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Organizational Guidelines for the Prosecutor's Office

Rachel E. Barkow*

It is an all-too familiar story for criminal prosecutors: employees of an entity either negligently or intentionally violate the law, innocent people are victimized, lives destroyed. Prosecutors must decide how best to obtain justice and to stop this kind of behavior going forward. Going after the individual employees who committed the misconduct is of course an option, but history teaches that it is often hard to detect the wrongdoing or identify who within the entity bears responsibility for the harm. And individual actions tend not to lead to systemic changes. Thus, over time, prosecutors have also sought to target the entity itself because it stands in the best position to root out misconduct and stop it from recurring. Prosecutors recognize it might be unfair to prosecute the organization if it behaved reasonably and made good faith efforts to encourage its employees to comply with the law, so they allow the entity to escape liability altogether or face a lesser punishment if the entity took sufficient steps to detect and stop wrongdoing, such as adopting training programs, implementing adequate supervision, and instituting other compliance mechanisms.

The modern era of corporate criminal law enforcement is now dominated by this entity-based approach of compliance. There is broad agreement among prosecutors that this is the right way to deter misconduct within a company. Indeed, it is the official policy of the Department of Justice, and one of the key principles behind the United States Sentencing Commission's Organizational Guidelines.

Prosecutors should be equally enthusiastic for using this framework to address wrongs that place within a similar organization: the prosecutor's office itself. Prosecutorial misconduct, whether intentional or negligent, is not an infrequent occurrence. Although most prosecutors follow the law and behave ethically – just as most corporate employees do – that is not true of all prosecutors. A host of studies have documented prosecutorial misconduct,[1] and one of – if not the -- most common type of

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[1] Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors* 108 (2003) (prosecutorial misconduct led to the dismissal of charges in more than 2,000 cases since 1970 and in more than thirty of these cases, innocent defendants were wrongly convicted); Innocence Project, Understanding the Causes, Government Misconduct, available at http://innocenceproject.org/understand/Government-Misconduct.php?phpMyAdmin=52c4ab7ea46t7da4197 (last visited Nov. 12, 2009) (finding prosecutorial misconduct in 33 of 74 cases of wrongful convictions and noting that 37% of the instances of misconduct involved the suppression of exculpatory evidence); James S. Liebman et al., Capital Attrition, Error Rates in Capital Cases, 1973-1995, 78 Tex. L. Rev. 1839, 1846, 1850 (2000) (finding in a study of all capital convictions (almost 5,800) from 1973-1995 that illegal suppression of evidence is one of the most common reasons for reversal in death penalty cases); Ken Armstrong & Maurice Possley, The Verdict: Dishonor, Chi. Trib., Jan. 10, 1999, at 3 (highlighting 381 homicide cases throughout the nation that were reversed because of a failure to disclose exculpatory evidence or because the prosecutor knowingly presented false

prosecutorial misconduct[2] in these cases involved the suppression of exculpatory evidence in violation of *Brady v. Maryland*.[3] And these studies are just the tip of the iceberg because the number of disclosure violations is undoubtedly far higher because most cases involving prosecutorial misconduct will either never be discovered or, even if noticed, will not result in a reversal or modification.

The existing framework for addressing prosecutorial misconduct is entirely backward-looking – and ineffective. Judges and state bars are supposed to police violations when they occur. But just as a model that focuses solely on individual liability and addressing particular violations after-the-fact proved inadequate in deterring corporate crime, so, too has it failed in addressing misconduct within the larger entity of the prosecutor's office. Most violations never come to light, and when they do, individual actors responsible for the misconduct rarely face any consequences.

Prosecutors recognized these failings when the entity at issue was a corporation. They have aggressively focused on the entity itself to address these shortcomings and to encourage forward-looking reforms. Specifically, they have used the entity as a partner in stopping wrongdoing before it happens by insisting on strong compliance programs that rely on training, supervision, transparency, and monitoring.

This Article argues that it is time for prosecutors to recognize that their own offices should be held to the same standards. Part I begins by describing the pressures that lead to prosecutorial misconduct and the lack of any effective checks on this behavior. Part II outlines the parallels between prosecutorial misconduct and the misconduct of corporate employees and describes how prosecutors have addressed organizational misconduct in the corporate context. Part III explains how the corporate compliance model could be practically applied to prosecutors' offices. Finally, Part IV considers the potential catalysts for taking this organizational-level, compliance-based approach to prosecutorial misconduct.

I. The Incentives and Disincentives for Prosecutorial Misconduct

Although most prosecutors comply with their legal and ethical obligations to disclose exculpatory evidence, some do not. This section explores why violations occur and why existing deterrents are insufficient checks against misconduct.

A. The Pressures To Violate the Law

Why do violations occur? In some cases, the failure to turn over evidence is intentional. The adversary system places a premium on winning, and prosecutors are hardly exempt from the pressure to win.[4] Whether they are elected or appointed,

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evidence); Fredric N. Tulsky, *Review of more than 700 appeals finds problems throughout the justice system*, San Jose Merc. News, Jan. 22, 2006 (finding almost 100 instances of prosecutorial misconduct within a single district in California).

[2] The Justice Project, Improving Prosecutorial Accountability 2 (2009).

[3] 373 U.S. 83 (1963). Exculpatory evidence includes impeachment material. Giglio v. United States, 405 U.S. 150 (1972).

[4] As Richard Uviller observed, "even the best of prosecutors – young, idealistic, energetic, dedicated to the interests of justice – are easily caught up in the hunt mentality of an aggressive office." H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 Fordham L. Rev. 1695, 1702 (2000).

prosecutors often feel pressure to obtain convictions to demonstrate their effectiveness, as convictions are the lodestar by which prosecutors tend to be judged.[5] When a high-profile crime occurs, the pressure to win is likely to be even greater.[6] As one federal judge has observed, "It's the easiest thing in the world for people trained in the adversarial ethic to think a prosecutor's job is simply to win."[7]

This is not to say that prosecutors are intentionally framing innocent people.[8] Rather, once a prosecutor concludes a defendant is guilty, he or she may intentionally fail to disclose exculpatory evidence because he or she does not want to jeopardize losing the case against what he or she believes to be a guilty defendant.[9] Similarly, the prosecutor may have an honest but objectively incorrect belief that the evidence does not need to be disclosed because it is not material. The prosecutor, after all, has considered the evidence and concluded that it points toward guilt. As a result, the prosecutors is likely to underestimate ex ante the extent to which a particular piece of exculpatory evidence could change the result of a proceeding because that evidence clearly did not change the prosecutor's mind about whether to go forward.[10] The failure to turn the evidence over would thus be intentional, but the prosecutor would not be intentionally violating the law.

Not all failures to disclose are intentional, of course. In many, likely most, cases, inadvertence or negligence may explain the lack of disclosure. Prosecutors' offices have large caseloads and are often poorly funded and understaffed, with many offices having high rates of turnover and others employing prosecutors who work on only a part-time

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[5] Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 Howard L.J. 475, 484 (2006) ("Generally, the conviction rate will constitute the basic yardstick of an office's efficacy, and those who contribute to the rate will advance.").

[6] *Id.*; Kenneth J. Melilli, *Prosecutorial Discretion in an Adversarial System*, 1992 B.Y.U. L. Rev. 669, 688 (1992) ("Particularly where cases generate public attention, the prosecutors' office may be reluctant to appear ameliorative.").

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

[8] While that may be true in rare cases, see Pottawattamie County v. McGhee, No. 08-1065 (U.S. 2009), there is no evidence that it is a common occurrence.

[9] Paul C. Giannelli, *Prosecutorial Ethics and the Right to a Fair Trial: The Role of the* Brady *Rule in the Modern Criminal Justice System*, 57 Case W. Res. L. Rev. 593, 601 (2007) (observing that prosecutors know they cannot retry a defendant who is acquitted and that they may worry that disclosing evidence might make it harder for them to convict a defendant they believe to be guilty).

[10] Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 Ohio St. J. Crim. L. 467, 488 (2009) (noting how prosecutors may have a difficult time accurately assessing the value of exculpatory evidence because "tunnel vision" may make them prone to view that evidence "through the lens of one's preexisting expectations and conclusions"); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 William & Mary L. Rev. 1587, 1611(2006) ("[T]he prosecutor's application of *Brady* is biased not merely because she is a zealous advocate engaged in a 'competitive enterprise,' but because the theory she has developed from that enterprise might trigger cognitive biases, such as confirmation bias and selective information processing"); Jonathan A. Fugelsang & Kevin N. Dunbar, *A Cognitive Neuroscience Framework for Understanding Causal Reasoning and the Law*, 359 Phil. Transactions Royal Soc'y London B 1749, 1751 (2004) ("[P]eople are more likely to attend to, seek out and evaluate evidence that is consistent with their beliefs, and ignore or downplay evidence that is inconsistent with their beliefs."); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917 (1999) (explaining how prosecutors can become attached to a particular theory of a case and thereby ignore evidence inconsistent with that theory).

basis.[11] This can lead to overlooked evidence or insufficient documentation about promises made to witnesses or their prior records or statements. In many cases, prosecutors may simply not know exculpatory evidence exists because the police never passed along the information.[12]

Offices are likely to differ in terms of how much of a premium they place on winning, thus leading to intentional nondisclosures, or in terms of the resource pressures that may lead to negligent violations. The available evidence confirms that violations are likely to cluster in particular offices, as it appears that many prosecutors' offices have within them multiple cases of misconduct and repeat offenders.[13] To be sure, there are also isolated cases of misconduct that are rare for a rare for a particular office, but what is more likely is that problems will be more widespread, either in the form of a repeat offender who is never detected or sanctioned, or as manifest by multiple violators within a particular office.

B. Lack of Effective Deterrents or Oversight To Ensure Compliance

Both intentional and negligent conduct can be deterred by sanctions, but prosecutors have few incentives outside of their sense of professional responsibility for taking greater care to comply with *Brady*. Indeed, there are currently no effective deterrents for prosecutorial misconduct. The biggest problem is that most violations are never discovered in the first place. Defendants often have no way of knowing whether a prosecutor is in possession of exculpatory evidence that should be disclosed under *Brady*. In most cases, it is entirely fortuitous that a violation comes to light.[14] Because the likelihood that a disclosure violation will be detected is so low, prosecutors are less likely to be deterred from engaging in intentional misconduct or taking steps to ensure that they do not make unintentional mistakes.[15]

This is all the more so because, even in the relatively rare instances when violations come to light, prosecutors virtually never face a penalty for the violation. Although federal prosecutors could bring criminal actions against prosecutors who willfully violate a defendant's constitutional rights under 18 U.S.C. § 242, those actions

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[11] Dunahoe, supra note __, at 62-63; Armstrong & Possley, supra note __, at __ (quoting the New Orleans District Attorney about the caseload pressures and resource constraints in his office, including "rampant" turnover, that makes "it difficult to keep track of what evidence has been disclosed in every case" handled by prosecutors); Rasmusen et al., *Convictions versus Conviction Rates: The Prosecutor's Choice*, 11 Am. L. & Econ. Rev. 47, 67 (2009) (noting that, of the 2,341 prosecutor's offices in 2001, 532 of them had part-time chief prosecutors).

[12] Stanley Z. Fisher, "Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports, 28 New Eng. L. Rev. 1 (1993).

[13] California Commission on the Fair Administration of Justice: Report and Recommendations on Reporting Misconduct, 12 (Oct. 18, 2007), available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf (noting that several counties in California "appear to have a disproportionately high rate of cases in which claims of prosecutorial misconduct were sustained" and "also had multiple cases of repeat offenders").

[14] Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

[15] A. Mitchell Polinsky & Steven Shavell, On the Disutility and Discounting of Imprisonment and the Theory of Deterrence, 28 J. Legal Stud. 1, 4-7 (1999) (explaining the importance of the likelihood of detection on deterrence).

are not brought,[16] and other criminal charges are exceedingly rare.[17] Contempt citations are similarly unusual.[18] Nor are prosecutors typically punished by their supervisors or removed from office.[19]

The hurdles for a victim who wishes to bring a civil suit are typically insurmountable. Prosecutors have absolute immunity for conduct "intimately associated with the judicial phase of the criminal process," which includes the failure to disclose exculpatory evidence.[20] The Supreme Court has also determined that prosecutors have absolute immunity even when the claim is that prosecutors have failed to create a proper administrative system for identifying exculpatory evidence because of poor supervision or record sharing.[21]

And although prosecutors have an ethical obligation to disclose exculpatory material, the violation of which can lead to professional discipline,[22] prosecutors rarely face sanctions from state bars. Richard Rosen conducted an empirical study of how state bars treated *Brady* violations during a five-and-half-year period from 1980-1986. Rosen's study included the relevant available published materials, plus supplemental survey responses from 41 states.[23] Despite the study's broad scope, Rosen found only nine cases in which the state bar even *considered* imposing discipline for *Brady* violations and just six cases where some disciplinary action was actually taken. Of those six, four of the cases involved minor sanctions – a caution, a reprimand, and two censures.[24] In 1999, reporters at the Chicago Tribune examined 381 homicide cases involving prosecutorial misconduct and found that not a single one of the prosecutors involved received a public sanction.[25] More recently, in 2003, the Center for Public

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[16] Brian Johnson and Phillip B. Bridgmon, *Depriving Civil Rights: An Exploration of 18 U.S.C. 242 Criminal Prosecutions 2001-2006*, 34 Crim. Just. Rev. 196 (June 2009); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 69 (finding that, since §242 was adopted in 1866, only one prosecutor was convicted under the statute). For an argument that prosecutions under §242 might be optimal for intentional violations of *Brady*, see Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. Ann. Surv. Am. L. 4587-88 (2005).

[17] Possley & Armstrong, supra note __, at 1 (finding only 6 cases this century where prosecutors faced criminal charges for concealing evidence or using falsified evidence)

[18] Rosen, *supra* note __, at 703.

[19] Rosen, *supra* note __, at 703.

[20] Imbler v. Pachtman, 424 U.S. 409 (1976); Carter v. Burch, 34 F.3d 257, 263 (4th Cir. 1994); Campbell v. Maine, 787 F.2d 776, 778 (1st Cir. 1986). For an argument that absolute immunity should not apply when prosecutors violate *Brady*, see Johns, supra note __, at 146-150.

[21] Van de Kamp v. Goldstein, 129 S.Ct. 855, 861-852 (2009).

[22] Every state has rules for lawyer discipline, modeled to some extent on either the American Bar Association Model Rules of Professional Conduct or Model Code of Professional Responsibility. Rosen, supra note __, at 715. Indeed, 44 states have adopted verbatim one of the ABA provisions addressing the failure to disclose exculpatory evidence, and most of the rest of the states make only minor changes to the ABA's models. *Id.* at 715 n.122.

[23] Rosen, *supra* note __, at 719-720, 730.

[24] Rosen, *supra* note __, at 730. An updated study of Professor Rosen's research covering an additional ten-year span revealed only 7 additional cases where discipline was sought, and only four cases where prosecutors actually received sanctions. Jeffrey Weeks, *No Wrong Without a Remedy*, 22 Okla. City U. L. Rev. 833, 881-882 (1997).

[25] Possley & Armstrong, supra note __, at C1. One prosecutor was fired but was later reinstated, another was suspended for 30 days, and third had his license suspended for 59 days.

Integrity examined 2,012 cases where a conviction was reversed or a sentence was reduced because of prosecutorial misconduct, and found that in only 44 of those cases did the prosecutor come to the attention of state disciplinary authorities, and seven of those cases were dismissed.[26] A nationwide study of all reported cases involving discipline for prosecutorial misconduct found only 27 instances of prosecutors receiving discipline for unethical behavior that compromised the fairness of a trial.[27]

It is not surprising that so few cases involving *Brady* violations result in bar discipline. The main reason is that few cases reach the attention of state bars. In Rosen's study, 35 states responded that no formal complaints had been filed for *Brady* misconduct.[28] The reason for the low reporting rate is that there are few institutional actors well positioned to report violations. The individual prosecutor who commits the violation is not going to report himself or herself, and the office in which he or she works may have no knowledge of the violation. Even if the office knows of a violation, it has little incentive to report the offending prosecutor because of the negative effect it would have on office cohesion. Defense lawyers may have knowledge of violations, but, as repeat players, they have to be careful not to anger prosecutors and their colleagues who will decide the fate of their clients.[29]

One might expect judges to be more proactive in reporting prosecutorial violations, but they, too, have largely failed to call prosecutorial misconduct to the attention of state bar authorities. A recent study by the California Commission on the Fair Administration of Justice, for example, reviewed 443 reported decisions between 1998 and 2008 in which courts cited prosecutors for misconduct. In 53 of the cases, the conviction was reversed, and, pursuant to state law, the judge should have referred the prosecutors to the state bar for discipline.[30] In fact, not a single case was referred for discipline – and some of the offending prosecutors had engaged in misconduct more than once.[31] Judges may be reluctant to report prosecutors because they "simply have no appetite for directly imposing personal or professional penalties on the prosecutors with whom they regularly interact" or because they "wish to avoid the risk of overdeterring appropriate prosecutorial zeal."[32] Judges may also not have enough information about the internal workings of the office or the prosecutor's intent to know whether a failure to

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[26] Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors* 79 (2003).
[27] Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721, 751-754, tbls. VI & VII (2001). Local studies show this same pattern. For example, discovery from a civil rights lawsuit in Queens, New York, found that not a single prosecutor was disciplined out of 84 cases involving prosecutorial misconduct resulting in the reversal of a conviction. Brief of Amicus Curaie The National Association of Criminal Defense Lawyers et al., Pottawattamie County v. McGhee, No. 08-1065, at 31 (U.S. 2009).
[28] Rosen, *supra* note __, at 731.
[29] Rosen, *supra* note __, at 734-735.
[30] California Commission on the Fair Administration of Justice: Report and Recommendations on Reporting Misconduct, 4, 13 (Oct. 18, 2007), available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf.
[31] *Id.* at 12 (identifying 30 repeat offenders, including two prosecutors who engaged in misconduct in three separate cases). See also Radley Balko, *No Accountability: Why are bad prosecutors so rarely punished?*, Reason Magazine, available at http://reason.com/archives/2009/10/26/no_accountability.
[32] Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 Geo. L.J. 1509, 1517 (2009).

disclose was made in good or bad faith.[33] In jurisdictions where judges are elected, they may be concerned that prosecutors will oppose their reelection if they are too aggressive in reporting prosecutors.

In the rare cases that do come to the attention of disciplinary authorities, bar authorities themselves may be reluctant to impose sanctions. First, they may lack the resources to investigate properly the allegations, which may have occurred years earlier. Second, even if they possess the necessary staffing and funds to engage in a proper inquiry into misconduct, state bars, which are typically arms of the judiciary, may be reluctant to dig too deeply into the operation of the prosecutor's office because of a concern that they will interfere with the workings of another part of government.[34] Third, state bars may be reluctant to sanction particular prosecutors in the face of uncertainty about whether a violation was intentional or unintentional. As noted, often violations occur because prosecutor's offices are under-resourced. It may be difficult for a bar to identify when this is the case and when a prosecutor deliberately failed to turn evidence over. *Brady* does not distinguish between good faith and bad faith failures to disclose, but a disciplinary authority would certainly find the distinction meaningful.[35] The bar could thus be concerned about its capacity to differentiate between intentional and excusable misconduct. Whatever the precise cause of the failure of state bars to treat these violations more seriously, they are clearly not policing prosecutorial misconduct to any meaningful extent. The overwhelming majority of prosecutors faces no sanction for misconduct, and even repeat offenders fall through the cracks.[36]

Prosecutors are also unlikely to be deterred by the prospect that a case will be reversed because of a *Brady* violation. For starters, *Brady* is typically enforced after a trial where the defendant was found guilty,[37] and the threshold for finding a *Brady*

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[33] *Brady* made clear that the Constitution is violated "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Judges may therefore find themselves both convinced that a *Brady* violation occurred while at the same time harboring doubts about whether the prosecutor deserves punishment from the bar.

[34] Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev.721, 761 (2001) ("To the extent discipline requires an investigation of the workings of a prosecutor's office, disciplinary agencies may consider it invasive of the authority of a coordinate branch of government."); Andrew Smith, Note, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 Vand. L. Rev. 1935, 1953-1954 (2008) (observing that this claim has been successful in disciplinary proceedings).

[35] Some have suggested that different consequences in the case itself should follow if a prosecutor intentionally engages in misconduct or acts in bad faith. *See*, *e.g.*, Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 737 (1987) (arguing that reversal should be automatic when prosecutors act in bad faith); David L. Botsford & Stanley G. Schneider, *The "Law Game": Why Prosecutors Should be Prevented from a Rematch; Double Jeopardy Concerns Stemming From Prosecutorial Misconduct*, 47 S. Tex. L. Rev. 729, 772 (2006) (advocating a ban on retrials when prosecutors engage in intentional misconduct).

[36] The Justice Project, *supra* note __, at 11 (citing study that found 443 instances of prosecutorial misconduct over a ten-year period with thirty cases involving repeat offenders). See also Ellen Yaroshefsky, Wrongful Convictions: It Is Time To Take Prosecution Discipline Seriously, 8 UDC/DCSL L. Rev. 275, 281-282 (2004) (observing that a single office -- the Bronx District Attorney's Office -- had 72 cases reported cases of prosecutorial misconduct between 1975 and 1996); Andrea Elliot, Prosecutors Not Penalized, Lawyer Says, N.Y. Times, December 17, 2003, at B1 (noting that 14 of 74 prosecutors who committed prosecutorial misconduct in the Bronx were multiple offenders).

[37] Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 McGeorge L. Rev. 643, 645 (2002).

violation in that circumstance is high. Courts will reverse convictions for failing to disclose exculpatory evidence only if the evidence was material.[38] To show materiality, defendants must prove that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[39]

Perhaps even more importantly, the prosecutor making a decision to disclose or not will have to guess *before* trial whether the nondisclosure is likely to be deemed material when a reviewing court considers it *after* a trial. The prosecutor thus has to guess what the overall record in the case will be to decide how significant any individual piece of evidence will be. As one district court judge aptly put it, this analysis is "speculative on so many matters that simply are unknown and unknowable before trial begins."[40] Given the uncertainty involved and the high threshold for getting a case reversed, it is unlikely that the prospect of reversal will exercise significant pull on a prosecutor's behavior before trial.

This is especially true because of the prosecutor's vantage point in the case. A prosecutor brings a case because he or she believes a defendant is guilty – indeed, prosecutors are ethically bound not to pursue a case if they believe a defendant is innocent. Thus, the prosecutor has already made a decision for himself or herself that the exculpatory evidence does not undermine the guilt of the defendant. The prosecutor is therefore likely to assume a judge or jury would view things the same way.

II. Lessons from Corporate Crime Enforcement

The current state of prosecutorial misconduct shares much in common with the state of corporate criminal law enforcement up until the 1990s. This section identifies the parallels between misconduct within a corporation and within a prosecutor's office and explains why and how prosecutors – particularly federal prosecutors because they are the leading force in the area of white collar crime[41] – shifted their thinking about how to combat corporate crime.

A. The Parallels to Prosecutorial Misconduct and the Old Corporate Crime Regime

Prior to the 1990s, there were lots of incentives and few effective deterrents for corporate misbehavior. As with prosecutorial misconduct, some individuals within a company had incentives to engage in intentional wrongdoing, either to profit directly from the criminal act or to improve their standing within the company;[42] crimes of

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[38] United States v. Agurs, 427 U.S. 97, 108-113 (1976). Some commentators have advocated changing the standards for disclosure under state law. See, e.g., Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833, 933 (1997); Allison J. Doherty, *The FBI's I-Drive and the Right to a Fair Trial*, 91 Iowa L. Rev. 1571, 1590 (2006).
[39] United States v. Bagley, 473 U.S. 667, 682 (1985); Strickler v. Greene, 527 U.S. 263, 281 (1999).
[40] United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005).
[41] Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 Ind. L.J. 473, 475 (2006) (noting that federal law governs most cases of criminal enterprise liability in the corporate context).
[42] Jennifer Arlen, *Removing Prosecutors from Corporate Governance Regulation: Limiting Prosecutorial Discretion To Impose Structural Reforms*, at 8.

negligence also occurred, often because of poor oversight or a lack of resources.[43] And, as with prosecutorial misconduct, there were not many consequences for corporate employees who committed intentional or negligent acts. Also similar to prosecutorial misconduct, much of the wrongdoing never came to light.[44] And, again mirroring prosecutorial misconduct, even when misconduct was discovered, it was often hard to identify which specific individual within the larger entity was responsible.[45]

As a result, federal prosecutors saw the virtue in going after the company itself, under a theory of entity liability, in addition to focusing on individual wrongdoers. Traditional entity liability, established in the early 1900s, rests on the idea that organizations can be held responsible for acts taken by its employees, and that such liability is necessary to deter corporate misconduct.[46] There are three requirements for liability: (1) the corporate agent must commit an illegal act with the requisite level of intent;[47] (2) the agent must have acted in the scope of his or her employment;[48] and (3) the agent must have intended to benefit the corporation.[49] Corporations can be convicted under a theory of *respondeat superior* even if an individual is never charged, and it is not necessary to identify a specific person who acted illegally, only that "*some* agent of the corporation committed the crime."[50] Before the 1990s, the punishment for the company was typically a small fine, and prosecutors did not require companies to cooperate in finding lawbreakers within the firm or to adopt significant compliance programs.[51] Thus,

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[43] Just as *Brady* is violated whether the prosecutor acted in good faith or bad faith, many corporate crimes punish behavior whether or not there is a showing of intentional misconduct. *See Developments in the Law*, *supra* note __, at 1260 (noting that corporate crimes can be based on a recklessness, negligence, or strict liability standards).

[44] Arlen, supra note __, at 8 (citing Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?* (Working Paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891482) (finding that the SEC detected fewer than 6 percent of corporate frauds committed between 1996 and 2004 and that only 16% of frauds were uncovered by non-financial market regulators)).

[45] Arlen, supra note __, at 8 ("corporate crimes often involve actions by many people, and often the person who committed the physical act that constitutes the crime is not the person who made the decision to commit it").

[46] *See* New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494-496 (1909).

[47] *Developments in the Law--Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction,* 92 HARV. L. REV. 1243, 1247-48 (1979).

[48] *Id*. at 1249-50. An agent acts within the scope of his or her authority if he or she acts with actual or apparent authority. Harry First, General Principles Governing the Criminal Liability of Corporations, Their Employees and Officers, in White Collar Crime: Business and Regulatory Offenses § 5.03(1), at 5, 10 (Otto G. Obermaier & Robert G. Morvillo eds., 1990).

[49] *Developments in the Law*, supra note __, at 1249-1250. The company need not actually benefit from the employee's act, and the company can be liable even if the primary goal of the employee was to benefit himself or herself. Dan K. Webb et al., Understanding and Avoiding Corporate and Executive Criminal Liability, 49 Bus. Law. 617, 621 (1994).

The Model Penal Code requires that the illegal act must have been committed by a high managerial agent within the company, but the federal system and the majority of states have not adopted this additional requirement. Ellen S. Podgor, *Educating Compliance*, Am. Crim. L. Rev. (need to insert full cite once published; this should be on page 1 of article, around n.5.)

[50] *Developments in the Law*, supra note __, at 1248.

[51] Mark Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U. L. REV. 247, 254 (1991) (evaluating fines levied upon corporations between

even though the liability rule for entities was broad, the sanctions were light, so companies had few incentives to change their practices to avoid criminal liability. And because companies were strictly liable for their employees' illegal conduct, even if they took steps to prevent it, they had little incentive to report that misconduct to the government.[52]

B. The New Approach to Corporate Crime and the Lessons To Be Learned

In the 1990s, federal prosecutors changed their approach. They began to see companies not merely as targets for prosecution, but as valuable partners in achieving real reform. This new approach recognized that companies needed incentives to help the government bring individual wrongdoers to justice and to change the culture within the firm to bring about greater compliance with the law.

1. Corporate Entities as Partners in Law Enforcement

As the last century drew to a close, prosecutors took stock of corporate law enforcement efforts and recognized that office culture was the key to understanding and deterring corporate crime. In particular, prosecutors acknowledged that company compensation and promotion practices helped drive corporate crime if they placed an emphasis on short-term profits, and that firms could also promote crime if there was not a culture within the firm that promoted compliance with the law.[53] Prosecutors also realized that companies were better positioned than government prosecutors to identify wrongdoing within the firm and to take actions to deter that conduct.[54]

Prosecutors therefore changed their approach to entity liability for corporations. Congress and the Sentencing Commission were critical to this shift because the first essential step to change was to increase the sanctions for companies that violated federal law.[55] Fines increased in the 1990s and again after Congress passed the Sarbanes-Oxley Act of 2002, which directed the Sentencing Commission to ensure that its Organizational Sentencing Guidelines "are sufficient to deter and punish organizational criminal

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1984 and 1988 and finding that the median fine (given in 63% of cases from 1984 to 1987 and in 53% of cases in 1988) was $10,000).

[52] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 714-715 (1997)

[53] Jennifer Arlen, *Removing Prosecutors from Corporate Governance Regulation: Limiting Prosecutorial Discretion To Impose Structural Reforms*, at 8 in Prosecutors in the Boardroom. See also Buell, supra note __, at 493-94 and n.98 (observing that entities can promote wrongdoing both through compensation and promotion practices and through "more subtle (and possibly more powerful and intractable) behavioral influences that may operate in institutional settings").

[54] Arlen, at 8; Jennifer Arlen & Reinier Kraakman, *Controling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 691-93, 699 (1997); Samuel Buell, *Criminal Procedure Within the Firm*, 59 Stan. L. Rev. 1613, 1625 (2007).

[55] S. Rep. No. 225, 98th Cong., 1st Sess. (1983), reprinted in 1984 U.S.C.C.A.N. 3182 at 76, 77 (finding that current sentencing practices were "creating the impression" that fines in white collar cases "can be written off as a cost of doing business" and that corporate offenders "frequently do not receive sentences that reflect the seriousness of their offenses").

misconduct."[56] In response, the Guidelines threaten "heavy criminal fines for law violators and the likelihood of court-supervised probation."[57] Sentences could be reduced and prosecution potentially avoided altogether, however, if companies adopted compliance programs and reported violations to the government. The sanctions were therefore designed to prompt firms to take internal actions to identify and report wrongdoers.[58]

Faced with this new "carrots and sticks" approach to corporate liability,[59] companies had an incentive to comply with prosecutorial demands to avoid criminal charges or to get sentence reductions. Prosecutors, in turn, used this leverage to spur companies to change their practices and the culture within the firm to deter future wrongdoing and to assist the federal government in bringing individual wrongdoers to justice.[60]

2. The Centrality of Compliance Programs

To encourage companies to change firm culture, both the Department of Justice and the Sentencing Commission have sought to encourage the adoption of compliance programs. The Department of Justice made clear that it would consider the efforts made by a company to create a compliance program in deciding whether to prosecute.[61] The Department advises prosecutors to evaluate programs to determine whether "corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives."[62] The Department also focuses on the comprehensiveness of the program and any remedial actions taken by the

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[56] Sarbanes-Oxley Act of 2002, Public Law 107-204, § 805(a)(2)(5).

[57] John R. Steer, Vice Chairman, U.S. Sentencing Comm'n, Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit (Apr. 26, 2001) (unpublished paper presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Oklahoma), *available at* http://www.ussc.gov/orgguide.htm.

[58] Arlen & Kraakman, supra note __, at 754 (noting that the purpose of sanctions is "to induce firms to detect, report, and punish wrongdoers").

[59] Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 964 (2009).

[60] *Id.* at 960-961.

[61] When the Department of Justice began to develop principles for charging corporations in 1999, it gave eight factors for prosecutors to consider, including "[t]he existence and adequacy of the corporation's compliance program" and "any efforts to implement an effective corporate compliance program or to improve an existing one." Memorandum from Eric Holder, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html. In 2003, then-Deputy Attorney General Larry Thompson issued an updated memorandum (Thompson Memo) on charging corporations that listed nine factors prosecutors *must* consider in charging organizations, including the language from the Holder Memo regarding compliance programs. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys, Principles of Federal Prosecutions of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm. Under current DOJ policy, the existence of a compliance program remains a factor that prosecutors should consider in deciding whether to charge a corporation. Principles of Federal Prosecution of Business Organizations, United States Department of Justice, United States Attorneys' Criminal Resource Manual §§ 9-28.300, 9-28.800, *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

[62] Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Attorneys (Aug. 28, 2008), http://www.usdoj.gov/dag/readingroom/dag-memo-08282008.pdf.

corporation when wrongdoing comes to light.[63] The Department further considers the "authenticity" of corporate cooperation[64] and the promptness by which companies report wrongdoing. The directive, then, urges prosecutors to consider whether the company has what is in effect merely a "paper program" or "whether it was designed and implemented in an effective manner."[65]

In practice, this has meant that companies establish compliance programs before prosecutors mandate that they do so in an effort to stave off indictments and the hope that prosecutors will not impose upon the company a more onerous compliance program than the one the company adopts for itself.[66] Prosecutors, for their part, tend to look favorably on the existence of these programs and frequently agree not to charge a company or to defer charging a company because the company has a compliance program, though often prosecutors will insist on additional conditions that require the company to adopt some other changes to its business practices.[67] While these specifications can include a range of requirements unique to each firm and to the prosecutor negotiating them, some common requirements are drawn from the United States Sentencing Guidelines dealing with organizations.

The Commission's Organizational Guidelines provide for reduced sentences for convicted corporations that have instituted effective compliance programs[68] and that have reported the crime promptly and cooperated fully with the authorities in the investigation.[69] If an organizational offender does not have an effective compliance program, they can be ordered to create such a program during a period of court-supervised probation.[70]

In the Commission's view, an effective program must include the exercise of "due diligence in seeking to prevent and detect criminal conduct" by employees and agents and must "otherwise promote an organizational culture that encourages ethical conduct

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[63] Filip Memo, supra note __.
[64] Memorandum from Larry D. Thompson, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.
[65] *Id.*
[66] Jennifer Arlen, *Removing Prosecutors from Corporate Governance Regulation: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARD ROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (forthcoming).
[67] *See generally* PROSECUTORS IN THE BOARD ROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (forthcoming); Eugene Illovsky, *Corporate Deferred Prosecution Agreements: The Brewing Debate*, CRIM. JUSTICE, Summer 2006, at 36, *available at* http:// www.abanet.org/crimjust/cjmag/21-2/corporatedeferred.pdf. Prosecutors insist on various other conditions as well, which may include fines, personnel actions, restrictions on business practices (even legal ones), and limits on public statements. PROSECUTORS IN THE BOARD ROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (forthcoming).
[68] U.S. Sentencing Commission, Guidelines Manual Ch. 8, § 8C2.5(f).
[69] *Id.* at § 8C2.5(g).
[70] John R. Steer, Vice Chairman, U.S. Sentencing Comm'n, Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit (Apr. 26, 2001) (unpublished paper presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Oklahoma), *available at* http://www.ussc.gov/orgguide.htm, at 6.

and a commitment to compliance with the law."[71] This, in turn, means that the company must "establish standards and procedures to prevent and detect criminal conduct."[72] "[S]pecific individual(s) within the organization shall be delegated day-to-day operational responsibility for the program," and they must report to high-level personnel within the organization,[73] who must be responsible for overseeing the compliance and ethics program.[74] The organization must monitor and audit to detect unlawful conduct[75] and institute a system that allows employees to anonymously or confidentially report or seek guidance about potential wrongdoing.[76] An effective program must also include incentives for compliance and disciplinary mechanisms for non-compliance.[77]

Prosecutors and the Sentencing Commission place high importance on corporate compliance programs because of their view that these programs can reduce the incentives of employees to commit crimes and promote a culture of ethical and lawful behavior.[78] In addition, by making the corporation's actions more transparent and subject to monitoring, the government is able to detect and prosecute individuals for crimes it would not have known of or could not have proven otherwise.

It is all but impossible to measure directly the effectiveness of these programs,[79] but one telling indicator is the wide consensus among government experts that they are valuable. Compliance programs are now seen as critical by a host of expert agencies, including the Environmental Protection Agency,[80] the Department of Health and Human Services Office of Inspector General,[81] and the Securities and Exchange Commission.[82] The Delaware Supreme Court has recognized the importance of compliance programs, concluding that directors can be civilly liable if they fail to adopt appropriate oversight

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[71] U.S. Sentencing Commission, Guidelines Manual, § 8B2.1.
[72] *Id.* § 8B2.1(b).
[73] *Id.* § 8B2.1(b)(2)(B).
[74] *Id.* § 8B2.1(b)(2).
[75] *Id. §* 8B2.1(b)(5)(A).
[76] *Id. §* 8B2.1(b)(5)(C).
[77] *Id. §* 8B2.1(b)(6).
[78] Tom R. Tyler & Steven L. Blader, *Can Business Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143 (2005); John M. Conley & William M. O'Barr, *Crimes and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 5 (1997); Smith, Simpson & Huang, *supra*; Kathleen M. Boozang & Simone Handler-Hutchinson, *"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution*, 35 Am. J.L. & Med. 89, 93 (2009).
[79] Steer, supra note __, at 9.
[80] Final Policy Statement on Incentives for Self-Policing, Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66706 (Dec. 22, 1995) (policy statement designed to encourage self regulation and reporting of environmental violations); Steer, supra note __, at 14 (noting that EPA also adopted a criminal enforcement policy that takes into account compliance programs).
[81] Steer, supra note __, at 14 (describing the HHS OIG compliance program guides for providers in the health care industry); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U. L.Q. 487, 500 (2003) (noting that HHS modeled its approach after the Organizational Sentencing Guidelines).
[82] Kevin B. Huff, Note, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 Colum. L. Rev. 1252, 1270-1272 (1996); Krawiec, supra note __, at 502-503.

mechanisms or to monitor those mechanisms.[83] Compliance programs have also been viewed as critical to avoid liability for workplace harassment.[84] With so many experts pushing for them, major companies now as a matter of course have corporate compliance programs as a separate branch within their organization and employ attorneys and advisors to assist them in their effort to comply with the law.[85]

Compliance monitoring has an even more storied history as applied to government agencies. Long before the Organizational Sentencing Guidelines were adopted, Congress recognized the need for monitoring government entities to ensure their compliance with the law and to improve accountability. There are more than 60 inspectors general throughout the federal government that monitor federal agencies to ensure that they comply with the law.[86]

The prosecutor's office is thus peculiar as compared to private industry and to other government agencies in its lack of any kind of compliance program.[87]

III. Translating the Compliance Model to Prosecutors' Offices

A prosecutor's office, like a corporation, is an organization comprised of many individuals, some of whom may intentionally commit illegal acts because of pressures within the entity and because the prospect of detection and punishment is unlikely, and some of whom commit illegal acts through negligence because of poor training or

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[83] Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (citing *In re Caremark Int'l Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) as establishing the "necessary conditions predicate for director oversight liability").

[84] Krawiec, supra note __, at 503-504 (noting a firm's compliance program is relevant as a defense to a claim for punitive damages, "as an affirmative defense against enterprise liability" in sexual harassment cases, and as evidence about whether a firm has discriminatory intent).

[85] Podgor, *supra* note __, at (near n.39). Although Kimberly Krawiec is skeptical that compliance programs are effective, most of her evidence relates to ethics programs and diversity training. Krawiec, supra note __, at 511-515. To the extent she analyzes compliance programs along the lines of those encouraged by the Organizational Sentencing Guidelines, she relies upon just three studies, one of which looks at corporate behavior that pre-dates the Guidelines. *Id.* at 512-514 and n.85. The most persuasive evidence she marshals involves two studies finding no relationship between compliance programs and violations of the Occupational Safety and Health Act. *Id.* But these studies hardly address the use of compliance programs to address other legal violations, which may be more easily deterred than OSHA violations. In addition, any study of compliance programs has to account for the fact that the compliance program itself is designed to bring more violations to light that would have otherwise never been unearthed. Thus, it may be that overall compliance is up and the program itself is simply highlighting instances of non-compliance that would otherwise never have been discovered.

[86] Paul C. Light, The Enigma of Bureaucratic Accountability: Monitoring Government – Inspectors General and the Search for Accountability 26 (1993) (as of 1989, there were 61 Offices of Inspector General in the federal government, all with a purpose to monitor and audit the agencies to which they are assigned). Internal affairs bureaus and civilian review boards serve a similar function. Police Assessment Resource Center, List of Oversight Agencies, available at http://www.parc.info/oversight_agencies.chtml.

[87] Brief of Amicus Curaie The National Association of Criminal Defense Lawyers et al., Pottawattamie County v. McGhee, No. 08-1065, at 36 (U.S. 2009) (noting that "there appear to be no disciplinary boards anywhere dedicated to investigating prosecutorial misconduct allegations"); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors*, Lessons from Administrative Law, 61 Stan. L. Rev. 869, 887-895 (2009) (describing checks that operate on other administrative agencies).

inadequate resources or recordkeeping within the organization.[88] Just as organization-level reforms have been used to improve corporate behavior in addition to using individual liability in both contexts, so, too, can an entity-based compliance model be used as a supplement to improve prosecutors' behavior.

One of the chief problems with *Brady* violations is that the vast majority never come to light. A chief goal of a compliance program is to improve the detection of wrongdoing through monitoring, auditing, and reporting.[89] Compliance programs are thus well-suited to get at the detection problems that plague the current system for policing disclosure problems.

But an entity-based compliance model would go further than that. Another major goal of entity liability is to change office culture and practices so that intentional and negligent infractions decrease. If corporate culture can be changed, so, too, can the ethos inside a prosecutor's office. Indeed, as Marc Miller and Ronald Wright point out, it is likely to be easier to transform the culture within a prosecutor's office. The offices already have internal hierarchies and organizational command structures that "are designed precisely to produce coherent group action."[90] And because the relevant employees are lawyers, they have been trained to value "a commitment to consistency and the justification of general rules in terms of public values rather than personal convenience."[91] Thus, if high-level officials within a prosecutor's office seek to change the norms within it, line prosecutors are likely to be highly susceptible to making the shift. That norm shifting could, in turn, go a long way toward mitigating violations.

Compliance programs also seek to find out where the risks for violations are and to determine why laws get violated in an effort to remedy the problems. Thus, if an evaluation of office policies reveals that *Brady* violations occur because of poor recordkeeping regarding impeachment material related to witnesses, for example, the office can take steps to address that shortcoming and thereby reduce violations that occur for that reason. If the problem is poor training, compliance programs are positioned to address that as well. The important point is that compliance programs are about diagnosing problems and finding risks as much as they are about deterring misconduct.

These central principles hammered out in the corporate context apply with equal force to the public agency of the prosecutors. Indeed, the law already recognizes the parallels between corporations and government agencies like prosecutor's offices. The Sentencing Commission Organizational Guidelines apply to "all organizations,"[92] which the Commission notes includes not only corporations, partnerships, associations, joint-

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[88] Gruner, supra note __, at 153 (noting that structural corporate reforms "may be needed where managers adopted a policy or practice that promoted an offense, failed to detect and prevent an offense through reasonably available means, or did not respond to prior offenses by investigating those offenses and developing new corporate practices to avoid repetitions").

[89] Richard S. Gruner, *Structural Sanctions: Corporate Sentences Beyond Fines* 148 in Debating Corporate Crime (William S. Lofquist et al., eds 1997) ("The law compliance mechanisms that are imposed through structural sanctions will tend to reveal a greater percentage of offenses by corporate employees than would otherwise have come to light, thereby facilitating greater law enforcement efforts and deterrence concerning individual employees.").

[90] Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 Iowa L. Rev. 125, 179 (2008).

[91] *Id.* at 180.

[92] U.S.S.G. §8A1.1.

stock companies, unions, trusts, pension funds, unincorporated organizations, and non-profit organizations, but also "governments and political subdivisions."[93]

The Commission's hallmarks for effective compliance programs are therefore helpful in thinking about what should be expected of prosecutors' offices. In thinking about each of these factors, it is important to recognize that particular programs will look different in larger offices than in smaller offices, just as corporate compliance programs look more formal in larger organizations than in smaller ones.[94] For example, whereas a larger office might need formal training programs, smaller offices might achieve the same goals with informal staff meetings; larger offices might have a designated official responsible for compliance whereas smaller offices could instead employ more intensive supervision in the day-to-day handling of cases.[95] But common to all offices would be greater attention within the organization itself to deterring and ferreting out wrongdoing through training, supervision, transparency, and reporting. This section discusses each of these attributes as they relate to the prosecutor's office.

A. Training and Guidance

Although the Supreme Court made clear more than four decades ago that prosecutors have a duty to disclose exculpatory evidence,[96] prosecutors' offices have been slow to make clear to its line attorneys what that obligation means in practice. Indeed, many offices have no written manuals or standards[97] and offer no *Brady* training whatsoever.[98] In the absence of an effective training program, it is hardly surprising that *Brady* violations are prevalent.

Successful corporate compliance programs make training about legal requirements a centerpiece of corporate reform, and the same should be true of prosecutor's offices, as some offices already recognize.[99] The importance of training is emphasized by leading professional groups. The ABA's Project on Standards for Criminal Justice insists that "[t]raining programs should be established within the prosecutor's office for new personnel and for continuing education of his staff"[100] and that "special emphasis" should be given to ethical obligations.[101] Similarly, the National District Attorneys Association also has a National Prosecution Standard that provides that

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[93] U.S. Sentencing Guidelines Manual § 8A1.1, cmt. n.1. See also Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 Ind. L.J. 473, 474 n.2 (2006) (observing that "corporate liability" should actually be broadened to "entity criminal liability" because "many types of legal entities – including partnerships, nonprofits, and even some government bodies – can be subject to prosecution").
[94] U.S. Sentencing Guidelines Manual § 8B2.1, cmt. n.2(C).
[95] *Cf. id.* (noting that smaller organizations can meet their obligations by "training employees through informal staff meetings, and monitoring through regular walk-arounds" or continuing observation while managing the organization").
[96] Brady v. Maryland, 373 U.S. 83 (1963).
[97] Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 399, 422.
[98] Brief of Harry F. Connick, United States Court of Appeals, Fifth Circuit, No. 07-30443, at 21.
[99] Los Angeles County Dist. Attorney's Office, Special Directive 02-08, Brady Protocol (2002), available at http://da.co.law.ca.us/sd02-08htm;
[100] ABA Standards Relating to the Prosecution Function and the Defense Function, Standard 2.6 (Approved draft 1971).
[101] *Id.*

"[t]he prosecutor and his staff should participate in formal continuing legal education."[102] In addition, the United States Department of Justice "recognizes that it is sometimes difficult to assess the materiality of evidence before trial" and thus "encourage[s] prosecutors to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation."[103] As Judge Kozinski has observed, "[t]raining to impart awareness of constitutional rights is an essential function of an office whose administration of justice the public relies on."[104]

Training programs should address not merely the strict rules of *Brady* compliance, but highlight the ethical duties and appropriate values of the prosecutor.[105]

B. Supervision

The Organizational Sentencing Guidelines make clear that, for a compliance and ethics program to be effective, high-level personnel must be responsible for it.[106] A former Department of Justice Inspector General similarly observes that supervisory input is critical for greater law compliance and that one role of the supervisor is to address prosecutorial mistakes as a learning opportunity within the office.[107]

It is difficult, if not impossible, to know how supervisory chains work within each of the country's thousands of prosecutor's offices. But studies show that, even in the federal system, where most offices have a structured command structure, supervisory review is often absent.[108]

Offices that take compliance seriously must make sure that supervisors convey the importance of disclosure obligations and monitor line attorneys to make sure that they comply with their obligations. Supervisors must be the people in the office responsible for compliance and for ensuring that all prosecutors are properly trained.

C. Transparency, Monitoring, and Risk Assessment

When the Sentencing Commission put together an advisory group to consider the effectiveness of the Organizational Guidelines, that group reported that, "in order to do compliance effectively, you've got to do risk assessment, you've got to monitor, you've got to audit."[109] Regulatory agencies like the Securities and Exchange Commission recognize this as well, requiring firms to conduct internal investigations after securities

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[102] National District Attorneys Association, National Prosecution Standards, § 9.5 (2d ed. 1991).
[103] United States Attorney's Manual, §9.5001(B)(1), (E) (rev. 1997).
[104] United States v. Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993).
[105] Studies of corporate employee compliance show that employees are more likely to comply with rules when companies tap into employees' values and encourage them to act on them. *See*, *e.g.*, Tom R. Tyler, & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 Academy of Management J. 1143, 1153 (2005).
[106] U.S.S.G. *§* 8B2.1(b)(2)(B).
[107] Symposium, The Changing Role of the Federal Prosecutor: In Memory of William Tendy, 26 Fordham Urb. L. J. 737, 758 (1999).
[108] Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 Nw. U. L. Rev. 1284, 1295 (1997) ("In most offices, the idea of supervisory review is accepted in principle, but only a few of our districts seriously implement it.").
[109] U. S. Sentencing Comm'n, Presentation of the Ad Hoc Advisory Group on the Organization Sentencing Guidelines (Oct. 7, 2003), available at http://www.ussc.gov/corp/advgrprpt/1007_Brief.pdf.

law violations and to report back to the agency its findings as a condition of settling a case.[110] Prosecutors, too, have placed premium on monitoring when they insist on corporate reforms.[111]

Although obtaining information about the current internal processes in prosecutors' offices is difficult,[112] the evidence gathered by researchers demonstrates that many prosecutors' offices lack mechanisms for assessing risks, tracking problems, and imposing discipline.[113]

Prosecutors' offices should recognize what has become clear in the corporate context, and that is the importance of auditing and risk assessment. Prosecutors' offices should engage in self-regulation by keeping track of any prosecutor in the office who receives criticism from a judge for failing to disclose evidence and taking action to sanction those violations.[114] Lawyers should be required to report any reprimand they receive from a judge to a designated supervisor in the office. The office should also conduct periodic audits of cases to find instances of misconduct that were not reported by the lawyer involved. At the federal level, for instance, the Office of Professional Responsibility conducts searches of judicial opinions noting prosecutorial misconduct and reports the results to the Deputy Attorney General with a recommendation of how the misconduct should be addressed.[115] But because most instances of misconduct will not be discovered by a court, offices should also conduct periodic, random internal audits of cases to see that evidence was properly disclosed.[116]

Each office should also keep a publicly-accessible database of the problems it uncovers and what follow-up action the office took to address the issue. There may be restrictions on whether the names of individual prosecutors could be publicly identified

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[110] Gruner, supra note __, at 152.

[111] Prosecutors in the Boardroom: Using Criminal Law To Regulate Corporate Conduct (Anthony Barkow & Rachel Barkow, eds., forthcoming NYU Press 2010); Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 167 (2008).

[112] California Commission on the Fair Administration of Justice: Report and Recommendations on Reporting Misconduct, 10 (Oct. 18, 2007), available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf.

[113] California Commission on the Fair Administration of Justice: Report and Recommendations on Reporting Misconduct, 10 (Oct. 18, 2007), available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf ("many offices lack formal procedures for tracking and investigating complaints, with no uniform policy"); Final Report of the New York State Bar Association's Task Force on Wrongful Convictions (2009) at 30, available at http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf (noting that some offices in New York "had no procedures" for handling misconduct).

[114] Cf. NY Task Force, supra note __, at 31 ("Where there is no effective procedure already in place for preventing, identifying and sanctioning misconduct, prosecutor's offices should establish such a procedure appropriate to its staffing.").

[115] U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005 at 1, 5

[116] Brandon L. Garrett, *Aggregation in Criminal Law*, 95 Cal. L. Rev. 383, 440 (2007) (noting that self-regulation by prosecutors in the forms of audits and reviews for systemic problems is critical because prosecutors "may be the most powerful repeat players in the criminal system" and because "the ability of reform to reduce error and shape the system in the future depends intimately on the role of prosecutors").

under the relevant civil service laws,[117] so the public version could keep the name of the offender anonymous. For example, the office could indicate in the public document what the prosecutor did and the consequences, for example, whether the prosecutor was disciplined or forced to attend a *Brady* training session. The state bar should receive a version of the report with the names of the prosecutors listed so that it could determine whether further investigation is necessary, and so that it can keep a database that would allow it to identify repeat offenders or offices with particular problems.[118] That, in turn, could aid the identification of offices or prosecutors that require more training or discipline and improve public accountability.[119]

Another way to improve transparency and monitoring without imposing substantial costs would be for prosecutor's offices to adopt an "open-file" discovery process. Many offices already follow an open file policy, and several scholars have touted open-file policies as a protection against *Brady* violations.[120] Whereas most other administrative agencies are held in check by open government laws like FOIA and FACA that allow public citizens and interested groups to monitor how they operate, prosecutors typically are exempt from the operation of those laws because of privacy and law enforcement concerns. Allowing defendants access to the prosecutor's evidence file would help compensate for the fact that so much of what prosecutors do is secret, in contrast to the way most other government agencies operate.[121]

Another option for improving transparency that would not require a large amount of resources would be to make the offices' *Brady* policies public.[122] Peter Joy points out that "a relatively small number of the more than 2300 prosecutors' offices that try felony

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[117] California Commission on the Fair Administration of Justice: Report and Recommendations on Reporting Misconduct, 10 (Oct. 18, 2007), available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf (noting that the DA offices in California must comply with civil service protections for many of the employees, leading to a "complete lack of transparency of internal discipline procedures").

[118] Fred Zacharias has suggested that "[p]erhaps it makes sense for [disciplinary authorities] to treat a prosecutor's office as one lawyer for purposes of determining whether a pattern of code violatiosn justifies discipline." Zacharias, *supra* note __, at 767.

[119] California Commission on the Fair Administration of Justice: Report and Recommendations on Reporting Misconduct, 14 (Oct. 18, 2007), available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20REPORTING%20MISCONDUCT.pdf.

[120] Andrew Smith, *Brady Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 Vand. L. Rev. 1935, 1960 (2008); Bennett L. Gershman, *Reflections of Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 728 (2006). For an argument for broader discovery modeled on the military system, see Paul C. Giannelli, *Brady and Jailhouse Snitches*, 57 Case W. Res. L. Rev. 593, 604 (2007).

[121] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors*, Lessons from Administrative Law, 61 Stan. L. Rev. 869 (2009).

[122] The California Commission on the Fair Administration of Justice has similarly recognized the importance of public transparency in the context of *Brady* policies. California Commission on the Fair Administration of Justice, Report and Recommendations on Compliance with the Prosecutorial Duty To Disclose Exculpatory Evidence, 5, 7 (March 6, 2008), available at http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20BRADY%20COMPLIANCE.pdf ("[T]he Commission strongly believes that public accountability requires [*Brady* policies] be in written form and available for public scrutiny.").

cases in state courts of general jurisdictions have manuals or written standards, or, if they do, those manuals or standards are not available to the public."[123] Making *Brady* policies and training public would allow interested stakeholders – including other law enforcement officials and defense lawyers – the opportunity to offer input on those policies. If an office has no policy at all, that alone could be a sign that the office may not be taking its *Brady* obligations seriously.

Finally, an effective monitoring and reporting system must provide avenues for whistleblowers to bring violations to the attention of supervisors without fear of retaliation.[124]

The right mix of oversight may vary depending on the size and resources of the office, but the key to any effective compliance program is self-evaluation by the entity that is designed to identify wrongdoing and its causes and to adopt mechanisms to deter them from recurring.

IV. Prompting Organizational Change in the Prosecutor's Office

The biggest challenge to the entity-liability model for prosecutors' offices is figuring out how to prompt prosecutors' offices to change course and adopt compliance programs. As explained above, corporations began to adopt compliance programs in response to the threat of criminal prosecutions that could yield heavy punishments and threaten the very existence of the company.[125] What similar pressure could prompt prosecutors' offices to change course given that, under the current regime, *Brady* violations typically result in no negative consequences for either individual prosecutors or their offices? This Part considers some of the possible prompts for change.

Judges as Prompts. Although judges have been reluctant to hold individual prosecutors in contempt of court or to recommend them for discipline by the bar, it is possible that judges may feel more comfortable using the threat of contempt or public reprimands to spur office-wide reforms.

Recent cases involving federal judges and prosecutors offer illustrations of how this could be done. In the recent high-profile case of former Alaska Senator Ted Stevens, federal prosecutors' failure to turn over exculpatory evidence prompted Judge Emmet Sullivan to appoint an outside attorney to investigate prosecutors involved in the case to determine whether further contempt actions against them would be appropriate.[126] In another federal case in Florida, after it was discovered that prosecutors had authorized government witnesses secretly to record conversations with the defense team and failed

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[123] Joy, *supra* at 422 (citing Carol J. DeFrances, Bureau of Justice Statistics, Prosecutors in State Courts, 2001, at 1 (2002), available at http:// www.ojp.gov/bjs/abstract/psc01.pdf).

[124] *Id. §* 8B2.1(b)(5)(C); Ad Hoc Advisory Group, supra note __, at 28. Whistleblowers could include individuals within the prosecutor's office, as well as judges who might be aware of possible misconduct but who are unwilling or unable to deal with it in court. NY Task Force, supra note __, at 30 (noting that Barry Scheck, Director of the Innocence Project, recommended "compliance officers who would receive confidential complaints from trial and appellate judges concerning possible attorney misconduct").

[125] As Jennifer Arlen has observed, "[c]orporate liability is needed because corporations will not spend money to deter crime unless the government provides them with strong financial incentives to do so." Arlen, supra note __, at 9.

[126] Howard W. Goldstein, *Corporate Crime*, N.Y. Law. Journal (May 6, 2009).

to disclose *Brady* material, the court issued a 50-page order criticizing the prosecutors. Although the Court "acknowledge[d] that the United States Attorney and his senior staff members had no direct knowledge" of the misconduct, the Court nevertheless entered "a public reprimand" against the United States Attorney and senior staff in the office for poor supervision.[127] In the District Court's view, "it is the responsibility of the United States Attorney and his senior staff to create a culture where "win-at-any-cost" prosecution is not permitted" and "such a culture must be mandated from the highest levels of the United States Department of Justice and the United States Attorney General."[128] The judge then ordered the United State's Attorney's Office to give the court a full report of the government's internal investigation of the case.[129] Other federal judges have been similarly vigilant in making sure that prosecutors fulfill their disclosure obligations and in referring noncompliant prosecutors for discipline.[130]

The Department of Justice seems to have taken note of these judicial actions. It recently announced that it is instituting a new annual training program on disclosure obligations for federal prosecutors.[131] The Department is also considering putting out a guidance manual that would address particular situations where information needs to be disclosed.[132] Within each U.S. Attorney's Office, a senior lawyer will be vested with the responsibility of addressing disclosure issues that arise in cases and for conducting training within the office.[133] In addition, the Department is going to launch a pilot a program to improve how case information is managed, and it is creating a new position in the Department of Justice that will oversee all the discovery reforms.[134]

Thus, the Department has responded to judicial pressure by instituting some of the very organizational reforms discussed here. Attorney General Eric Holder has also been tackling the question of office culture by giving speeches to new prosecutors emphasizing that:

> Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored. Any policy that is in tension with that is to be questioned and brought to my attention. And I mean that.[135]

It is not hard to see the relationship between the judicial criticism in these particular cases and the Department's response. The judge's actions prompted the Department to take a

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[127] United States v. Shaygan, 2009 WL 980289, *2 (S.D. Fla. 2009).
[128] *Id.* at *3.
[129] *Id.* at *32.
[130] Goldstein, *supra* note __, at __ (citing cases from the District of Massachusetts, the District of Columbia, and the Ninth Circuit).
[131] Mike Scarcella, *DOJ Pushes 'Comprehensive Approach' to Discovery Reform*, Nov. 6, 2009, available at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202435245614.
[132] *Id.*
[133] Carrie Johnson, *Justice Department Looks to Avoid Another Stevens Fiasco*, Wash. Post., Oct. 15, 2009; Joe Pazzolo, *Justice Department Opposes Expanded Brady Rule*, Main Justice, available at http://www.mainjustice.com/2009/10/15/justice-department-opposes-expanded-brady-rule/.
[134] Pazzolo, *supra* note __.
[135] Nedra Pickler, *U.S. Attorneys Told to Expect Scrutiny; Senator's Case Leaves Taint, Holder Says*, The Boston Globe, Apr. 9, 2009, at 8.

closer look at its policies to deflect criticism and to ensure that it was meeting its constitutional obligations. Thus, if more judges followed this course and demanded greater attention to disclosure at the state and local level, one could expect similar changes in prosecutor's offices around the country. There are obstacles, to be sure. As noted, judges often have no way of knowing if violations were committed in bad faith or good faith, and they may be reluctant to second-guess or scrutinize law enforcement policies. But these cases show that judges can start a healthy dialogue and internal look in some offices without unduly interfering with their operation.

Legislatures as Prompts.

It is possible that state legislatures may seek to encourage greater attention to compliance programs, for two reasons, though neither is particularly powerful in today's political environment. First, as more wrongful convictions come to light, there is greater political pressure to ensure that law enforcement officials are convicting the right people. No one wants to see innocent people convicted while those who are actually guilty roam free. It is unfair and unsafe. Because these wrongful convictions sometimes result from disclosure violations, that may lead legislators to look at disclosure problems more generally and seek ways to guard against such failings. Second, although suits against individual prosecutors are typically barred under § 1983 because of absolute immunity, municipalities can be sued if they show deliberate indifference to the rights of citizens.[136] Some prosecutor's offices are municipal offices as opposed to state offices, so they could be sued if they completely fail to train prosecutors regarding their disclosure obligations.[137] In cases where disclosure violations result in wrongful convictions, damage awards can be quite high, so some lawmakers may seek to minimize the risk that state treasuries will have to pay out these judgments.

The prosecutor's offices themselves typically do not internalize those costs. Most prosecutors stay in office for relatively short periods of time, so they are likely to be more concerned with short-term success as measured by obtaining convictions than by the long-term budget impact of aggressive prosecutorial tactics.[138] More fundamentally, the offices themselves do not pay the damage awards directly out of their budgets, so they naturally do not care as much about the costs as legislators responsible for taxes and revenue generation to pay such judgments.[139]

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[136] Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); City of Canton v. Harris, 489 U.S. 378, 388 (1989).

[137] Thompson v. Connick, 553 F.3d 836 (5th Cir. 2008) (upholding district court decision upholding a $14 million verdict against the Orleans Parish District Attorney's Office for failing to train its lawyers regarding their *Brady* obligations), aff'd by a divided court en banc, 578 F.3d 293 (2009); Bd. Of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 409 (1997) (a failure to train can succeed under §1983 when the deprivation of a constitutional right is a "highly predictable consequence" of the failure to train).

[138] Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn To Uphold?*, 47 S. Tex. L. Rev. 801, 825-830 (2006); Alexandra White Dunahoe, *revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. Ann. Surv. Am. L. 45, 59-67 (2005)

[139] A brief on behalf of organizations representing counties, state legislatures, cities, mayors, and municipal lawyers filed in the Supreme Court advocated absolute immunity for prosecutors for these reasons. Brief of the National Association of Counties et al. at 14, Pottawattamie County v. McGhee, No. 08-1065 (U.S.

The municipalities that pay out these judgments may therefore seek to correct this misalignment of incentives by seeking to get legislation passed that would encourage prosecutor's offices to protect against such judgments by implementing training and other compliance programs. For instance, municipalities may lobby state legislatures to offer funding for offices to adopt compliance programs. Admittedly, this is a stretch, because the number of wrongful convictions that lead to successful damage actions is relatively small. It may well not be sufficient to prompt greater action. But to the extent particular offices are repeat offenders, the pressure may be greater.

Prosecutors as Prompts. The most promising prompt is likely to come from within the prosecutor's office itself. Prosecutors should start to view the adoption of compliance programs as in their own interest. After all, the goal of law enforcement should be to prosecute people who have actually committed crimes, and disclosure violations can lead to wrongful convictions. In addition, all prosecutors' offices should be committed to constitutional values, which means compliance with disclosure violations. Relatedly, to the extent offices try to attract the best lawyers to join them, it is more likely to occur if the office can show a commitment to compliance with the law.[140]

For offices trying to regain public trust and credibility, a compliance program may be particularly critical. An example of this is the Dallas County prosecutor's office in Texas. After it became clear that the office was responsible for several wrongful convictions, in 2007, a newly elected district attorney, Craig Watkins, established a Conviction Integrity Unit that is responsible for reviewing cases to ensure that the office did not convict the wrong person.[141] In addition, the office now engages in audits of cases to ensure that disclosure obligations have been satisfied, and requires attorneys to save their trial notes so that the cases can be properly reviewed for misconduct.[142]

Whether or not an office is responding to a history of misconduct, creating a culture of compliance and ethical behavior is in the interest of prosecutors who head the office. It is impossible for the head of an office to directly monitor all those who work as line prosecutors. Setting up a system within the office that emphasizes compliance is therefore critical to infusing line assistants with the right values as they make discretionary decisions in their cases. This should obviously be important for the sake of justice, but there are instrumental reasons as well. High profile cases involving wrongful convictions and prosecutorial misconduct can and have cost elected prosecutors their jobs.[143] No official responsible for enforcing the law wants to be seen as flouting it, but that is the impression that is created when line assistants, acting in the name of the head prosecutor, engage in misconduct.

2009 Term). *See also* Dunahoe, supra note __, at 100 ("prosecuting agencies do not pay damage awards and there is no obvious way to make them pay such awards").

[140] Buell, supra note __, at 525 (noting that crime within an organization can bring reputational harm not just to the organization but to individuals who work there).

[141] Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35, 62-63 (2009)

[142] Cite Terri Moore's comments at conference.

[143] *See* Steve Weinberg, *Changing an Office's Culture*, available at http://projects.publicintegrity.org/pm/default.aspx?act=sidebarsa&aid=27 (describing how district attorneys in San Diego suffered election losses because of misconduct within the office).

Although prosecutors are most likely to adopt compliance measures because of motivations internal to the office, it is also possible that prosecutors outside the office could serve as prompts. In particular, the Department of Justice and State Attorney General Offices may play a more active role in encouraging local offices to pay closer attention to compliance. One way this can be done is simply to lead by example. The Department of Justice often sets a benchmark that other offices seek to follow. In addition, while DOJ and state AG offices likely lack the authority to bring criminal charge against local prosecutor's offices as entities, they may have power to bring charges against individuals within the office or to offer incentives for change.

For example, although even the most egregious cases of prosecutorial misconduct rarely if ever result in individual criminal actions being brought by DOJ,[144] it is possible that DOJ could begin to investigate the most serious violations to see if they signal a larger problem with an office. The Department has historically concerned itself with state-level abuses in the criminal justice system – in prisons and police departments, for example – so it would not be a complete stretch for it to engage in greater oversight of prosecutor's offices through criminal prosecutions.[145] Although a single violation by a single prosecutor does not necessary indicate a problem with an entire office, the approach to corporate liability teaches that even a single violation merits a closer "detailed examination of the corporate offender's internal law compliance standards and procedures, coupled with compelled improvements in those standards and procedures where improvements are necessary to avoid further misconduct."[146] So, if a single violation occurs, DOJ could use that violation to inspect how an office is working. By speaking to the leadership in that office, DOJ may be able to convince it to change its policies and could use the threat of an action against individual prosecutors as the prompt. To be sure, it is not clear that office cohesion will mean that a lead prosecutor would rather adopt systemic reforms rather than see a single prosecutor within his or her office prosecuted. But in some cases, that threat may lead to a lead prosecutor to pay closer attention to whether reform is necessary.

State AG offices may also be able to spark reform. Many state AG offices provide training and resource help to local offices, so state AG offices could focus some of that effort on disclosure training and advice on how to set up information processing in an office to make negligent failures to disclose more likely. In most states, the state AG's office has a cordial and respectful relationship with local prosecutor's offices, so this kind of assistance might be seen as welcome, not threatening.

CONCLUSION

The corporate compliance model offers valuable insights for prosecutors for two reasons. First, legal violations within corporations and prosecutors' offices occur for

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[144] Indeed, federal prosecutors overwhelmingly decline to prosecute under 242 even when the official is not a prosecutor. Transactional Records Access Clearinghouse (TRAC), Under Color of Law (2004), available at http://trac.syr.edu/tracreports/civright/107/ (noting that "federal prosecutors declined to file charges against virtually all -- 98.7% -- of the individuals who the investigative agencies had concluded were in violation of 18 USC 242").

[145] For an argument that the federal government should consider pursuing criminal sanctions against prosecutors, see Smith, supra note __, at 1966-1971.

[146] Gruner, supra note __, at 151.

similar reasons. It makes sense that a solution for one would also work well for the other. And, as this article explained, the compliance model from the Organizational Sentencing Guidelines translates easily to a prosecutor's office.

But the second reason this model is helpful is that prosecutors themselves have already endorsed it. Indeed, federal prosecutors were the architects of the compliance regime for corporations. Thus, the only remaining step to initiating compliance programs in a prosecutor's office is to get prosecutors to see that what they demand of others, they should demand of themselves.

All too often, the prosecutor's office sees itself as a unique entity. Prosecutors tend to believe they are not like any other executive agency or arm of government. Other agencies are monitored by inspectors general, judicial review, and the public through freedom of information act policing. The prosecutor's office is exempt from all that. But the prosecutor's office is not above the law. And if the checks that apply to other agencies are absent, it is that much more important for the prosecutor's itself to take care to adopt internal checks to make sure that those entrusted with enforcing the law are not violating it in the process. In the case of corporations, prosecutors have concluded that compliance programs that emphasize training, supervision, auditing, risk assessment and reporting are critical to combating illegal behavior. Those same ingredients can work within the prosecutor's office itself. Prosecutors just need to start listening to their own advice.