip Stanhope, the fourth Earl of Chesterfield, who wrote and published letters to his son and instructional books on manners and deportment, including *Principles of Politeness*, and of *Knowing the World* (1794).

97. *People v. Hill*, 952 P.2d 673, 681 (Cal. 1998).

98. *Id.*; see also *People v. Parson*, 187 P.3d 1 (Cal. 2008).

99. *People v. Wharton*, 809 P.2d 290, 337 (Cal. 1991).

100. *People v. Price*, 821 P.2d 610, 689 (Cal. 1991).

101. *People v. Visciotti*, 825 P.2d 388, 435 n.44 (Cal. 1992).

102. *People v. Haskett*, 801 P.2d 323, 344 (Cal. 1990).

103. PERRIN ET AL., *supra* note 47, at 495.

f. Improper Opinion and Vouching

Prosecutors are prohibited from offering their personal opinions regarding the validity of evidence or the guilt or innocence of the parties.<sup>104</sup> “A prosecutor may not express a personal opinion or belief in the guilt of the accused when there is a substantial danger that the jury will view the comments as based on information other than evidence adduced at trial.”<sup>105</sup> Impermissible statements include those concerning personal knowledge of or belief in the defendant’s guilt, those not based on legitimate inferences from the evidence,<sup>106</sup> or statements suggesting that they would not prosecute any person they did not believe to be guilty.<sup>107</sup>

Prosecutors are also prohibited from expressing their personal opinions about the credibility of witnesses.<sup>108</sup> Known as “vouching,” this expression of opinion is dangerous because a

jury is especially likely to perceive the prosecutor as an ‘expert’ on matters of witness credibility. . . [and] may be inclined to give weight to the prosecutor’s opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled.<sup>109</sup>

In finding misconduct, courts will weigh the danger that a jury will determine a prosecutor’s opinion to be based on evidence known to him or her but not presented to the jury.<sup>110</sup> Statements by the prosecutor immediately preceding or following their opinion and suggesting their opinion was based on a specific piece of evidence presented at trial will encourage courts to find that the statement of opinion was proper.<sup>111</sup> For example, a prosecutor may comment that the standard of “proof beyond a reasonable doubt” is “an excellent standard, one that we accept gladly, one we feel that we can meet, or we wouldn’t take the case for trial,” as this comment suggests that the evidence was sufficient to convict, not that there were facts regarding the defendant’s guilt which were not in evidence.<sup>112</sup> A statement by the prosecutor that “[a witness] has told what I consider is a plausible, honest, forthright story” was impermissible, however.<sup>113</sup> When referring to evidence of the crime, a prosecutor’s comments were inappropriate where he stated, “I don’t know about you,

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104. *Id.*

105. *People v. Mincey*, 827 P.2d 388, 413 (Cal. 1992).

106. *See, e.g., People v. Lopez*, 175 P.3d 4, 11 (Cal. 2008); *Mincey*, 827 P.2d at 413; *People v. Green*, 609 P.2d 468, 483–84 (Cal. 1980); *People v. Alverson*, 388 P.2d 711, 713–14 (Cal. 1964); *People v. Wiley*, 57 Cal. App. 3d 149, 162 (Cal. Ct. App. 1976).

107. *See People v. Bain*, 489 P.2d 564, 569 (Cal. 1971) (citing *People v. Edgar*, 34 Cal. App. 459, 468 (1917)).

108. *Bates v. Bell*, 402 F.3d 635, 646 (6th Cir. 2005).

109. *U.S. v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985).

110. *U.S. v. Young*, 470 U.S. 1, 18 (1985); *Lopez*, 175 P.3d at 11; *People v. Green*, 609 P.2d 468, 488 (Cal. 1980).

111. *Lopez*, 175 P.3d at 11 (recording that the prosecutor’s comment about her belief in defendant’s guilt immediately followed comments about defense counsel’s cross-examination of the victims).

112. *People v. Wiley*, 57 Cal. App. 3d 149, 163 (Cal. Ct. App. 1976).

113. *People v. Alverson*, 388 P.2d 711, 713–14 (Cal. 1964).

I'm an old war horse. I've been through a lot of these. That choked me up."<sup>114</sup> A statement that a witness told the "absolute truth . . . [a]nd I know that" was improper, but did not prejudice the jury.<sup>115</sup>

Survey results:

Claims Waived, No Misconduct – 11.

Claims Waived, Without Comment – 5.

No Misconduct – 39.

Claims Waived, Nonprejudicial Misconduct – 0.

Misconduct, Nonprejudicial – 6.

Misconduct, Prejudicial – 0.

Plain Error – 0.

Over the twenty-five year span, the court found only six instances where prosecutors crossed the line and offered improper personal opinion or vouched for the credibility of a witness. The court did not deem any of those remarks significant enough to alter the verdict. One such example of pushing too far occurred during a closing argument in which the prosecutor reminded the jury of a deputy witness's emotional moment on the stand by stating that the officer "stood up here and bared his soul to you. There was no holding back. . . . Do you think he wanted to cry up here? Do you think it made him feel good in front of his fellow co-workers? These guys don't wear their emotions on their sleeve."<sup>116</sup>

#### g. Appeal to Passion and Prejudice

Efforts by prosecutors to gain favorable verdicts not by virtue of reason and common sense, but rather by appealing to their jurors' emotions, are improper.<sup>117</sup> This is sometimes referred to as the "Golden Rule"—putting the jurors in the shoes of the victim or the victim's family.<sup>118</sup> For example, it is clear misconduct for a prosecutor to suggest that jurors' sons or girlfriends would not dare ride motorcycles in the area where the defendant was located.<sup>119</sup> It is not misconduct, however, for a prosecutor to refer to a victim using emotional words such as "a gentle person," and "[a] poor lady" who had received a "savagely beating" where these were accurate characterizations.<sup>120</sup>

Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision in capital cases, the jurors must make a moral assessment of all the relevant facts as they reflect

114. *People v. Mendoza*, 171 P.3d 2, 14 (Cal. 2007).

115. *People v. Avena*, 916 P.2d 1000, 1015 (Cal. 1996) (emphasis omitted).

116. *People v. Fuiava*, 269 P.3d 568, 625 (Cal. 2012) (internal quotations omitted).

117. See *PERRIN ET AL.*, *supra* note 47.

118. *Id.*

119. *People v. Jones*, 86 Cal. Rptr. 516, 518–19 (Cal. Ct. App. 1970).

120. *People v. Martinez*, 224 P.3d 877, 910 (Cal. 2010).

on their decision. Emotion must not reign over reason, and courts should guard against prejudicially emotional argument. Emotion need not, and cannot, however, be entirely excluded from the jury's moral assessment.<sup>121</sup> During the penalty phase in a capital case, a prosecutor may ask a jury not to forget the victims and consider the lives the victims might have had.<sup>122</sup> Similarly, evidence that the defendant regarded Satan as his savior was admissible.<sup>123</sup>

Ultimately, the test for misconduct is whether the prosecutor has employed deceptive or reprehensible methods to persuade either the court or the jury.<sup>124</sup> Unbecoming, harsh remarks by the prosecutor that are reasonable—if hyperbolic and tendentious—inferences from the evidence do not amount to deceptive or reprehensible methods of persuasion.<sup>125</sup>

Survey results:

Claims Waived, No Misconduct – 9.

Claims Waived, Without Comment – 4.

No Misconduct – 37.

Claims Waived, Nonprejudicial Misconduct – 1.

Misconduct, Nonprejudicial – 9.

Misconduct, Prejudicial – 0.

Plain Error – 0.

In one case where the court found misconduct, the prosecutor elicited from a law enforcement officer the fact that he was testifying in the uniform he wore on the night of another officer's shooting. The testifying officer stated that his uniform still had the deceased officer's blood on it, and that he wore the uniform because the deputy "meant a lot to [him]" and it "was the last time that [he] saw him . . . ."<sup>126</sup>

#### h. Lack of Remorse

Remorse is a mitigating factor that jurors may consider during the penalty phase of a capital trial.<sup>127</sup> While a prosecutor may argue that remorse is lacking, he may not argue that lack of remorse is an aggravating factor.<sup>128</sup> It is also improper for a prosecutor to argue that by failing to

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121. *People v. Jackson*, 199 P.3d 1098, 1117 (Cal. 2009); *People v. Leonard*, 157 P.3d 973, 1009 (Cal. 2007) (quoting *People v. Smith* 68 P.3d 302, 338 (Cal. 2003)).

122. *People v. Haskett*, 640 P.2d 776, 790 (Cal. 1982).

123. *See People v. Kipp*, 33 P.3d 450, 474 (Cal. 2001).

124. *People v. Rowland*, 841 P.2d 897, 920 (Cal. 1992) (quoting *People v. Price*, 821 P.2d 610 (Cal. 1991)).

125. *People v. Gonzales*, 253 P.3d 185, 226–27 (Cal. 2009); *People v. Dennis*, 950 P.2d 1035, 1066 (Cal. 1998); *see also People v. Huggins*, 131 P.3d 995, 1050 (Cal. 2006).

126. *People v. Fuiava*, 269 P.3d 568, 625 (Cal. 2012).

127. *People v. Cain*, 892 P.2d 1224, 1272 (Cal. 1995).

128. *People v. Cook*, 139 P.3d 492, 525 (Cal. 2006).

confess, a defendant showed a lack of remorse.<sup>129</sup> Further, it is permissible to argue that a defendant's untruthfulness and evasiveness demonstrated a lack of remorse.<sup>130</sup> Where the defense has introduced evidence of the defendant's remorse, a prosecutor may argue that the defendant did not appear to be remorseful during trial.<sup>131</sup>

It was not found improper for a prosecutor to argue that a defendant confessed because it had become obvious that the authorities suspected him of being the killer, not because he was truly remorseful.<sup>132</sup> A prosecutor may also reference a defendant's statements that victims "deserved it" as evidence of lack of remorse.<sup>133</sup> Likewise, it was not improper for a prosecutor to introduce evidence of a defendant's lack of remorse where the defendant ate a "full breakfast of eggs, coffee, sausage and French toast and finished it off with a cigarette" while the victims bled to death.<sup>134</sup> Of course, in commenting on a lack of remorse, the prosecutor may not comment on the defendant's failure to testify.<sup>135</sup>

Survey results:

Claims Waived, No Misconduct – 6.

Claims Waived, Without Comment – 7.

No Misconduct – 18.

Claims Waived, Nonprejudicial Misconduct – 0.

Misconduct, Nonprejudicial – 0.

Misconduct, Prejudicial – 0.

Plain Error – 0.

Of the thirty-one cases in this survey, there were no actual examples of misconduct. "[I]ndirect, brief, and mild references . . ." regarding a defendant's lack of remorse are typically held to constitute harmless error.<sup>136</sup>

#### i. Victim Impact

The Eighth Amendment to the United States Constitution regulates whether a sentencing jury in a capital case may consider evidence of a crime's impact on a victim and/or the victim's friends and family.<sup>137</sup> While

129. *People v. Pollock*, 89 P.3d 353, 373 (Cal. 2004); *People v. Coleman*, 450 P.2d 248, 254 (Cal. 1969). *See also* *People v. Fierro*, 821 P.2d 1302, 1338 (Cal. 1991).

130. *People v. Boyette*, 58 P.3d 391, 439 (Cal. 2002); *People v. Holt*, 937 P.2d 213, 260 (Cal. 1997).

131. *People v. Heishman*, 753 P.2d 629, 662 (Cal. 1988).

132. *People v. Linton*, 302 P.3d 927, 975 (Cal. 2013).

133. *People v. Enraca*, 269 P.3d 543, 565 (Cal. 2012).

134. *People v. Blacksher*, 259 P.3d 370, 428 (Cal. 2011).

135. *People v. Vieira*, 106 P.3d 990, 1009 (Cal. 2005).

136. *People v. Bradford*, 939 P.2d 259, 323 (Cal. 1997) (quoting *People v. Hovey*, 44 Cal. 3d 543, 749 P.2d 776 (1988)).

137. *Payne v. Tennessee*, 501 U.S. 808, 821 (1991); *Booth v. Maryland*, 482 U.S. 496, 501–02 (1987).

victim-impact evidence may not always be relevant or admissible, “for the jury to assess meaningfully the defendant’s moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.”<sup>138</sup> According to the California Penal Code, “[u]nless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime . . . .”<sup>139</sup>

Concerns about admitting victim-impact statements include the fact that the emotions of the victim’s family and friends are “wholly unrelated to the blameworthiness of a particular defendant.”<sup>140</sup> In addition, victim-impact considerations might make it so that imposition of the death sentence turns on whether the victim left behind a family, or how articulate that family is in describing their sense of loss.<sup>141</sup> Further, such statements are difficult, if not impossible, to rebut.<sup>142</sup> In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial.<sup>143</sup>

Victim, impact evidence is not limited to the victim’s relatives or persons present during the crime, nor is it limited to circumstances known or foreseeable to the defendant at the time of the crime.<sup>144</sup> Victim-impact evidence can be provided by children of murder victims<sup>145</sup> or other surviving victims.<sup>146</sup> Victim-impact evidence may include a murder victim’s charitable and church activities.<sup>147</sup> For example, victim-impact testimony from multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant is permissible.<sup>148</sup> Any prohibition on victim-impact statements does not bar brief references to the victims or their families.<sup>149</sup>

An example of unduly prejudicial victim-impact evidence includes tape-recorded groans of a dying victim.<sup>150</sup> On the other hand, a twenty-five-minute “static” video interview taped before a victim’s death against a “calm” backdrop with no music overlay, showing the victim being in-

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138. *Payne*, 501 U.S. at 825.

139. *People v. Lewis*, 140 P.3d 775, 840 (Cal. 2006).

140. *Booth*, 482 U.S. at 504.

141. *Id.* at 505.

142. *Id.* at 506.

143. *See People v. Edwards*, 819 P.2d 436, 467–68 (1991) (citing *People v. Haskett*, 640 P.2d 776, 790 (1982)).

144. *People v. Tully*, 282 P.3d 173, 245–46 (2012); *People v. Bramit*, 210 P.3d 1171, 1187 (2009); *Edwards*, 819 P.2d at 467–68.

145. *People v. Boyette*, 58 P.3d 391, 429–30 (2003).

146. *People v. Brown*, 93 P.3d 244, 254 (2004).

147. *People v. Pollock*, 89 P.3d 353, 370–71 (2004).

148. *See id.* at 372.

149. *People v. Beardslee*, 806 P.2d 1311, 1337 (1991).

150. *See People v. Sanders*, 905 P.2d 420, 461–62 (1995); *People v. Love*, 350 P.2d 705, 711–14 (1960).

interviewed on singing and acting, constitutes no “extraordinarily emotional presentation” and no prejudicial victim-impact evidence.<sup>151</sup>

Survey results:

Claims Waived, No Misconduct – 4.

Claims Waived, Without Comment – 4.

No Misconduct – 24.

Claims Waived, Nonprejudicial Misconduct – 1.

Misconduct, Nonprejudicial – 1.

Misconduct, Prejudicial – 0.

Plain Error – 0.

There were only thirty-four claims focused on the legitimacy of victim-impact evidence, perhaps reflecting the relative lack of restriction on such testimony. The court only found two instances of misconduct, and neither instance was found to be prejudicial. The first of the two instances of misconduct occurred in *People v. Marshall*, where the court found “[t]he objectionable comment was relatively brief . . . unemphatic, and was of minimal significance within the penalty phase as a whole.”<sup>152</sup> The second occurred in *People v. Kelly*, where the court found that:

the introduction at trial of a lengthy victim impact statement and extensive prosecutorial comment on the victim’s religious and civic character . . . contained no details pertaining to the actual impact and suffering inflicted on the victim or his family, and made only passing reference to the victim’s character.<sup>153</sup>

Thus, the prejudicial effect of the prosecutor’s comments here was “undoubtedly minimal or nonexistent,”<sup>154</sup> and any error was harmless beyond a reasonable doubt.

#### j. Future Dangerousness

In the penalty phase of capital cases, prosecutors are permitted to suggest that the jury should consider the defendant’s future dangerousness in deciding between the death penalty and a sentence of life without possibility of parole. When the prosecution makes this suggestion, due process requires that the jury be instructed that a sentence of life in prison will render the defendant ineligible for parole, and the defendant will remain in prison for the remainder of his or her life.<sup>155</sup>

A prosecutor may not introduce expert testimony regarding a defendant’s future dangerousness, but may make an inference of future

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151. *People v. Prince*, 156 P.3d 1179, 1093–94 (2007).

152. *People v. Marshall*, 790 P.2d 676, 686 (1990).

153. *People v. Kelly*, 800 P.2d 516, 538 (1990).

154. *People v. Ghent*, 739 P.2d 1250, 1271 (1987).

155. *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994).

dangerousness based on evidence of the defendant's past violent conduct.<sup>156</sup> For example, a prosecutor properly argued that, based on the his earlier disciplinary record, the defendant could present a discipline problem to prison authorities, and that although the defendant was evidently a talented guitar player, the authorities probably would not allow him to have a strung guitar in prison, as those strings "can be used for a lot more than just playing."<sup>157</sup>

When suggesting aggravating factors for the jury to consider, prosecutors are limited to the factors listed by statutes and usually may not suggest that the jury consider future dangerousness as an aggravating factor.<sup>158</sup> "Evidence of future dangerousness may be introduced in rebuttal when the defendant first raises the issue of performance in prison . . . ."<sup>159</sup>

As an example, a prosecutor's suggestion that the jury consider the defendant's possession of a "shank" while in jail when determining future dangerousness was proper, as it was based on evidence of the defendant's prior conduct.<sup>160</sup> Where a defense's expert witness offers testimony regarding the defendant's future dangerousness, a prosecutor is allowed to elicit further testimony on cross-examination.<sup>161</sup> Where a letter written by the defendant containing multiple references to both past violence and possible future violent conduct on his part was admitted, no error was found.<sup>162</sup>

Survey results:

Claims Waived, No Misconduct – 6.

Claims Waived, Without Comment – 3.

No Misconduct – 19.

Claims Waived, Nonprejudicial Misconduct – 1.

Misconduct, Nonprejudicial – 2.

Misconduct, Prejudicial – 0.

Plain Error – 0.

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156. *People v. Sattiewhite*, 328 P.3d 1, 28 (2014); *People v. Champion*, 891 P.2d 93, 128–29 (1995); *People v. Hayes*, 802 P.2d 376, 412–13 (1990).

157. *People v. Ervin*, 990 P.2d 506, 534 (2000); *see also Sattiewhite*, 328 P.3d at 28; *People v. Bradford*, 939 P.2d 259, 350 (1997) (citing *People v. Taylor*, 52 Cal. 3d 719, 750 (1990) (holding that "[i]t is not misconduct for a prosecutor at the penalty phase to argue that a defendant, if sentenced to prison, might kill another prisoner, when there is factual support for this argument derived from the defendant's record of violence outside of prison.")). Something has to be said about the peculiarity of cases in which the prosecutor asks for the death penalty because "no one within the confines of the Department of Correction will be safe with [him] as a prisoner." *Sattiewhite*, 328 P.3d at 29. The court here found that the comments were not improper, because the defendant's prior violent acts supported this conclusion. *Id.*

158. *People v. Romero*, 354 P.3d 983, 1020 (2015).

159. *People v. Mattson*, 50 Cal. 3d 826, 878 (1990).

160. *People v. Edwards*, 306 P.3d 1049, 1122 (2013).

161. *Mattson*, 50 Cal. 3d at 877.

162. *Sattiewhite*, 328 P.3d at 29; *People v. Morris*, 807 P.2d 949, 979–80 (1991).

Of the thirty-one claims of misconduct, three were found to have merit and all three were deemed nonprejudicial. The common thread in all three instances of misconduct was that the prosecutor initiated or attempted to initiate the introduction of expert testimony on future dangerousness.<sup>163</sup> Because the court cautioned the jury to disregard “any assertion or insinuation . . . that there was a failure of proof regarding the defendant’s propensity to violence if in prison,”<sup>164</sup> however, no prejudice occurred.

k. *Voir Dire*

There are certain limits on a prosecutor’s comments during *voir dire* questioning of prospective jurors.<sup>165</sup> A prosecutor may not make misstatements of the law or evidence when questioning jurors;<sup>166</sup> nor can a prosecutor argue the merits of the case.<sup>167</sup> It is not misconduct, however, for a prosecutor to ask questions that relate to jurors’ experience with circumstances relevant to the case.<sup>168</sup> For example, it was not misconduct for a prosecutor to ask jurors about their experiences in making decisions after alcohol consumption where it was anticipated that the defendant would present evidence of his intoxication during the trial.<sup>169</sup>

Survey results:

Claims Waived, No Misconduct – 6.

Claims Waived, Without Comment – 1.

No Misconduct – 11.

Claims Waived, Nonprejudicial Misconduct – 0.

Misconduct, Nonprejudicial – 12.

Misconduct, Prejudicial – 0.

Plain Error – 0.

In *People v. Pearson*, the court affirmed the murder conviction but reversed the death penalty sentence due to the trial court’s improper excusal of a prospective juror for her views on capital punishment.<sup>170</sup> While the court acknowledged a prospective juror may be challenged for cause based upon his or her views regarding capital punishment, the juror may only be removed if those views would prevent or substantially impair the performance of the juror’s duties as defined by the juror’s oath.<sup>171</sup> A criminal defendant has the right to, and the prosecutor cannot interfere

163. *People v. Bramit*, 210 P.3d 1171, 1189 (2009); *People v. Boyette*, 58 P.3d 391, 443–44 (2002).

164. *People v. Ervine*, 220 P.3d 820, 861 (2009).

165. See *PERRIN ET AL.*, *supra* note 47, at 75.

166. See *People v. Thomas*, 269 P.3d 1109, 1132 (2012).

167. See *id.*

168. *People v. Salcido*, 186 P.3d 437, 469 (2008).

169. *Id.* at 483.

170. *People v. Pearson*, 266 P.3d 966, 986 (2012).

171. *Id.* at 984.

with, an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause.<sup>172</sup> To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process.<sup>173</sup> In *Pearson*, the prosecutor interfered with that right and biased the selection process by challenging and removing a juror for cause based on her “vague, indifferent or uninformed” decisions concerning the death penalty, even though she also stated that she would uphold her oath as required.<sup>174</sup> By allowing this juror to be removed for cause, the defendant was deprived an impartial jury requiring a reversal of the death penalty.

### 1. *Batson* Challenges

In *Batson v. Kentucky*, the Supreme Court held that it was impermissible for a prosecutor to use peremptory challenges to exclude jurors based on race, ethnicity, or sex.<sup>175</sup> When a defendant makes a *Batson* challenge to a prosecutor’s use of a peremptory challenge, he must make a *prima facie* showing that the challenge was predicated on group bias.<sup>176</sup> The juror will still be excluded if the prosecutor can provide a neutral reason for the challenge.<sup>177</sup> Although such an error does not necessarily mandate reversal of the judgment of guilt or the special circumstance findings, the error does compel an automatic reversal of a defendant’s death sentence.<sup>178</sup>

A prospective juror may be excluded for cause because of his or her views on capital punishment if those views would “prevent or substantially impair” the performance of his or her duties as a juror in accordance with the trial court’s instructions and his or her oath.<sup>179</sup> To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them, however, unconstitutionally biases the selection process.<sup>180</sup> So long as a juror’s views on the death penalty do not prevent or substantially impair the juror from “conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate,”<sup>181</sup> the juror is not disqualified by his or her failure to enthusiastically support capital punishment.

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172. *Id.* See *Witherspoon v. Illinois* 391 U.S. 510, 521 (1968).

173. See *People v. Rodrigues*, 885 P.2d 1, 48–49 (Cal. 1994).

174. 266 P.3d at 985.

175. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128–29 (1994) (extending *Batson* to gender and sex); *Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

176. *Batson*, 476 U.S. at 96.

177. *Id.* at 97.

178. *People v. Heard*, 75 P.3d 53, 66 (Cal. 2003).

179. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

180. *People v. Pearson*, 266 P.3d 966, 985 (Cal. 2012).

181. *People v. Rodrigues*, 885 P.2d 1, 48 (Cal. 1994).

Survey results:

Challenges ruled proper, no error – 75.

Challenges ruled improper – 5.

Of the seventy-five claims relating to *Batson* challenges, five were found to have merit and four led to a reversal of a death penalty verdict. In one case, fourteen black jurors were excluded for “spurious” reasons, such as the nature of the juror’s employment, recreational choices, or choice of reading material; the prosecutor was unable to articulate how these failings related to jury service.<sup>182</sup> In another case, the prosecution’s proffered race-neutral reasons for exercise of peremptory challenges were unsupported by the *voir dire* record, which reflected that the prosecutor had excluded every Hispanic juror.<sup>183</sup>

#### IV. SURVEY CONCLUSIONS

A summary of the results of the survey found 926 claims that constituted actual misconduct in the 815 criminal cases reviewed during the twenty-five years surveyed. This is without regard to whether the misconduct was prejudicial or not. Stated another way, California’s highest court deemed that prosecutors violated their ethical obligations<sup>184</sup> or the standards set forth in judicial opinions<sup>185</sup> on an average of 1.14 violations per case.

The fundamental principle underlying the effort that motivated this Article is that some manner of deterrence is essential to curbing instances of prosecutor misconduct. It is reasonable to conclude that the lack of adverse consequences contributes to misconduct. Given the rare instance of a reversal resulting from misconduct,<sup>186</sup> coupled with the knowledge that no adverse consequences will result from the misconduct, there is a reduced incentive for prosecutors to comport their conduct to the established guidelines. While most prosecutors strive to uphold the obligations that flow from their powerful positions, might all prosecutors be further incentivized to work within the guidelines if there were consequences to their misconduct?

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182. *People v. Fuentes*, 818 P.2d 75, 82 (Cal. 1991).

183. *People v. Silva*, 21 P.3d 769, 795 (Cal. 2001).

184. See MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2009).

185. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that the Equal Protection Clause forbids prosecutors from striking potential jurors using preemptory challenges based on race alone); *Griffin v. California*, 380 U.S. 609, 611–15 (1965) (holding that a prosecutorial comment on the defendant’s exercise of his constitutional right to remain silent constitutes reversible error).

186. In our survey ten cases had the guilt or penalty phase reversed, including five for *Batson* error.

## V. A PROSECUTOR REVIEW PANEL

As set forth in the previous article,<sup>187</sup> I suggested that an independent statewide review committee should be created to evaluate claims of prosecutorial misconduct, investigate the circumstances of the conduct, and, if warranted, discipline the erring prosecutor.<sup>188</sup> I now renew my call for an independent Prosecutor Review Panel (“PRP”) but with some modifications from my earlier proposal.

Since the publication of my earlier article, I have come to recognize that, though the proposal was sound, its implementation may have been overly complicated and perhaps overambitious. I offer this revision which I believe addresses the issues of misconduct in a more direct, comprehensive, and manageable way. The proposal, as set forth below, is composed of five parts: (1) centralized review by a statewide panel, (2) identification of misconduct through appellate opinions, (3) evaluation of the circumstances and seriousness of the misconduct, (4) tiered discipline proportionate to the misconduct, and (5) the prosecutor’s right to respond and seek modification of the discipline proposed.

### A. *Centralized Review*

In the earlier proposal I suggested a series of review committees designed to receive misconduct reports, investigate claims, and, if appropriate, discipline prosecutors.<sup>189</sup> Based on the multitude of time-consuming tasks involved, I felt that a number of committees would be necessary.<sup>190</sup> The amount of time those committees would consume investigating and analyzing misconduct reports was a concern, however.

Under my revised scheme, the lengthy and involved process of investigating claims of misconduct has been eliminated and replaced by appellate court review. Appellate courts have already undertaken the necessary investigation and analysis regarding prosecutor misconduct in their opinions, leaving the PRP the sole task of determining appropriate sanctions (see Section B below). As a consequence, the PRP staff will require far fewer attorneys. A single panel composed of a panel chair, staff attorneys, and a support staff should be able to effectively accomplish the PRP’s goals.

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187. See Caldwell, *supra* note 1.

188. *Id.* at 98–101.

189. *Id.* at 99.

190. *Id.*

*B. Identification of Prosecutorial Misconduct Through Appellate Review*

My original proposal relied on an accused, defense counsel, trial judge, or another interested party reporting what they believed to be prosecutor misconduct.<sup>191</sup> Even though other lawyers (defense counsel and even other prosecutors) are obligated to report misconduct, it does not happen with any degree of regularity.<sup>192</sup> Misconduct reports are infrequent and haphazard.<sup>193</sup> To meaningfully address the issue of prosecutor misconduct there must be a systematic means of misconduct identification. My proposal calls for PRP review of all criminal appellate opinions which have identified prosecutor misconduct. As stated earlier, appellate courts are already tasked with reviewing most serious criminal convictions.<sup>194</sup> Necessarily included in those reviews are rulings on prosecutorial misconduct claims.<sup>195</sup> Since appellate courts already undertake the analysis and determine the validity of these misconduct claims, there is no need for the PRP to duplicate the effort. These criminal appellate opinions replete with their misconduct findings offer a precise and reliable misconduct screening mechanism. Utilizing this preexisting resource would free the PRP from having to identify when misconduct has occurred, and would instead allow them to focus purely on evaluating the seriousness of the misconduct and meting out the appropriate discipline.

*C. Evaluation of the Seriousness of the Misconduct*

PRP staff attorneys, confronted with definitive findings of misconduct, must evaluate the seriousness of the misconduct in order to determine the commiserate discipline. The appellate court findings may prove helpful in this stage as well. For example, a finding that prosecutorial misconduct was serious enough to prejudice the outcome of a trial would

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191. *Id.* at 99–100.

192. See Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L. J. 437, 439–42, nn.4, 5 (2012) (noting “a general reluctance to report by those who, by virtue of their training and interactions, are most likely to witness and recognize lawyer misconduct—lawyers and judges” and acknowledging that despite an ethical duty to report misconduct “that duty often is ignored”); see also Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128–29 (2008). But see Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 103–05 (2016) (suggesting that the ready availability of related records, scholarship, and support in the digital age may be reversing this trend).

193. See Greenbaum, *supra* note 192, at 439–40; see also Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L. J. 1555, 1599–1601 (2001) (noting that nonreporting appears to have been the norm for a long time, despite the ABA’s institution of clearer reporting guidelines).

194. Of course not all convictions are appealed; however, the more serious the charge the greater the chances of appellate review. Cf. *Court Role and Structure: Court of Appeals*, USCOURTS.GOV, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure>.

195. See, e.g., Gerald F. Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 MARQ. L. REV. 495, 498 (2009) (discussing how death penalty cases in California, as in almost all states are automatically appealed to the California Supreme Court “As in nearly all death penalty states, judgments of death in California are directly appealed to the state supreme court, without intervention by the intermediate courts of appeal.”).

indicate that the most serious types of sanction should be considered. Given that the overwhelming number of misconduct findings are not prejudicial,<sup>196</sup> the work will not always be as straightforward. Even in more difficult cases, however, appellate opinions will characterize the type of misconduct and its context,<sup>197</sup> which should prove useful in considering disciplinary options.

#### D. Tiered Discipline

The PRP would have the ability to deliver a range of sanctions, including private reprimand, public reprimand, fines, suspension, and disbarment. Clearly, the more calculated and egregious the conduct, the greater the discipline required. I believe it critical, however, to allow the PRP great flexibility to account for context and to enable rehabilitative compromise. By itself, this should improve the way the criminal justice system addresses prosecutor misconduct; however, it is not a complete remedy for prosecutor misbehavior, particularly in the case of “minor” violations that affect the system cumulatively over time.

Misconduct resulting from the inexperience, or even incompetence, involving relatively minor misconduct should be dealt with differently than misconduct that appears to be knowing, calculated, and designed to impact the verdict. Even minor ethical violations, however, have the potential to become pervasive. For such instances, I propose a second, lower tier of sanctions which would be more in line with traditional employee discipline, parking citations, and traffic tickets: unpleasant, but not necessarily career-damaging. The theory behind this approach is that minor, yet ubiquitous, behavioral adjustments may correct bad habits before they develop into more serious problems. Moreover, PRP members might be less reluctant to dole out reprimands when those sanctions do not impair careers.

Consider this parallel: moving violation citations are a vital part of vehicle accident prevention.<sup>198</sup> In general, they incentivize bad drivers to reform and help to more clearly define what the state considers good conduct.<sup>199</sup> Moreover, they are generally regarded as a necessary complement to harsher disincentives, like DUI and reckless endangerment prosecutions.<sup>200</sup>

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196. See *supra* Section II.D. See also RIDOLFI ET AL., *supra* note 7, at 98–113.

197. See, e.g., *People v. Williams*, 233 P.3d 1000, 1044–45 (2010), *as modified* (Aug. 18, 2010) (characterizing the prosecutor’s invocation of religious authority as prosecutorial misconduct and describing the mitigating context—defense counsel’s extensive use of the same—all despite ruling that the misconduct was not prejudicial).

198. See Roger C. Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 423–25 (1969).

199. See *id.* at 421–25, 426.

200. See *id.* at 437–41; see also Jeremy D. Davey & James E. Freeman, *Improving Road Safety Through Deterrence-Based Initiatives: A Review of Research*, 11 SULTAN QABOOS U. MED. J. 29–37 (2011).

Lesser prosecutorial sanctions might be equally well suited to prevent prosecutorial misconduct before the habit becomes ingrained. Fines might be especially effective with younger attorneys, curbing early tendencies to willfully flout rules and game the system before they develop into misconduct. These remedial options may also include advisory letters to the offending attorneys themselves, letters to supervisors, increased MCLE or pro bono requirements, future preclusion from trying certain types of cases, and, ultimately, salary reductions, transfers, or demotions.

To insulate good actors from simple, occasional mistakes and growing pains, something like the current point-on-your-license traffic citation model might well serve.<sup>201</sup> Under this approach, minor sanctions could be issued for individual issues without public disclosure. More serious career implications, however, could be enforced when multiple offenses occur within a set period of time. One or two points, and everything would stay the same, but three points in five years would require a public record and more serious sanctions.<sup>202</sup> This second tier of sanctions would require its own set of guidelines, but they need not be as extensive or involved as those for more serious misconduct. A state's ethics rules,<sup>203</sup> case law,<sup>204</sup> and a few general rules could provide the PRP with a basic framework. Allowing the panel to administer lesser penalties under somewhat looser guidelines enables the punishment of bad actors who have learned to game the system.

#### *E. The Prosecutor's Right to Respond and Seek Modification*

Naturally, due process is a concern in any scheme that involves a government deprivation of property through sanctions or of liberty through restrictions on the practice of law. Prosecutors subject to discipline by the PRP must be allowed to appeal the nature or extent of the discipline allocated. The manner and procedure for these appeals should be determined by the review agency upon its creation. This procedure should allow for prosecutors to challenge the discipline but not the finding of misconduct. This procedure should be fully self-contained within the agency, with no outlet to the criminal justice system, in order to prevent an additional burden from being placed on the courts. Moreover, adopting a transparent, detailed sanction guideline akin to the federal

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201. See Cramton, *supra* note 198, at 433 (noting that in some circumstances, point systems "may have a greater psychological effect on the driver than harsh penalties.").

202. See *id.* at 446 (discussing the efficacy of point systems in rehabilitating problem drivers).

203. See, e.g., *Current Rules of Professional Conduct*, ST. B. CAL., THE STATE BAR OF CALIFORNIA, <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules.aspx> (last visited June 29, 2017).

204. *People v. Fuentes*, 818 P.2d 75, 82–83 (Cal. 1991).

sentencing guidelines<sup>205</sup> might help ensure proportional and consistent application, simplifying the appeals process.

## VI. ECONOMIC AND POLITICAL VIABILITY OF PROPOSAL

Is the problem of prosecutor misconduct significant enough to merit the costs associated with the solution? The need for some mechanism to render prosecutors accountable for their misdeeds so as to deter such conduct has been argued countless times and has featured several remedies.<sup>206</sup> Working from the conclusion that the problem is significant enough to merit a solution, a couple of questions remain.

The first question focuses on the political viability of the proposal. Any sense that the work of the PRP would provide a backdoor for an accused to seek additional redress of his conviction would be completely unacceptable. To be clear, this proposal in no way impacts the integrity and sanctity of the appellate court's decision. The PRP focuses exclusively on the findings of misconduct and the appropriate sanctions; there is no review of any nature as to the appellate court's decision.

The second question to be addressed is the cost of this new administrative agency. In order to determine an appropriate budget necessary to properly implement a prosecutor misconduct panel, I look to a similar administrative agency for comparison—the California Commission on Judicial Performance.<sup>207</sup> The California Commission on Judicial Performance is an independent state agency with the responsibility of investigating complaints of judicial misconduct and disciplining judges who engage in such misconduct.<sup>208</sup> In 2014, the California Commission on Judicial Performance had a staff consisting of twenty employees, eleven of whom were attorneys, and the remaining nine were support staff.<sup>209</sup> That same year, the Commission received 1,212 complaints alleging that 882 judges had committed some form of judicial misconduct.<sup>210</sup> Of the 1,212 complaints, eighty-four resulted in further staff inquiry,<sup>211</sup> 101 resulted in the Commission conducting a preliminary investigation,<sup>212</sup> and forty-three resulted in the Commission taking some form of disciplinary

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205. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL, § 3E1.1 (Nov. 2015), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf> (describing the federal sentencing guidelines' general application principles).

206. See, e.g., Caldwell, *supra* note 1.

207. *Overview of Commission Proceedings*, ST. CAL. COMM'N ON JUD. PERFORMANCE, [https://cjp.ca.gov/complaint\\_process/](https://cjp.ca.gov/complaint_process/) (last visited June 29, 2017).

208. *Id.*

209. State of California Commission on Judicial Performance 2014 Annual Report 31, [http://cjp.ca.gov/files/2016/08/2014\\_Annual\\_Report.pdf](http://cjp.ca.gov/files/2016/08/2014_Annual_Report.pdf). Note: although the Commission was authorized to have a total of twenty-two employees (twelve attorneys and ten support staff), two positions remained vacant, thus resulting in the Commission consisting of twenty employees for 2014.

210. *Id.* at 9.

211. *Id.*

212. *Id.*

action.<sup>213</sup> The annual cost of the Commission's work was \$4,085,406.<sup>214</sup> Assuming the proposed PRP will operate in a manner similar to the Commission on Judicial Performance, we can use the Commission's 2014 expenditures, complaints, and staff size to calculate some rough estimates regarding the cost and size of a PRP as proposed.

It is my view that the PRP would incur roughly similar costs. Even though the work of the PRP will involve more cases, the actual work undertaken will not be nearly as involved as that of the judicial commission. The judicial commission, among its other responsibilities, undertakes investigations and conducts hearings.<sup>215</sup> The PRP is tasked with no such investigative function other than reviewing appellate opinions for findings of prosecutorial misconduct. Furthermore, the PRP would not institute hearings of any nature. Consequently, even though approximately 5,000 criminal appellate decisions work their way through the California judicial system each year,<sup>216</sup> the relatively modest staff of ten to eleven staff attorneys and their support staff should be adequate to the task.

## VII. DRAWBACKS OF PROPOSAL

No plan is perfect. Under this revised proposal, the PRP would fail to consider any prosecutor misconduct perpetrated in criminal cases that were not appealed. This means that misconduct in misdemeanor prosecutions and lesser felony proceedings would go largely unaddressed. Likewise, instances of misconduct remedied directly at the trial court level would evade review. Much pretrial misconduct—for example, unethical and coercive plea bargaining maneuvers—would slip through the cracks for similar reasons. That said, the most serious cases with the most serious consequences would come under scrutiny.

Delayed justice is another concern. Issuing sanctions too long after misconduct can reduce their deterrent effects.<sup>217</sup> In California, criminal appeals take an average of 699 days—almost two years.<sup>218</sup> Because the PRP would start its sanction determinations by surveying appellate court decisions, its punishments would not be swift. Consequently, its sanctions

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213. *Id.* at 11. Disciplinary measures: two judges were publicly censured, three were admonished in public, nine were admonished in private, and twenty-nine were issued advisory letters.

214. *Id.* at 32. (Note, the commission's actual budget for the 2013–2014 fiscal year was \$4,213,000, although only \$4,085,406 of it was expended.)

215. *Id.* at 13.

216. JUD. COUNCIL CAL., *2014 Court Statistics Report: Statewide Caseload Trends, 2003–2004 Through 2012–2013*, at 29, COURTS.CA.GOV (2014), <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf>.

217. *Cf.* Davey & Freeman, *supra* note 200, at 3 (“Classic Deterrence Doctrine refers to the deterrent effect of celerity, as it is proposed that the application of punishments for illegal behavior will be most salient when they are administered soon after the criminal act.”); Libor Dusek & Christian Traxler, *Experience with Punishment and Specific Deterrence: Evidence from Speeding Tickets* (forthcoming 2016) (noting that the deterrent effect of speeding tickets is much larger when they are delivered quickly after the vehicular misconduct).

218. JUD. COUNCIL CAL., *supra* note 216, at 29.

could be less effective. Even a slightly lessened deterrent effect is far superior to none, though.

Another drawback is that the PRP's sanctions might fall disproportionately on some types of prosecutors. For example, prosecutors in high-volume offices would likely try more cases and consequently subject themselves to more appellate review. Career prosecutors would likewise endure more appellate assessment than their short-term associates. What is more, the most seasoned and successful prosecutors—those given the responsibility of trying capital cases—would face perpetual review as a result of automatic appeals. But is this not exactly as it should be? Should those trying the highest volume of cases and those with the most serious consequences not be subject to the highest levels of scrutiny?

### VIII. CONCLUSION

As a society we entrust prosecutors with countless decisions and responsibilities that lead to life-altering consequences for defendants, victims, and a society trusting that our criminal justice system is fair and equitable. Where the consequences for citizens engaging in illegal activity are statutorily regulated and consistently applied, we have no comparable procedure for regulating the misconduct of the prosecutors who seek those consequences in an unethical manner. As the study has clearly shown, prosecutorial misconduct is a real and prevalent problem, is often unaddressed, and almost never results in any sort of deterrent consequences. While it is not feasible or appropriate for prosecutorial misconduct to be handled by the courts through reversals, an administrative agency tasked solely with administering discipline based on findings of misconduct by the appellate courts would facilitate a balancing of the interest in preserving verdicts with the interest in promoting prosecutorial ethics. I believe this proposal is not only reasonable and practical; it is necessary to the furtherance of justice.