

REVISITING THE COST-BENEFIT CALCULUS OF THE MISBEHAVING PROSECUTOR: DETERRENCE ECONOMICS AND TRANSITORY PROSECUTORS

ALEXANDRA WHITE DUNAHOE*

INTRODUCTION

The prosecutor's power to employ the full machinery of the state to scrutinize and force an individual's immersion in a criminal investigation and adjudication occupies a unique position among state actors whose authority suggests the potential for deprivation of precious rights. Indeed, "[b]etween the private life of the citizen and the public glare of criminal accusation stands the prosecutor."¹ The tremendous power wielded by the criminal prosecutor is counterbalanced by sentencing guidelines, the supervisory powers doctrine, the doctrine of separation of powers, professional discipline, and, in some instances, the political process, to name a few. Nonetheless, the sentiment expressed by numerous scholars,² judges,³

* Law Clerk to the Honorable Jay S. Bybee, United States Court of Appeals for the Ninth Circuit.

1. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 814 (1987).

2. Numerous scholars have noted the problem of prosecutorial misconduct and volunteered a myriad of solutions for curbing prosecutorial abuse. *See, e.g.*, Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 25–33 (1971) (calling for publication of prosecution guidelines); Albert Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972) (discussing growing incidences of ethical misconduct bearing on the trial process by members of the judiciary and the bar); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174 (1965) (offering personal recollections about exercise of prosecutorial discretion in one U.S. Attorney's Office); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970) (discussing the need for structured controls on prosecutorial discretion); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991) (arguing that the drafters of professionalism standards have crafted hopelessly vague rules and that the amorphous mandate that prosecutors "do justice" gives little guidance to prosecutors and scant remedial power to disciplinary bodies).

3. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 84 (1935)

("[The prosecutor] was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pre-

and columnists⁴ suggests a growing view that these controls are largely inadequate to curtail the potential for prosecutorial abuse.

Recent evidence suggests that this sentiment is, at least, not wholly unfounded. Prosecutorial misconduct documented by the U.S. Department of Justice's Office of Professional Responsibility has tripled during the last decade, requiring a larger staff of investigative lawyers to police abuses by Justice Department attorneys.⁵ The American Bar Association's somewhat dated Survey on Lawyer Discipline Systems indicates a steady increase in the number of complaints filed against attorneys, in general, for ethical violations,⁶ and, more recently, concerns over prosecutorial misconduct served as the impetus for the Citizens Protection Act of 1998,⁷ a law that purports to provide an additional measure of accountability for federal prosecutors.⁸ At the state level, incidents of prosecutorial misconduct are, likewise, attracting greater attention. Media portrayals of misbehaving state prosecutors are featured not only by the

tending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.”);

see also Demjanjuk v. Petrovsky, 10 F.3d 338, 354 (6th Cir. 1993) (chastising Justice Department prosecutors for their handling of the John Demjanjuk case); United States v. Boyd, 833 F. Supp. 1277, 1280–81 (N.D. Ill. 1993) (using the words “tragic” and “painful” to describe the decision to overturn the convictions of seven members of the notorious Chicago street gang, the “El Rukns,” because of prosecutorial misconduct); John Flynn Rooney, *Aspen Overturns More El Rukn Convictions*, CHI. DAILY L. BULL., Sept. 20, 1993, at 1 (reporting reflections of Judge Aspen regarding the misconduct in the El Rukn trials).

4. *See, e.g.*, Jim McGee, *The Appearance of Justice*, WASH. POST, Jan. 10–15, 1993, at A1. McGee published a six-part series examining instances of prosecutorial misconduct and critically analyzing the role of the Department of Justice in failing to address that misconduct.

5. *See Truth and Consequences: How the Department of Justice Really Works*, U.S. NEWS & WORLD REP., July 1, 1996, at 28.

6. *Survey on Lawyer Discipline Systems—1988 Data*, ABA Center for Professional Responsibility, Standing Committee on Professional Discipline (1989), *cited in* United States v. Lopez, 765 F. Supp. 1433, 1437 & n.1 (N.D. Cal. 1991).

7. 28 U.S.C. § 530B (2000).

8. *See, e.g.*, Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 211–24 (2000) (discussing the history and practical effect of the CPA); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 460 (2001) (discussing the inadequacy of the CPA and urging the extension of new rules to state and local prosecutors, whom, in the view of the author, existing state ethical codes do not adequately constrain).

press,⁹ but also in popular television dramas such as “The Practice,” wherein a lead character, criminal defense attorney Lindsay Dole, is confronted with an over-zealous, and noticeably less sympathetic, state district attorney who will stop at nothing to secure a conviction in her first degree murder trial.¹⁰

While many commentators view prosecutorial misconduct as pervasive,¹¹ empirical studies have been less conclusive. Some cite an increase in judicial opinions condemning prosecutorial excesses,¹² while others point to reversal rates and limited professional discipline.¹³ Still others focus on media attention to the more egregious instances of misconduct.¹⁴ The one thing that emerges clearly from this otherwise bewildering mass of scholarship and media attention is that prosecutorial misconduct is perceived by many as an affront on the justice system which should be addressed.

Obviously, the problem of prosecutorial misconduct garners extensive media and scholarly attention because it threatens to impair rights protected by the Federal Constitution and the constitutions of most states. When constitutional rights are at stake,

9. See, e.g., Maura Dolan, *Law: Defendants Wrongly Convicted in Molestation Case Can't Hold Local Jurisdiction Responsible, State Justices Rule*, L.A. TIMES, Jan. 30, 1998, at A1; William T. Quinn, *Judge Clears Drug “Kingpin” in Bissel Case*, THE STAR-LEDGER (Newark, N.J.), Dec. 4, 1997, at 1; Denise LeBoeuf, who was recently appointed to head a new Louisiana capital defense agency, said:

Capital cases are so political that winning becomes far more important for the average D.A. We're not talking about being competitive. We're talking about winning at all costs. Deliberately deceiving the court. Withholding favorable evidence. Arguing things they know aren't true. Harassing defense witnesses. Concealing deals they make with their witnesses. Winning means getting a death sentence. They are out to win.

Christopher John Farley & James Willwerth, *Dead Teen Walking*, TIME, Jan. 19, 1998, at 54. This article in *Time* primarily featured the real life plight of Shareef Cousin, a juvenile whose murder conviction and death sentence was overturned by the Louisiana Supreme Court for egregious prosecutorial misconduct. See *State v. Cousin*, 710 So.2d 1065 (La. 1998).

10. *The Practice: Of Thee I Sing* (ABC television broadcast, Oct. 13, 2002).

11. See *supra* note 2 and sources cited therein.

12. See Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1085 (1994); Jim McGee, *Judges Increasingly Question U.S. Prosecutors' Conduct*, WASH. POST, Nov. 23, 1993, at A1 (citing numerous examples of judicial findings of prosecutorial misconduct).

13. See, e.g., Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 743–55 (2001).

14. See generally Jim McGee, *The Appearance of Justice*, WASH. POST, Jan. 10–15, 1993, at A1.

constitutional tort law has been said to “marr[y] the substantive rights granted by the Constitution to the remedial mechanism of tort law.”¹⁵ In other words, where the Constitution guarantees a right, constitutional tort law can, in some instances, operate to provide a civil remedy. Such a remedial scheme exists in the Federal Civil Rights Act of 1871 (section 1983).¹⁶ According to the Supreme Court, section 1983 “was intended to [create] ‘a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution.”¹⁷ The conventional wisdom of scholars, judges and politicians alike has been that the imposition of civil penalties serves a dual function in this context: it compensates victims of constitutional deprivations, while simultaneously deterring future instances of official misconduct. These same scholars tend to bemoan the operation of prosecutorial immunities for their insulating effect, a safeguard which, they posit, comes at the expense of deterrence.¹⁸

15. Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 *Miss. L.J.* 157, 157 (1998).

16. 42 U.S.C. § 1983 (2002). The statute states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Id.

17. *Carey v. Phipus*, 435 U.S. 247, 253 (1978) (*quoting Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)); *see also Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (stating that section 1983 seeks “to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide related relief”), (*quoting Wyatt v. Cole*, 504 U.S. 158, 161 (1992)).

18. The immunity case law that has developed under section 1983 approaches what may be termed the “metaphysics of the law, where the distinctions are, or at least may be very subtle and refined, and sometimes, almost evanescent.” *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841). Since the Supreme Court’s decision in *Imbler v. Pachtman*, the doctrine of prosecutorial immunity from civil suit has been subjected to interpretations of shifting emphasis in what is generally characterized as the continuing conflict between providing compensation for egregious constitutional violations and deterring official misconduct, and the competing goal of securing the need for the efficient administration of criminal justice. 424 U.S. 409 (1976). Numerous scholars have critiqued the current regime of prosecutorial immunities, both absolute and qualified, charging that the doctrines foreclose the most effective sanction available to curb prosecutorial misconduct. *See, e.g.,* Anthony Meier, Note, *Prosecutorial Immunity: Can § 1983 Provide an Effective Deterrent to Prosecutorial Misconduct?*, 30 *ARIZ. ST. L.J.* 1167, 1169 (1998) (arguing that the Supreme Court should maintain a narrow definition of prosecutorial functions subject to absolute immunity to avoid frustrating the pur-

However, the conventional wisdom that favors civil monetary deterrence is suspect where governmental misconduct is involved. Recent scholars have compellingly attacked deterrence justifications for constitutional cost remedies by drawing attention to the complexity of budgetary inflows and outflows, agency-sponsor interactions, and the various, frequently divergent, individual incentives motivating government actors, all of which combine to suggest that civil remedies may carry no deterrence benefits whatsoever.¹⁹ These scholars have argued that attempts to accurately predict the deterrence potential of governmental sanctions require the formulation of a highly contextual model for analyzing governmental costs and benefits.²⁰ Assuming, for the sake of analysis, that prosecutorial misconduct is a problem worthy of addressing, this article endeavors to take the first step toward conceptualizing the problem of prosecutorial misconduct within a framework that recognizes the unique arena in which prosecutors operate.

Part I lays the groundwork for conceptualizing prosecutorial misconduct within an economic framework. This section argues that individual low-level prosecutors are responsible for a significant percentage of prosecutorial misconduct, and, further, that these prosecutors seek primarily to maximize professional gains. Having isolated the primary offenders and established the individual incentives at work, the propriety of a personal, rather than an agency-wide, deterrence approach is examined. This section concludes that the transitory nature of low-level state prosecutors, as well as the practical impediments to deterring prosecutorial misconduct through agency-wide approaches, suggests that individualized sanctions are necessary in order to achieve optimal deterrence for a wide variety of prosecutorial errors. Following this analysis, the misconduct appropriately subject to sanction is outlined. Although the Supreme Court's immunity case law makes no such distinction, most commentators' concerns appear to be directed squarely at those prosecutorial abuses that threaten to systemati-

pose of section 1983 claims); Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1174 (1996) (“[N]o ‘safeguards’ currently serve as an adequate substitute for civil liability to deter abuses.”).

19. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 859–60 n.116 (1989) (generally pointing to several empirical studies showing that government bureaucrats overestimate benefits and underestimate costs).

20. See Levinson, *supra* note 19, at 347.

cally impair the right of a defendant to receive a fair trial. Hence, a brief examination and preliminary categorization of prosecutorial misconduct implicating this right is provided.

Part II builds on this discussion by dissecting the deterrence potential of five potential prosecutorial sanctioning mechanisms: judicial censure and publicity, professional discipline, reversal, criminal sanctions, and civil penalties. Each of these sanctions is evaluated for its potential to influence the cost-benefit calculus of the low-level transitory prosecutor, ability to respond to individual as well as systemic misconduct, and economic efficiency. Additionally, within each of these categories of prosecutorial sanctions, the efficiency of potential modifications of current regime is considered.

This analysis demonstrates that the aptness of a sanction varies dramatically in relation to the misconduct involved. From the following discussion a common thread will emerge: ultimately, any attempt to curb prosecutorial abuse must focus on modifying the cost-benefit calculus of those responsible for its existence. In certain circumstances, where internal agency policies or norms are the cause, the appropriate sanction will be one that targets the political gain incentives of the internal agency policymakers. Alternatively, where individual discretionary choices are the culprit, the sanction must be more individualized. Individualized sanctions cut against the grain of conventional constitutional deterrence approaches, as the usual thought is that targeting the head translates most efficiently into agency-wide change. However, this view is misplaced where low-level prosecutors are involved, in part because of the insulation they receive (from both the political process and internal efforts to "clean house") by the operation of state civil service regulations. Influencing the cost-benefit calculus of individual, low-level state prosecutors, who frequently enjoy enormous prosecutorial discretion, is a complex and sometimes arduous task. Yet, numerous sanctioning mechanisms are available for curbing prosecutorial abuse, and these methods are capable of being tailored to achieve optimal deterrence of prosecutorial misconduct in the vast majority of cases. In sum, rather than drastic modifications of the current regime of prosecutorial immunities or penalties, a careful analysis of the nature of the misconduct involved, the individual and agency-wide motivations at work, as well as the consequences of alternative sanctioning mechanisms, has the greatest potential to provide the elusive deterrence remedy for prosecutorial abuse.

I.
ANALYZING PROSECUTORIAL MISCONDUCT

Around about the early 1960s, a unique paradigm, termed “law and economics,” emerged to shed fresh light on an ever-increasing assortment of puzzling legal subjects. While previously the notion was thought to be practically synonymous with economic analysis of antitrust law,²¹ a “new” law and economics—one that sought to apply economic principles and theories far beyond the confines of antitrust—began with the pioneering genius of Guido Calabresi²² and Ronald Coase,²³ and became firmly entrenched among legal academicians so inclined with the publication of Richard Posner’s *Economic Analysis of Law*.²⁴ As Posner has written, the new law and economics scholarship strove to systematically conceptualize, predict and explain common law fields (including those that “do not regulate avowedly economic relationships”) such as contracts,²⁵ torts,²⁶ restitution,²⁷ and property;²⁸ the theory and practice of punishment;²⁹ civil, criminal and administrative procedure;³⁰ the the-

21. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 23 (6th ed. 2003) (describing the development and expansion of economic analyses in the early 1960s).

22. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961).

23. Ronald Coase, *The Problem of Social Cost*, 3 *J. L. & ECON.* 1 (1960).

24. POSNER, *supra* note 21.

25. See, e.g., A. Kronman & R. Posner, *THE ECONOMICS OF CONTRACT LAW* (1979); Richard A. Posner & Andrew M. Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 *J. LEGAL STUD.* 83 (1977).

26. See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 154 (1970); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 *CORNELL L. REV.* 341 (1991) Virginia E. Nolan & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law*, 57 *OHIO ST. L.J.* 835 (1996).

27. See, e.g., Hanoch Dagan, *Mistakes*, 79 *TEX. L. REV.* 1795, 1809–36 (2001); Wendy J. Gordon, *On the Economics of Copyright, Restitution, and “Fair Use”*: *Systemic Versus Case-by-Case Responses to Market Failure*, 8 *J. L. & INFO. SCI.* 7, 11 (1997); Saul Levmore, *Explaining Restitution*, 71 *VA. L. REV.* 65, 67 (1985).

28. See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 *HARV. L. REV.* 713 (1996); Frank Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 *Q. J. ECON.* 582 (1924); James E. Krier & Stewart J. Schwab, *Essay, Property Rules and Liability Rules: The Cathedral in Another Light*, 70 *N.Y.U. L. REV.* 440 (1995).

29. Much of the groundbreaking scholarship in the field of criminal law is traceable to several important eighteenth and early nineteenth century commentators. See, e.g., CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* (Henry Paolucci

ory of legislation and regulation;³¹ law enforcement and judicial administration;³² and even constitutional law,³³ primitive law,³⁴ admiralty law,³⁵ family law,³⁶ employment law,³⁷ and jurisprudence.³⁸ The result has been an enlightened understanding, a plethora of predictive theories and models, and a surplus of scholarly debate,

trans., Bobbs-Merrill Co. 1963) (1764); 1 JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in THE WORKS OF JEREMY BENTHAM 1, 81–154 (John Bowring ed., 1843); 1 BENTHAM, *Principles of Penal Law*, in THE WORKS OF JEREMY BENTHAM 1, 365 (John Bowring, ed., Russell & Russell, Inc. 1962) (1843). More recent scholars have built upon this work. See, e.g., POSNER, *supra* note 21, at 215–46.

30. See generally Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067 (1989); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61 (1971); Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

31. Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313 (1998); Christopher H. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws, 1969–73*, 9 DUKE ENVTL. L. & POL'Y F. 29 (1998).

32. See, e.g., Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); RICHARD POSNER, *THE ECONOMICS OF JUSTICE* (1981).

33. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1218–45 (1967); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999).

34. See, e.g., Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J. L. & ECON. 1, 42–52 (1980).

35. See, e.g., William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); Note, *Calculating and Allocating Salvage Liability*, 99 HARV. L. REV. 1896 (1986); AN ADMIRALTY LAW ANTHOLOGY (R. Jarvis ed. 1995).

36. See, e.g., GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); BECKER, *A TREATISE ON THE FAMILY* (enlarged ed. 1991); BECKER, *ACCOUNTING FOR TASTES* (1996); Anthony W. Dnes, *Applications of Economic Analysis to Marital Law: Concerning A Proposal to Reform the Discretionary Approach to the Division of Marital Assets in England And Wales*, 19 INT'L REV. L. & ECON. 533 (1999).

37. See, e.g., David A. Strauss, *The Law and Economics of Racial Discrimination in Employment*, 79 GEO. L.J. 1619, 1640 (1991); Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79 (2003).

38. See, e.g., POSNER, *supra* note 21, at 23; POSNER, *supra* note 32.

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all of which has been met, at times, with cautious instruction concerning the limits of economic analyses. The following sections are not intended to provide an exhaustive examination of the law and economics paradigm; rather, they are intended to merely highlight the basic assumptions of economic analysis, as well as the peculiar difficulties that arise when the paradigm is applied to government behavior and decision-making.

A. *The Basic Paradigm*

Conventional law and economics is fundamentally a behavioral approach to the law that operates from the premise that people exhibit rational choice;³⁹ they are self-interested utility maximizers with stable preferences and the capacity to accumulate and assess information.⁴⁰ With the publication of Posner's seminal treatise on the subject, the developing law and economics discourse was transformed into a coherent legal theory.⁴¹ By demonstrating the primacy of efficiency, or the "allocation of resources in which value is maximized" in the law,⁴² Posner argued that "many legal doctrines rest on inarticulate gropings toward efficiency."⁴³ Yet in his introductory materials, Posner distinguishes two models of efficiency, one based on a concept of Pareto-superiority and the other on the

39. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that the effect of a law cannot be determined simply by looking at its terms, rather one must determine how people will respond to the law).

40. BECKER, *supra* note 36, at 14. However, most scholars admit that the rationality assumption inevitably fails to capture all human action. See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055 (2000). As Posner has analogized, just as Newton's law of falling bodies remains a useful predictive theory despite the apparent impracticality of its basic assumption that bodies fall in a vacuum, the economic approach to law explains with reasonable accuracy the behavior of a wide variety of persons in the real world. POSNER, *supra* note 21, at 17. Game theory imports additional assumptions about the nature of human behavior, and rests on the premise that people interact strategically in their dealings with others. For an introduction to game theory and its application to the law, see generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 8 (1994); John F. Nash, Jr., *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950); DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* (1991); ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* (1992); SHAUN P. HARGREAVES HEAP & YANIS VAROUFAKIS, *GAME THEORY: A CRITICAL INTRODUCTION* (1995); R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY* (1957); THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* (3d ed. 1960); JOHN VON NEUMANN & OSKAR MORGENTHAU, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (3d ed. 1953).

41. See POSNER, *supra* note 21.

42. *Id.* at 11.

43. *Id.* at 25.

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Kaldor-Hicks construction of efficiency as wealth maximization.⁴⁴ The Pareto-superior model describes an efficient transaction or reallocation as “one that makes at least one person better off and no one worse off.”⁴⁵ Although he employs the concept at length when analyzing sanctions for governmental misconduct,⁴⁶ because of the usual impracticability of “Pareto-improvement” outside of theoretical ivory towers, Posner generally prefers the more elastic Kaldor-Hicks construction.⁴⁷ This model of efficiency is concerned not with whether a potential reallocation will make certain individuals worse off, but rather with whether society’s aggregate utility has been maximized.⁴⁸ Thus, under the Kaldor-Hicks definition, a transaction or reallocation is efficient if the winners could compensate the losers, whether or not they actually do.⁴⁹ Posner broadly describes Kaldor-Hicks efficiency as “wealth maximization,” and he employs the concept to lay the foundation for his comprehensive economic analysis of the common law, public law, business law, wealth and income distribution, legal process, and even constitutional law.⁵⁰

Legal economic scholars have built upon these insights to formulate a unique paradigm with positive, normative and prescriptive contributions. In the positivist sense, economic analysis is used to explain many of the rules and outcomes underlying our legal system by highlighting the “stamp of economic reasoning” that they bear.⁵¹ In the normative sense, although economic scholars cannot tell society whether it should seek to limit specific undesirable behavior, many have demonstrated the inefficiency of such behavior, thereby clarifying a value conflict by illustrating how much of one value—efficiency—must be sacrificed to another.⁵² Finally, the prescriptive undertaking of legal economic analysis may be distinguished from the normative by its effort to determine precisely how

44. *Id.* at 12–13.

45. *Id.* at 12; *see also* V. PARETO, *MANUAL OF POLITICAL ECONOMY* 103–80 (Schwier trans. 1971) (Pareto’s theory of economic equilibrium).

46. *See* Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 *WASH. L. REV.* 635, 636 (1982).

47. *See* J.R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696, 711 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549, 550–51 (1939).

48. POSNER, *supra* note 21, at 13.

49. *Id.*

50. *Id.*

51. *See id.* at 25.

52. *Id.* at 24.

the law might be used to achieve specific ends, such as deterring socially undesirable behavior.

The economics of deterrence is a topic most frequently encountered in tort and criminal law. In the criminal law context we speculate that a person commits a crime because the expected benefits exceed the expected costs. The benefits may be the various tangible or intangible satisfactions that the criminal gains from the proscribed action, and the costs include various out-of-pocket expenses, opportunity costs, and the expected costs of punishment.⁵³ Deterrence economics isolates and analyzes these costs. The fundamental notion of deterrence economics is that people respond to the incentives that they face, particularly the penalties which are imposed by the legal system. Conceived in the broadest sense, deterrence theories focus on the “inhibiting effect that punishment . . . will have on the actions of those who are otherwise disposed” to commit some socially undesirable behavior.⁵⁴ Deterrence theory posits that punishment is inflicted to deter future wrongdoing by the person being punished (specific deterrence) and by others who might commit wrongs (general deterrence).⁵⁵ The expression “optimal deterrence” then interjects the problem of deterring all and only that conduct which is deemed undesirable. “Under-deterrence” and “over-deterrence,” of course, signify failures at both ends of that endeavor.

Economic analysis of prosecutorial misconduct is helpful in defining and conceptualizing both the nature of the problem as well as the propriety of alternative proposed solutions. Within this context, we might view efficiency goals on two inter-related levels. The first level focuses on imposing sanctions as a means of obtaining the appropriate level of behavior by prosecutors (meaning the care and

53. *Id.* at 219.

54. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 39 (1968).

55. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180 (1968); EHRlich, PARTICIPATION IN ILLEGITIMATE ACTIVITIES: AN ECONOMIC ANALYSIS IN *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 68–134 (G. Becker & W. Landes eds. 1974); POSNER, *supra* note 21, at 220–27. Likewise, because the possibility of undetected criminal conduct reduces the deterrent effect of penalties, the usual recommendation of deterrence economists is that penalties be increased to compensate for that reduction. More specifically, most economists posit that the amount of damages or fines imposed should equal the social costs of the activity divided by the probability of detection. This is commonly viewed as the “optimal level” for sanctions. Hence, if there is only a 50 percent chance of actual punishment the fine imposed should be doubled. See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 980 & n.31 (1984) (citing A. Polinsky & S. Shavell, Nat’l Bureau of Econ. Research, No. 932 (1982)).

attention that prosecutors devote to not infringing upon both the rights of the accused and the legal, ethical and professional strictures operating upon their office). The second level focuses on ensuring that such sanctions do not unnecessarily reduce the level of the activity involved (meaning both the number of instituted criminal prosecutions and the aggressiveness, for lack of a better word, of the prosecution itself).⁵⁶ Excessive fines or sanctions will produce inefficiency on both levels.

From an economic perspective, sanctions for prosecutorial misconduct may be viewed as excessive in two distinct instances. The first involves the notion of economic “deadweight” loss as it relates to the Pareto concept of efficiency. To use an illustration provided by Posner, assuming a situation where a fine levied against a criminal would produce as much deterrence as a prison sentence, but the prison term would also impose a deadweight economic loss “in the form of the criminal’s forgone legitimate earnings and the costs of guarding him,” the fine is economically preferable because an equal amount of deterrence is achieved more cheaply.⁵⁷ Similarly, as applied to prosecutors, a sanction will result in Pareto inefficiency if it directly imposes an avoidable social cost when two methods for achieving optimal deterrence exist. The second instance in which a sanction for prosecutorial misconduct may be viewed as excessive specifically implicates the problem of over-deterrence. Here Posner imagines a choice between two fines, both collectible at zero cost from the defendant. If the smaller fine is set at the optimal level, then the larger fine will be excessive because it will create incentives for inefficient behavior.⁵⁸ This inefficiency is introduced because of the problem of inaccuracy or uncertainty.⁵⁹ When the threat of a very large fine is connected to a violation for which there exists the possibility of false accusation or conviction, rational individuals will “avoid lawful behavior at the edge of the ‘forbidden zone’ in order to minimize the probability of being falsely accused

56. This model is loosely adapted from Judge Posner’s majority opinion in *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1177–78 (7th Cir. 1990); see also LANDES & POSNER, *supra* note 26, at 66 (noting that the “most interesting respect in which negligence and strict liability differ concerns the incentive to avoid accidents by reducing the level of an activity rather than by increasing the care with which the activity is conducted”).

57. Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 636 (1982).

58. *Id.* at 637.

59. See generally Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1 (1994).

and convicted of the offense.”⁶⁰ This avoidance creates social opportunity costs which are measured as the benefits of the forgone lawful behavior attributable to the risk of wrongful accusation or conviction.⁶¹

Elsewhere in his analysis Posner clarifies that where the available sanctions are not calibrated as naturally as those specified in dollars, a comparison of the costs of over-deterrence with the costs of under-deterrence becomes necessary. If the latter costs are greater, the “excessive” sanction may not be excessive—and, therefore, inefficient—in a broader economic sense. But in such a situation the choice is no longer between over-deterrence and under-deterrence; it is between the “optimal amount of deterrence and too much deterrence.”⁶²

Like much of the common law, the Supreme Court’s prosecutorial immunity case law may be characterized as an “inarticulate groping[] toward efficiency.”⁶³ The fear of over-deterrence clearly played a principal role in the *Imbler* Court’s grant of absolute immunity.⁶⁴ Conversely, critics of absolute immunity appeal to escalating incidents of egregious prosecutorial misconduct, suggesting problems of under-deterrence. Yet, as the following sections outline, economic analysis of government behavior and decision making highlights certain limits of the economic approach, and, while the paradigm maintains its usefulness in this arena, these limits require a close examination of the particular incentives and disincentives influencing the parties under examination.

B. Vulnerabilities: Refining the Government Decision-making Calculus

The importation of economic theories, principles and analysis into the realm of government behavior and decision-making is far from smooth. While the insights of economic analysis are particu-

60. Posner, *supra* note 57, at 636–37.

61. *Id.* False accusation and conviction injects the problem of Type I and Type II errors, elsewhere termed “false positives” and “false negatives.” Imposing sanctions on an innocent prosecutor for lawful behavior is known as Type I error, or a false positive. The converse of this, or the acquittal of a guilty prosecutor, is known as Type II error, or a false negative.

62. *Id.* at 637–38.

63. POSNER, *supra* note 21, at 25.

64. For instance, the *Imbler* Court expressed concern that a prosecutor in a close case might elect not to proceed to trial for fear that if he lost the case section 1983 liability would be triggered: “If prosecutors [we]re hampered in exercising their judgment . . . by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.” *Imbler v. Pachtman*, 424 U.S. 409, 426 (1976).

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larly relevant and most beneficial where rational economic actors in a market environment are involved, it has been argued that these insights are not properly extrapolated to public actors. Simply put, governments and their agents do not consistently behave like private firms.

This point was first noted by Michael Schill,⁶⁵ and recently refined in a provocative article by Daryl Levinson.⁶⁶ A simplified version of Levinson's argument goes something like this: A private enterprise, being comprised of a collection of rational individuals, will seek to maximize wealth by weighing the economic costs and benefits of its actions. If the private benefits of, say, opening a new factory are quantified, and private costs are then imposed in the nature of tort damages for pollution, those adopting a law and economics paradigm can safely assume that the enterprise will continue to pollute if, and only if, the benefits quantified exceed the costs imposed. Excluding all other variables, the threat and imposition of tort liability in this simple example forces the enterprise to internalize its external costs of production, and the compensation remedy, thus, achieves optimal deterrence. However, governments do not internalize costs in this straightforward manner, and, likewise, the benefits to be quantified have no monetary value.

Rather than monetary costs, Levinson argues that political incentives (or disincentives) provide the impetus for government decision-making.⁶⁷ And, unlike financial profits, which are naturally susceptible to quantification, it is difficult—perhaps impossible—to quantify the benefits of constitutional tort violations.⁶⁸ Because of the complex causal relationship between social costs and benefits,

65. Schill, *supra* note 19.

66. Levinson, *supra* note 19.

67. Levinson notes that damage remedies may at times create political incentives, but they do not constitute political incentives in their own right. *Id.* at 357.

68. For instance, consider the difficulties associated with quantifying the benefits that accrue to governments for willfully failing to disclose *Brady* material upon the request of a criminal defendant whose guilt, from the perspective of the prosecutor and a majority of the citizenry, is certain. Or, try placing a dollar value on the benefits of suppressing unpopular, but constitutionally protected speech. This is further complicated by the introduction of models of government decision-making, namely public choice theory, and the counter-majoritarian nature of many constitutional rights. For instance, assuming that political incentives (and disincentives) are the appropriate currency for conceptualizing government costs, majorities will often support "efficient breaches" of constitutional rules. Thus, as long as "the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will *never* deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than

budgetary inflows and outflows, and the various political incentives of government actors, Levinson asserts that no deterrence benefits similar to those seen in the private sector may be accurately predicted when governments are forced, by the constitutional tort system, to make budgetary outlays.

While this conclusion may skew the calculus, it does not inevitably imply that economic approaches to analyzing government behavior, or, more precisely, efforts at specifically deterring unconstitutional government behavior, are futile. Levinson, in a less pessimistic moment, suggests that this asymmetry between the currency, so to speak, of the respective costs and benefits accruing to government actors requires, merely, their reformulation. In other words, we can correct the mismatch by converting the financial costs imposed by the constitutional tort system into political costs.⁶⁹ However, before turning to a discussion of potential methods for affecting the prosecutorial decision-making calculus, a critical analysis of Levinson's core assumption—namely, that governments seek to maximize non-market political gains—as applied to the state prosecutor is warranted.

1. Defining Individual Incentives: What Do State Prosecutors Maximize?

This question is critical and surprisingly under-studied. Levinson offers no empirical analysis to support his view that governments, on the whole, seek to maximize political gains. He states simply that governments respond to votes, not dollars, thus leading to the conclusion that costs will only be internalized, by public actors, to the extent that market costs are translated into political costs. Yet, the notion that political gain lies at the heart of government decisionmaking is not the only plausible hypothesis—perhaps not even the most persuasive—particularly as applied to state prosecutorial bodies and their agents.

Another equally plausible argument posits that state prosecutors seek to maximize *professional* gain. This distinction is not purely semantic. The office of State Assistant District Attorney is frequently but one pit stop on the highway to private sector employment. The transitory nature of the office is explained by Gerald Lynch, himself a former prosecutor, to exemplify characteristic fea-

they lose from the taxes necessary to finance compensation payments to victims.” *Id.* at 370.

69. This need for a uniform currency arises because of the almost universal state practice of indemnifying state agents from suits alleging constitutional violations committed during the course of their state employment. *See infra* note 83 and sources cited therein.

tures distinguishing the Anglo-American adversarial system of criminal justice from its civilian counterpart:

In civilian systems, both prosecutors and judges are career civil servants, selected at an early age by merit-based criteria, and then advanced over the course of their careers by normal bureaucratic processes. American prosecutors are a much more mixed bag. Some are career civil servants, who join a prosecutor's office shortly after admission to the bar, and remain in that role essentially for the rest of their career. Others, who might also join the staff at a very young age, are more transient, seeking a few years of excitement, public service, or intense trial experience before pursuing private sector opportunities as criminal defense lawyers or civil litigators.⁷⁰

While further empirical study of the advancement patterns and turnover rates of state prosecutors is clearly warranted, one report estimates the average tenure of an Assistant D.A. in New Orleans to be two years.⁷¹ Assuming that a substantial percentage of these turnovers are not merely transfers to other public sector employment, we can hypothesize that, at least for the prosecutors surveyed, something other than political gain is stabilizing their cost-benefit calculus. Professional gain, on the other hand, can be defined and conceptualized to encompass the incentives facing both categories of prosecutors, career and transient. Defined broadly to encompass the rewards, in terms of positive career advancement either within or outside of the public sector, the concept of professional gain more accurately describes the individual benefits accruing to state prosecutors. More specifically, the professional gain incentive leads the transient prosecutor to shape his or her actions by pursuing what the majority of potential future employers and professional

70. Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2149 (1998); see also James S. Liebman, *The Overproduction of Death*, 100 *COLUM. L. REV.* 2030, 2119–20 & n.220 (2000) (remarking on the transitory nature of the office of state prosecutor and providing examples; “By [the time an appeal for prosecutorial misconduct is heard], the individual responsible for the violation very often is long gone from the agency that, in theory, is held responsible: Local prosecutors, for example, frequently go on to become state judges.”).

71. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *STAN. L. REV.* 29, 63 (2002) (citing Interview with Richard Olivier, Chief of Screening Division, New Orleans District Attorney, in New Orleans, La. (Jan. 7, 1999)); Michael Perlstein, *Crowded Ballot Overshadows DA's Race*, *TIMES-PICAYUNE* (New Orleans), Sept. 21, 1990, at B1 (noting that the annual turnover among D.A.s exceeded fifty percent); JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 221 (1980) (reporting that, in 1976, the typical tenure of a DA was three years).

organizations (with whom he or she seeks favor) will support.⁷² We might hypothesize that this incentive most frequently is expressed through a desire to attain valuable litigation experience, develop relations with the private bar, and advance their own professional reputation.

Mere redefinition of the tendency of individual low-level prosecutors to maximize professional (rather than political) gain, however, does not call into question Levinson's overall critique of the constitutional tort system. Levinson's analysis leaves room for the possibility that lower-level government bureaucrats frequently have incentives and means to pursue their own objectives, which may deviate from managerial preferences. In fact, he uses this observation to demonstrate the complexity of determining the effect of constitutional cost remedies on the ultimate behavior of bureaucratic officials. He concludes that "even if the managers of an agency are motivated to direct the agency to engage in socially optimal behavior, if the agency's activities must be implemented by street-level officials with discretion, there is no guarantee that socially optimal behavior will result and no way of easily ascertaining in which direction deviations will occur."⁷³

Yet, although Levinson's analysis offers little hope for curbing constitutional tort violations through deterrence remedies, as will be shown in the following sections, his insight, combined with the hypothesis that "street-level" state prosecutors seek to maximize professional, rather than political, gain is potentially valuable in the effort to effectively alter the prosecutorial cost-benefit calculus. Of course, the success of any approach that focuses on the individual incentives of transitory prosecutors hinges on the validity of the assumption that a significant percentage of prosecutorial misconduct takes place at the hands of low-level—rather than supervisory—prosecutors. Hence, a preliminary examination of the validity of this assumption is warranted.

72. Cf. Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 *FORDHAM L. REV.* 865, 888–89 (1990) (stating that "secur[ing] private sector legal employment and clients sometime in the future" is an economic motive for prosecutors to comment on cases outside the courtroom).

73. Levinson, *supra* note 19, at 386.

2. Isolating the Problem of Prosecutorial Misconduct:
Supervisory Policies or Street-level Wrongdoing?

Over thirty years ago, Professor Norman Abrahms discussed the development and value of internal prosecutorial policies.⁷⁴ At that time he noted that “[t]he modern prosecutor . . . [is] no longer the individual district attorney,” but rather practices in “a large bureaucratic institution comprised of tens or sometimes hundreds of lawyers.”⁷⁵ This observation has only become more certain with the passage of time. Today the National District Attorneys Association and the United States Bureau of Justice estimates that there are 27,000 local prosecutors in the United States, spread throughout 2,341 jurisdictions.⁷⁶ Each of the 2,341 jurisdictions employs a single chief prosecutor—usually elected, but sometimes appointed⁷⁷—who remains responsible, along with the agency he or she heads, for all local prosecution, from petty theft to homicide.⁷⁸ In large districts,⁷⁹ half of the offices surveyed reported seventy-nine or more assistant prosecutors.⁸⁰ These statistics suggest that the nationwide average ratio of assistants to chief prosecutors looks something like 10:1, and in large districts, which serve forty-five percent of the total population, the ratio may even be as high as 79:1.⁸¹

In light of these statistics, the assumption that assistant prosecutors are responsible for a significant percentage of prosecutorial misconduct is not entirely unrealistic for four reasons. First, the sheer number of assistant prosecutors (relative to chief prosecu-

74. See generally Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

75. *Id.* at 1.

76. See The Center for Public Integrity, *Methodology: How the Center Compiled Data for these Articles*, at <http://www.publicintegrity.org/pm/default.aspx?sid=methodology> (last visited Feb 22, 2005).

77. Most large district chief prosecutors were elected or appointed to four-year terms (eighty-eight percent) with half serving eight years or more. See Carol J. DeFrances, *Prosecutors in State Courts 2001*, Bureau of Justice Statistics Bulletin 1, 2-3, at <http://www.ojp.usdoj.gov/bjs/pub/pdf/psc01.pdf> (last visited Feb. 22, 2005).

78. See *id.* at 2. Combined, the large-district agencies employ “over 79,000 attorneys, investigators, victim advocates, and support staff.” *Id.* at 1. This study found that between 1992 and 2001 the total number of staff in these prosecutors’ offices increased by 39 percent; the number of assistant prosecutors increased by twenty-six percent during the same period. See *id.* at 4.

79. Large districts were defined as prosecutorial offices serving a district with a population of at least 500,000 or more residents. See *id.* at 4.

80. *Id.*

81. *Id.*

tors) suggests that the potential for misconduct is greater among assistants simply by virtue of the proportionally higher caseload borne by this group as a whole. Second, while certain rare exceptions do exist, as compared to their supervising chiefs, assistant prosecutors generally have less training and experience prosecuting criminal cases. Consequently, assistants are, for the most part, less familiar with state and federal constitutional strictures applicable to law enforcement, and more susceptible to inadvertent constitutional violations. Third, unlike chief prosecutors, assistant prosecutors are only indirectly accountable to the public for prosecutorial abuses, and even this measure of accountability is frequently thwarted by the operation of state civil service regulations.⁸² The potential for unconscious, knowing, or even malicious misconduct is, therefore, greater among this group, in light of their insulation. Finally, the statistics above suggest that, especially in large districts, close supervision by a single chief prosecutor, of the approximately eighty assistant prosecutors supporting the office is difficult at best. Hence, we can realistically speculate that low-level prosecutors possess considerable discretion over the handling and prosecution of their cases, thereby increasing the potential for unsupervised errors.

While the proportionally larger group of assistant state district attorneys may be responsible for the highest percentage of prosecutorial misconduct, most approaches to curbing prosecutorial abuses have focused on deterring the supervisor's misconduct. The hope is that this deterrence will, in essence, trickle down to those supervised. Thus, any approach that targets assistant prosecutors specifically must rely on a different hypothesis. The following section explores one ground upon which this alternative hypothesis might rest.

3. Translating Individual Incentives into Deterrence Remedies: Top-Down or Bottom-Up?

Because of the near universal scheme of state indemnification for government agents sued under section 1983,⁸³ Levinson focuses

82. Even setting state civil service protections aside, it is doubtful that political accountability could effectively reign in prosecutorial abuse. *See supra* note 68.

83. A somewhat dated study of all section 1983 suits in one federal district found no case in which an individual officer had borne the cost of an adverse constitutional tort judgment. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987); *see also* Lant B. Davis et al., *Project, Suing the Police in Federal Court*, 88 YALE L.J. 781, 810–11 (1979) (reporting that, in Connecticut cases reviewed, police sued under section 1983 were provided counsel and indemnified against loss); John C. Jeffries, Jr., *In*

his analysis on the larger question of the extent to which compensation remedies effectively deter government misconduct. While he explores several models of government behavior, including public interest models, majority rule models, interest group analysis, and theories of bureaucracy, each of these conceptualize a governmental body as a singular entity, and attempt predictions on that basis. For example, the public interest model of government behavior posits that, in general, government policies are likely to be “public-regarding” or promote the “public interest.” Likewise, majority rule models operate from the premise that government acts upon the preferences of a majority of citizens. Interest group analysis and theories of bureaucracy add complexity by assigning a greater role to organized interest groups and agency-sponsor interactions, respectively. Levinson’s analysis suggests that attempts to influence government behavior by manipulating the cost-benefit calculus of high level government officials may not always translate into agency-wide change.

Rather than extending this understanding to further analyze and predict prosecutorial behavior, this section argues that effective attempts to deter prosecutorial misconduct must focus on influencing the individual cost-benefit calculus of the low-level, transitory prosecutor. In other words, instead of conceptualizing government as a private firm pursuing monetary gain, a more apt analogy in the context of transitory prosecutors is that of a sole proprietorship pursuing professional gain. The sole proprietorship analogy takes account not only of the extensive discretion that low-level state prosecutors are endowed with by their supervisors, but also properly describes the individualistic character of the transitory prosecutor’s enterprise.⁸⁴ Likewise, rather than focusing, as Levinson does,

Praise of the Eleventh Amendment and Section 1983, 84 VA. L. REV. 47, 49–50 (1998) (asserting that, “[s]o far as can be assessed,” governments defend their officers against constitutional tort claims and indemnify them for adverse judgments). Peter Schuck has observed:

Most jurisdictions apparently provide [defense counsel] for employees who acted within the scope of employment. Officials assured of representation by government counsel, however, may still be apprehensive, for they neither select, pay, nor directly control the lawyers assigned to their case; counsel may be incompetent, unresponsive, or subject to conflicts of interest that become apparent only after the case is well under way.

PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 84–85 (1983).

84. By definition, the transitory prosecutor is not a career prosecutor. Thus, his continued employment is naturally subject to his own discretion. Additionally, unlike his elected supervisors, the transitory prosecutor’s entry into and exit from government service is accomplished relatively easily. The lack of practical supervi-

on attempts to manipulate the incentives of high-level government bureaucrats through constitutional cost remedies (i.e., top-down change), this section argues that efforts in this arena should focus on influencing the incentives of low-level government bureaucrats (i.e., bottom-up change).

Bottom-up change is contrary to the conventional wisdom in the constitutional tort context. It is frequently assumed that, although “beat cops” and low-level prosecutors do not campaign for employment, the fact that their supervisors (the local district attorney and police chief) do provides a sufficient check on official misconduct even by low-level agents. If government lawyers wrongfully prosecute an innocent man, this view posits, their boss might lose his job to a candidate renouncing such prosecutorial abuses and demanding systematic reform.⁸⁵ Indeed, the top-down view, grounded in majoritarian models of government behavior, plays a part in nearly all approaches to constitutional cost remedies.⁸⁶ As one prominent scholar stated, “heads tend to roll whenever a change in leadership is premised on misconduct or mistakes under a previous administration.”⁸⁷

Despite its frequent articulation, the extent to which this view may be practically justified remains questionable.⁸⁸ In the federal system, efforts by incoming prosecutors to “clean house,” so to speak, are practically impeded by the imposition of exacting standards of proof for firing government employees covered by the Civil Service Reform Act.⁸⁹ Most state government employees receive similar protection under state civil service regulations,⁹⁰ and

sion in areas with supervisor-to-chief ratios as high as 79:1 further bolsters this analogy as it tends to indicate substantial individual discretion. See *supra* text accompanying notes 77–81.

85. See, e.g., Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1110–11 (2000).

86. See, e.g., Levinson, *supra* note 19, at 364–73.

87. Luna, *supra* note 85, at 1110–11.

88. See, e.g., Levinson, *supra* note 19, at 384–85.

89. For the procedural protections applicable to federal employees, see 5 U.S.C. §§ 1101–1105 (1994), which provide merit selection and job security.

90. See Michael D. Fabiano, Note, *The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It*, 44 HASTINGS L.J. 399, 401–02 (1993) (noting that most collective bargaining agreements and civil service systems have just-cause limits on an employer’s ability to discharge employees and classifying the standard of proof for firing government employees covered by the Civil Service Reform Act as the most demanding level of just cause analysis). Instead of allowing either a government supervisor’s good faith belief of employee misconduct or finding of substantial evidence supporting allegations of employee misconduct to constitute “just cause,” the Act requires a finding of actual miscon-

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these protections are further reinforced and undergirded by the requirements of procedural due process.⁹¹ But these considerations aside, there is clearly nothing analogous to the wholesale displacement of a governmental body that fails to maximize the interest of its principals such as that which exists in the corporate takeover market.⁹² Thus, if a substantial percentage of prosecutorial misconduct occurs at the hands of low-level prosecutors sufficiently insulated by civil service regulations, removal of the supervisor(s), through the democratic process, cannot be expected to completely—or, perhaps, even partially—rectify the problem of street-level misconduct.

Alternatively, bottom-up approaches to deterrence remedies focus on influencing the incentives (and disincentives) of precisely these low-level officers. By targeting the individual incentives facing low-level prosecutors, and manipulating the cost-benefit calculus of those responsible for the majority of the day-to-day operations of the state prosecutorial offices, bottom-up approaches to deterrence remedies provide the most effective means for directly targeting prosecutorial abuse. As will be noted later, however, while effective at achieving deterrence, care must be taken in the implementation of bottom-up approaches in order to avoid problems of over-deterrence, and, further, where the misconduct is systemic in nature or results from unconstitutional agency policies or norms, bottom-up approaches may provide an ineffective response.

The previous sections have argued that low-level state prosecutors, who are responsible for a significant percentage of prosecutorial misconduct, seek to maximize professional gain, and that bottom-up change directly targeting these state officers will prove most effective in the ongoing effort to decrease instances of prosecutorial abuse. Before turning to a discussion of potential methods for influencing the cost-benefit calculus of the low level,

duct. *Id.* at 413. See also John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 *YALE L.J.* 259, 267–68 (2000) (“Under civil service rules, most government workers cannot be fired simply for not doing a good job. Generally, government workers face discharge only for demonstrably bad performance—provable misconduct or neglect that justifies civil service termination.”).

91. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985) (holding that public employees who can be discharged only “for cause” under civil service regulations have property rights in their jobs).

92. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 *U. CHI. L. REV.* 345, 355 & n.31; *supra* note 19, at 356 (citing Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 *AMER. L. & ECON. REV.* 313, 330 (2000)); Edward Rubin, *Rational States?*, 83 *VA. L. REV.* 1433, 1442 (1997).

transitory state prosecutor, one additional consideration merits discussion. That is, precisely what activities do we decry when we use the term “prosecutorial misconduct”? And, when is such “misconduct” appropriately sanctioned (through whatever sanctioning mechanism we might adopt)? The following section briefly addresses these and related questions concerning the normative standard for prosecutorial misconduct.

4. Determining Sanctionable Misconduct: Functional Uncertainty or Catalogued Precision?

Since the Supreme Court first employed the phrase in 1963, “prosecutorial misconduct” has been used to describe a varied assortment of activities that implicate equally diverse concerns.⁹³ For example, conduct such as the knowing subornation of perjury or withholding or suppression of *Brady* material threatens to undermine the reliability of the verdict reached, thereby heightening the risk of a wrongful conviction. Additionally, when prosecutorial misconduct forms the basis for conviction reversal it implicates concerns related to the efficient use of judicial and prosecutorial resources. Yet, even when no reversible error is found, if the actions of the prosecutor are contrary to established rules of evidence and/or ethics, the conduct may still threaten to undermine public confidence in the fairness of the proceeding as a whole and the general integrity of the criminal justice system. Thus, determining which categories of misconduct are deserving of sanction requires formulating a rationale for the imposition of sanctions in the first place.

Likewise, a central question in this determination ought to be the effect of uncertainty on compliance with the appropriate legal standard. When the conduct and activities subject to sanction are uncertain, “even actors who behave ‘optimally’ in terms of overall social welfare will face some chance of being held liable because of the unpredictability of the legal rule.”⁹⁴ While the Supreme Court’s grant of absolute immunity from civil suits stemming from official prosecutorial misconduct appears to be, at least partially, a reaction to the uncertain nature of constitutional requirements and the desire to insulate prosecutors from facing liability for poten-

93. See *Namet v. United States*, 373 U.S. 179, 186 (1963) (describing “prosecutorial misconduct” for the first time at the Supreme Court level as “when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege.”).

94. Calfee & Craswell, *supra* note 55, at 966.

tially accidental violations,⁹⁵ many have argued that the functional approach to immunity under section 1983 is vague and indeterminate, particularly as applied to “multifaceted” prosecutorial misconduct that is not easily categorized as either advocatory (and, hence, subject to absolute immunity) or investigatory (and, hence, subject to only qualified immunity).⁹⁶

A review of the scholarship analyzing the problem of prosecutorial misconduct suggests that the primary concern centers on that deliberate, flagrant, pervasive, and prejudicial prosecutorial abuse which denies a defendant’s constitutional right to a fair trial, and is frequently committed by repeat prosecutorial offenders.⁹⁷ The reason for this concern, and the prosecutorial actions implicating such concerns, appears more contentious. Most obviously, the “right to a fair trial” embodies and implicates the procedural protections found in the Fifth, Sixth, and Fourteenth Amendments. Yet, in individual cases, rights that are generally of great significance may be entirely trampled upon with little or no overall effect on the fairness of the proceeding. Sometimes these violations are encompassed under the doctrine of harmless error. Yet many scholars still decry this “harmless” prosecutorial misconduct, appar-

95. See *Imbler v. Pachtman*, 424 U.S. 409, 425 & n.22 (1976)

(“[S]uits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor’s possible knowledge of a witness’ falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and—ultimately in every case—the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, *sometimes to differing conclusions* This is illustrated by the history of the disagreement as to the culpability of the prosecutor’s conduct in this case.”) (emphasis added).

96. See, e.g., Anthony J. Luppino, Note, *Supplementing the Functional Test of Prosecutorial Immunity*, 34 STAN. L. REV. 487, 493 (1982) (“Unfortunately, the functional test does not satisfactorily resolve cases involving acts that serve more than one prosecutorial function. Trial judges must arbitrarily designate such conduct as furthering only the prosecutorial function that it most closely serves.”); see also *Gray v. Bell*, 712 F. 2d 490, 499–500 (D.C. Cir. 1983)

(“Although there are a number of decisions holding that activity less closely associated with the judicial phase of criminal proceedings should not receive absolute immunity, there is no clear consensus on how to properly characterize all of the various forms of prosecutorial conduct. This lack of a consensus is plainly attributable to an absence of any settled approach to determining when absolute immunity applies.”).

97. See, e.g., Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive and Well, and Living in Indiana?*, 3 GEO. J. LEGAL ETHICS 657 (1990) (delineating the myriad of ways in which a prosecutor may abuse his discretion); Gershman, *supra* note 2.

ently operating from the view that a measure of a fair trial is its adherence to stated processes.⁹⁸ Thus, to some extent, departing from the functional approach to prosecutorial immunity in favor of delineating specific categories of prosecutorial misconduct subject to sanction will undoubtedly prove controversial.

As one small step toward this process, however, consider the following categories of constitutional violations for which federal appellate courts in the 1990s overturned convictions:⁹⁹ (1) “commenting on an accused’s failure to testify in violation of Fifth Amendment rights under *Griffin v. California*;¹⁰⁰ (2) “depriving a defendant of the Sixth Amendment right to confront witnesses against him;”¹⁰¹ (3) “undermining the Eighth Amendment right to a reliable death verdict;”¹⁰² (4) “denying due process rights by making arguments known to be false;”¹⁰³ (5) “undermining the presumption of innocence or burden of proof beyond a reasonable doubt;”¹⁰⁴ (6) “arguing that post-*Miranda* silence impeaches a de-

98. See Danny J. Boggs, *The Right to a Fair Trial*, 1998 U. CHI. LEGAL F. 1, 2–4; Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There’s More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298, 1300 (1988) (“Due process requires not only that criminal proceedings reach a correct outcome—that justice be done—but also that the correct outcome be reached only through the use of fundamentally fair procedures.”); *Snyder v. Massachusetts*, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (Taft, C.J.) (due process violated where judge’s compensation depended on revenues from convictions, even though outcome may not have been affected).

99. This list was compiled by Paul J. Speigelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 138–39 (1999).

100. 380 U.S. 699, 613 (1969); see Speigelman, *supra* note 99 (citing *United States v. Johnston*, 127 F.3d 380, 393–98, 401–02 (5th Cir. 1997); *United States v. Roberts*, 119 F.3d 1006 (1st Cir. 1997); *United States v. Cotnam*, 88 F.3d 487, 493 (7th Cir. 1996); *United States v. Hardy*, 37 F.3d 753 (1st Cir. 1994); *Freeman v. Lane*, 962 F.2d 1252, 1254 (7th Cir. 1992); *Lesko v. Lehman*, 925 F.2d 1527 (3d Cir. 1991); *Floyd v. Meachum*, 907 F.2d 347, 351, 353–54 (2d Cir. 1990)).

101. See Speigelman, *supra* note 99 (citing *Agard v. Portuondo*, 117 F.3d 696, 706–14 (2d Cir. 1997); *United States v. Molina-Guevara*, 96 F.3d 698, 703–05 (3d Cir. 1996)).

102. See Speigelman, *supra* note 99 (citing *Nelson v. Nagle*, 995 F.2d 1549, 1555–58 (11th Cir. 1993); *Presnell v. Zant*, 959 F.2d 1524, 1528–31 (11th Cir. 1992)).

103. See Speigelman, *supra* note 99 (citing *United States v. Wilson*, 135 F.3d 291, 296–302 (4th Cir. 1998); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995); *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994); *United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991)).

104. See Speigelman, *supra* note 99 (citing *Mahorney v. Wallman*, 917 F.2d 469 (10th Cir. 1990); *Floyd v. Meachum*, 907 F.2d 347, 351–54 (2d Cir. 1990)).

defendant who has testified, in violation of Due Process guarantees as interpreted in *Doyle v. Ohio*;¹⁰⁵ and (7) “appealing to racial or ethnic prejudice.”¹⁰⁶ To this list we might add (8) the subornation of perjury; (9) the suppression or withholding of *Brady* material;¹⁰⁷ (10) the falsification of witness testimony or evidence; and (11) the threatening or detaining of potential defense witnesses. Less susceptible of simple categorization are the following: (1) improper argument or questioning, (2) the introduction of inadmissible evidence, (3) misconduct involving the selection of the charge and plea bargaining, (4) prosecutorial vindictiveness, and (5) misconduct before the grand jury, to name a few. While the first categories of delineated prosecutorial misconduct may, ultimately, lie at the heart of most commentators’ concerns, the specific actions that prosecutors must undertake to assure compliance with constitutional requirements for each is frequently uncertain. For example, after *United States v. Agurs*¹⁰⁸ the scope of the constitutional disclosure obligation is hotly debated. Yet, even within this woolly subject, courts have provided a standard (albeit ambiguous) by which prosecutors can shape their conduct. For instance, the *Agurs* Court stated that “the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial,”¹⁰⁹ a standard which the Court later defined to mean that “the omitted evidence creates a reasonable doubt that did not otherwise exist.”¹¹⁰

Ultimately, any attempt to address the problem of prosecutorial misconduct must begin by isolating the most serious violators and clearly instructing those actors as to the types of actions subject to sanction. An appropriate rationale for the imposition of sanctions against prosecutors will focus on securing, system-wide, the right of a defendant to receive a fair trial, and the prosecutorial

105. 426 U.S. 610 (1976). See Speigelman, *supra* note 99 (citing *Gravley v. Mills*, 87 F.3d 779, 782 (6th Cir. 1996); *United States v. Foster*, 985 F.2d 466, 468–69 (9th Cir. 1993)).

106. See Speigelman, *supra* note 99 (citing *United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990)).

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

108. 427 U.S. 97 (1976) (concluding that the doctrine of *Brady v. Maryland* extended to exculpatory evidence even if the defendant had not specifically requested the evidence).

109. 427 U.S. at 108.

110. *Id.* at 112. It is worth noting that if we are concerned about over-deterrence in this area, it is not a concern that the Court has firmly echoed, as the *Agurs* Court encouraged “prudent prosecutor[s] to] resolve doubtful questions in favor of disclosure.” *Id.* at 108.

actions impairing that right must be closely examined. From this starting point, an approach that centers on the misconduct alleged, rather than the function in which the prosecutor was acting at the time of the misconduct, goes significantly farther toward implementing the fair trial guarantee than the ill-defined functional approach used for civil sanctions under section 1983.

However, civil sanctions under section 1983 are not the only method for curbing prosecutorial abuse, and perhaps not even the most effective. Section 1983 civil sanctions may garner the most attention because of the conventional wisdom that monetary damages generally exact recognizable deterrence. Yet, the accuracy of this view as applied to governmental agents has been called into question quite compellingly. Thus, in an effort to determine the most effective methods for deterring prosecutorial abuse, the following sections will briefly explore the most frequently articulated alternatives to civil money damages.

II. DETECTING THE TRANSITORY PROSECUTOR

In light of Levinson's primary insight, any approach to manipulating the cost-benefit calculus of the transitory prosecutor must align the costs and benefits incurred to the incentives facing these government agents. In other words, having established that low-level transitory prosecutors seek to maximize professional gain, in order to be effective, the costs and benefits that accrue to these state actors must come in that form. Similarly, if the second assumption—that low-level transitory prosecutors are responsible for a significant percentage of prosecutorial misconduct—proves accurate, then methods for decreasing such misconduct must be tailored to these individual agents with a goal of accomplishing bottom-up change. Additionally, in light of the sensitive nature of the prosecutorial function, special care must be devoted to achieving optimal deterrence while simultaneously minimizing both the social costs of the sanction and over-deterrence. Several approaches are readily apparent, including judicial censure and/or professional publicity, professional discipline, criminal sanctions, reversal, and civil penalties. The following sections critically examine each of these potential alternatives, with special attention focused on the ways in which each alternative might be expected to influence the cost-benefit calculus of the transitory prosecutor.

A. *Censure and Publicity*

Many courts have noted that among the remedies available to control prosecutorial abuse is publicly naming, in a published opinion, the prosecutor who acted improperly.¹¹¹ A recent review of the forty-five reversals by federal courts of appeals in the 1990s in cases involving improper prosecutorial argument suggests that courts use this power sparingly.¹¹² In only six of the federal reversals did the court's opinion mention the prosecutor by name.¹¹³ State courts, on the other hand, may be more inclined to exercise this power. For example, in *People v. Hill*, the California Supreme Court named the prosecutor found responsible for egregious misconduct over 120 times in the opinion, and referred the matter to the California State Bar for investigation.¹¹⁴ In order to fully assess the potential of judicial censure and related publicity devices to curb instances of prosecutorial misconduct by low-level transitory prosecutors, an examination of the congruency, individuality and efficiency of such sanctioning mechanisms is warranted.

1. Congruency of the Cost-Benefit Calculus

Initially it is apparent that, unlike monetary sanctions, publicly naming the prosecutor responsible for official misconduct in a published opinion or elsewhere has at least the potential to impact the

111. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 180 (1986) (Court identifies prosecutor); *United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992) ("The Court may . . . chastise the prosecutor in a published opinion."); *Kyles v. Whitley*, 514 U.S. 419 (1995) (Court identifies prosecutor); *United States v. Flores-Chapa*, 48 F.3d 156, 159 (5th Cir. 1995) (court identifies prosecutor); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) (court identifies prosecutor); *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994) (court identifies prosecutor); *United States v. Friedman*, 909 F.2d 705 (2d Cir. 1990) (court identifies prosecutor); *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir. 1990) (court identifies prosecutor); *McGuire v. State*, 677 P.2d 1060, 1062 (Nev. 1984) (mentioning the name of prosecutor who had committed similar misconduct in two other cases). *But see* *United States v. Modica*, 663 F.2d 1173, 1185-86 & n.7 (2d Cir. 1981) (stating that "[a] reprimand in a published opinion that names the prosecutor is not without deterrent effect," but noting that "appellate courts have generally been reluctant to name the individual prosecutors whose comments have been found improper" and identifying only two reported decisions in the decade preceding the decision that referred to the offending prosecutor by name).

112. Spiegelman, *supra* note 99.

113. See *id.* at 170 & n.240 (citing *United States v. Flores-Chapa*, 48 F.3d 156, 159 (5th Cir. 1995); *United States v. Alzate*, 47 F.3d 1103, 1107-08 (11th Cir. 1995); *Davis v. Zant*, 36 F.3d 1538, 1548 (11th Cir. 1994); *Sizemore v. Fletcher*, 921 F.2d 667, 669 (6th Cir. 1990); *United States v. Friedman*, 909 F.2d 705, 708 (2d Cir. 1990); *Floyd v. Meachum*, 907 F.2d 347, 349-50 (2d Cir. 1990)).

114. *People v. Hill*, 952 P.2d 673, 703 n.13 (Cal. 1998).

professional gain incentive of the transitory prosecutor. The question becomes, however, whether a publicity sanctioning method will cause the costs, in terms of professional losses, to outweigh the benefits, in terms of professional gains, that accrue from such misconduct. Assuming an environment in which judicial censure in a reported decision was certain to follow prosecutorial abuse, the effectiveness of employing this method alone is doubtful. Calling attention to a prosecutor's misconduct in a reported decision is more likely to arouse the attention of the appropriate disciplinary body than potential private sector (or even future public sector) employers.

However, this method does carry one important advantage. For those potential future employers interested in researching the ethics or professionalism of applicants who were formerly low-level prosecuting attorneys, reported decisions highlighting the prosecutor's misconduct and identifying the offender by name significantly reduce the costs of obtaining such information. Media attention to the more egregious instances of prosecutorial misconduct similarly reduces information costs, but with less precision. In other words, media attention will most likely focus on only the most egregious prosecutorial violations, and the reports may, at least arguably, exhibit less dispassionate analysis than an appellate decision reporting the same misconduct.

This analysis suggests, however, that an even more effective method for reducing private sector information costs would be the direct release of misconduct records by the prosecuting office or some other record-keeping body. State laws may prevent (and constitutional due process doctrines further discourage) the unauthorized release of this information. However, from the perspective of streamlining the circulation of information among interested prospective employers, some adaptation of this option, perhaps providing the prosecutor an opportunity to dispute the defamatory information prior to its release, may prove optimal.

Since under any of these approaches, the costs of information are something above zero, ultimately, the efficacy of judicial censure and publicity methods will depend on the extent to which those professional employers or organizations with whom transitory prosecutors seek favor both value and seek out information regarding past incidents of prosecutorial misconduct. It is probably safe to assume that professional employers and organizations would disapprove of such conduct if it were brought to their attention, but in order to manipulate the individual cost-benefit analysis of the transitory prosecutor, the release of such information must be highly

probable and the consequences flowing from that release must outweigh the benefits of acting improperly.

2. Personal Nature of the Sanction

Naming the prosecutor responsible for misconduct in a judicial opinion or otherwise is perhaps the most personal sanction available. While this point requires little belaboring, the advantage that this carries is noteworthy. Rather than attempting to impose sanctions on the prosecuting agency, or even the state, as a whole, this method assures that the costs of prosecutorial misconduct will be felt individually by the offender. Hence, censure and publicity effectively responds to Levinson's critique that attempts to influence government behavior by manipulating the cost-benefit calculus of high-level government officials may not always translate into agency-wide change. Likewise, this approach serves to at least partially counterbalance the insulation that assistant prosecutors enjoy from the political process.¹¹⁵ Personal reprimands against low-level state prosecutors, whose reputations are still in the formative stages, does provide one potentially useful approach to manipulating the cost-benefit calculus of these individual state actors.

3. Efficiency Analysis

From an efficiency standpoint, judicial censure and publicity methods for curbing prosecutorial abuse must be analyzed in light of the two previously stated goals: obtaining the appropriate level of behavior and obtaining the appropriate level of activity. Additionally, as noted previously, when any sanctioning mechanism is adopted, it is important that the line between that which is forbidden and that which is permitted be drawn accurately, since, if successful, it will impose an abrupt behavior change at that location.¹¹⁶

Most obviously, we might argue that judicial censure and publicity avoids violating the Pareto-superiority criterion because no (or, perhaps more realistically, very few) avoidable economic deadweight losses accompany the sanction. Censure also initially appears to avoid problems of over-deterrence because the private (and social) cost imposed on the prosecutor will not usually exceed the social cost of the misconduct. To illustrate the latter, and less obvious point, consider a context in which the courts have generally refrained from intervening: the grand jury proceeding. Sup-

115. See *supra* notes 89–90 and sources cited therein.

116. See Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523–31 (1984).

pose that a prosecutor leaks information to the media in violation of the state-counterpart to Federal Rule of Criminal Procedure 6(e)(2), which forbids disclosing any matters occurring before the grand jury. Suppose further that this misconduct imposes a cost of \$100 on the criminal defendant (in terms of the prejudice to potential jury members and stigma), but, should an appeals court dismiss the indictment, the loss to society (in terms of the impossibility of convicting him) can be valued at \$10,000. If the probability of detecting the misconduct is one, a judicial reprimand which imposes a \$100 cost on the prosecutor (in terms of reputational harm) would provide optimal (albeit not 100 percent) deterrence of such misconduct.

While this may partially explain judicial aversion to dismissing grand jury indictments, this illustration merely demonstrates the precarious nature of the judicial reprimand from a deterrence standpoint. A sanction which imposes a much larger cost (in terms of reputational harm) will overdeter, causing prosecutors to “steer too far clear” of the nebulous boundaries of the constitutional and professional strictures operating upon their office.¹¹⁷ The consequences of this over-deterrence come in the form of social opportunity costs—the foregone lawful activity and the resulting convictions of the guilty—that the lesser sanction would have avoided.¹¹⁸ This potential may be most acutely observed among low-level, transitory prosecutors, who, by definition, do not enjoy a long tenure of office and will, thus, rarely directly reap (or perhaps fully perceive) the social rewards for their performance.

Yet, given the difficulties inherent in quantifying the various professional costs associated with censure sanctions as well as the private and social costs flowing from prosecutorial misconduct, we might use this opportunity to compare the costs of under-deterrence and over-deterrence. Using the same illustration, but instead quantifying the prosecutor’s reputational harm flowing from a judicial reprimand at \$1,000, if we conclude that the social costs of under-deterrence exceed the social costs of over-deterrence, then even this more costly reprimand might not be excessive—and, therefore, inefficient—in the broader economic sense.

In sum, the efficient use of judicial censure and publicity devices requires that the cost, in terms of the reputational harm to the

117. See Posner, *supra* note 57, at 638–40.

118. This analysis assumes that all judicial reprimands are not equal. In other words, a very harsh reprimand from a politically influential or locally respected jurist may be much more costly than a mild admonition from an obscure judge.

prosecutor, of the reprimand imposed approximate the private and social costs of the prosecutor's misconduct, while accounting for the possibility that the social costs of under-deterrence might exceed the costs of over-deterrence, therefore justifying what would otherwise be an excessive (from an economic standpoint) reprimand.

B. Professional Discipline

A similar analysis applies to the related method for curbing prosecutorial abuses through professional disciplinary sanctions. A frequently cited passage from *Imbler v. Pachtman* justifies immunizing prosecutors from civil liability, in part, because of their peculiar amenability to discipline: "[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."¹¹⁹ Indeed, the most frequently articulated goals of professional discipline systems coincide neatly with the goals of deterrence remedies for prosecutorial misconduct: the protection of the public,¹²⁰ the protection of the administration of justice,¹²¹ and the preservation of confidence in the legal profession.¹²² Nonetheless, numerous commentators have suggested that professional disciplinary sanctions have proven a hollow hope for curbing prosecutorial abuse.¹²³ Most of these commentators have focused

119. *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (citing AMER. BAR ASS'N, CODE OF PROF'L RESPONSIBILITY EC 7-13 (1969)).

120. See, e.g., *In re Merrill*, 875 P.2d 128, 131 (Ariz. 1994); *In re Abrams*, 689 A.2d 6, 12 (D.C. 1997); *In re Brown*, 674 So. 2d 243, 246 (La. 1996); *Board v. Dineen*, 557 A.2d 610, 614 (Me. 1989); *Attorney Grievance Comm'n v. Garland*, 692 A.2d 465, 472 (Md. 1997); *In re Olson*, 577 N.W.2d 218, 220 (Minn. 1998); *In re Harris*, 890 S.W.2d 299, 302 (Mo. 1994); *In re Imbriani*, 694 A.2d 1030, 1035 (N.J. 1997); *In re Curran*, 801 P.2d 962, 974 (Wash. 1990).

121. See, e.g., *In re Brady*, 923 P.2d 836, 840 (Ariz. 1996); *Statewide Grievance Comm'n v. Botwick*, 627 A.2d 901, 906 (Conn. 1993); *In re Chandler*, 641 N.E.2d 473, 479 (Ill. 1994); *In re Quaid*, 646 So. 2d 343, 350 (La. 1994); *In re Hartke*, 529 N.W.2d 678, 683 (Minn. 1995); *In re Bourcier*, 939 P.2d 604, 608 (Or. 1997).

122. See, e.g., *In re Agostini*, 632 A.2d 80, 81 (Del. 1993); *In re Addams*, 579 A.2d 190, 199 (D.C. 1990); *In re Hahm*, 577 A.2d 503, 506 (N.J. 1990); *Emil v. The Mississippi State Bar*, 690 So. 2d 301, 327 (Miss. 1997); *In re Berk*, 602 A.2d 946, 950 (Vt. 1991); *In re Felice*, 772 P.2d 505, 509 (Wash. 1989).

123. See, e.g., Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 47, 58-60 (1987) (asserting that "[d]isciplinary sanctions are rarely imposed against prosecutors" and proposing reforms to remedy that state of affairs); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697-98 (1987) (addressing the limited number of cases in which prosecutors have been disciplined for withhold-

their critiques on exposing the under-utilization of professional disciplinary sanctions and the lack of vigorous enforcement, rather than the defective nature of the sanctions themselves. Low apprehension and enforcement is highly relevant to determining the level at which an optimal sanction should be set, and efforts in this regard would be well advised to examine enforcement patterns for instruction.¹²⁴ This discussion, however, will apply the same three-part analysis employed above when examining the efficacy of judicial censure and publicity devices, in order to explore the merits of disciplinary sanctions, in general, for their usefulness in deterring the transitory prosecutor's misconduct.

1. Congruency of the Cost-Benefit Calculus

Like judicial censure and publicity, professional disciplinary sanctions exact costs that closely correspond to the professional gain incentive of transitory prosecutors, and the question becomes whether these costs are sufficient to exceed the professional gains that might be expected to flow from acts of prosecutorial misconduct. This, of course, depends largely on the form of discipline imposed. The traditional forms of professional discipline include private admonition, public reprimand, suspension, and, for extreme misconduct, disbarment. Less traditional (and less commonly used) methods for disciplinary enforcement include monetary remedies and sanctions such as restitution and the assessment of costs.¹²⁵

ing exculpatory material and advocating alternative remedies for prosecutorial misconduct); 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, 898 (1997) (arguing that "the disciplinary process has been almost totally ineffective in sanctioning even egregious *Brady* violations"); Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3464-77 (1999) (offering specific examples illustrating the limited discipline of prosecutors); JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 11:3, at 389-90 (2d ed. 1996) (same); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) ("[W]hile the prosecutor is theoretically subject to disciplinary codes [for misconduct], there is a notable absence of disciplinary sanctions against prosecutors, even in the most egregious cases.").

124. This is because the optimal sanction is dependent on the probability of uncovering the misconduct and apprehending the offender. See *supra* note 55 and sources cited therein.

125. See JOINT COMMITTEE ON PROFESSIONAL SANCTIONS, AMERICAN BAR ASS'N, ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, § 2.8, at 15 (1992) (approved Feb. 1986, amended Feb. 1992).

Expressive sanctions, such as the public reprimand and the private admonition, are the sanction of choice for most disciplinary agencies.¹²⁶ The public reprimand results in reputational harm similar (although perhaps more severe) to that flowing from judicial censure and publicity. On the other hand, the secrecy of the private admonition ensures that little or no reputational harm flows from the disciplinary action, and, correspondingly, little or no effect on the professional gain incentive will be realized.¹²⁷ Incapacitating sanctions, such as suspension and disbarment carry significantly more professional stigma, and are designed primarily to prevent future misconduct by the individual errant lawyer.

Because the hiring practices of many legal employers includes some form of due diligence in checking the professional disciplinary history of their applicants, and because a negative disciplinary history, if uncovered, is likely to weigh heavily against extending an offer of employment, disciplinary sanctions that are made public provide a useful method for directly influencing the professional gain incentive of the transitory prosecutor. Of course, the same information cost analysis applicable to judicial censure and publicity remains relevant here, although we might speculate that in many jurisdictions the costs of obtaining disciplinary information is less than the cost of searching federal or state reporters for reference to an individual prosecutor's past misconduct.¹²⁸

126. See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 22 (1998), (citing STANDING COMM. ON PROF'L DISCIPLINE, CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1996 (1998), at 5-9 chart 2 (reporting that in 1996 alone, 2,635 private admonitions and 814 public reprimands were imposed on lawyers in the reporting jurisdictions, for a total of 3,449 expressive sanctions, as compared to 2,962 other sanctions that were imposed)).

127. It is important to note that state disciplinary committee investigations generally occur in private, and no public record of the investigation is created unless the offending prosecutor is sanctioned in some substantial way, such as through reprimand, suspension, or disbarment. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.4.4, at 107 (1986). Hence, in order to impact the professional gain incentive of the transitory prosecutor, something beyond mere investigation must be instituted.

128. The costs of obtaining information regarding past disciplinary sanctions is continually decreasing as computerized databases become more frequently used by state bar associations. See *Lateral Hiring Roundtable . . . Due Diligence, Cultural Coherence Are Overriding Concerns for Cautious Law Firms*, OF COUNSEL, Feb. 3, 1997, at 10, 18 (mentioning the availability of computerized databases that "include a lot of information about the candidates that might be difficult to come by during the normal due diligence process").

2. Personal Nature of the Sanction

Similarly, it goes without saying that professional disciplinary sanctions are an extremely personal deterrence device. While reference to a prosecutor's name in a judicial opinion, which is frequently accompanied by a reference to his or her employing jurisdiction or office, carries reputational implications that extend beyond the individual prosecutor, a professional sanction almost exclusively besmirches the reputation of the individual prosecutor. This comes with advantages and disadvantages.

From the perspective of deterring prosecutorial misconduct through a bottom-up approach, the threat of professional sanction most acutely counteracts the individual prosecutor's incentive to maximize professional gain by engaging in improper conduct. The disadvantage, of course, is that no corresponding deterrent effect is felt by the supervising attorneys, and, thus, there is no direct incentive to adopt internal changes to prevent future misconduct. Hence, professional disciplinary sanctions are most appropriate when the misconduct involved does not stem from internal policies and procedures that require top-down modification.

3. Efficiency Analysis

The effect of professional disciplinary sanctions on the twin efficiency goals expressed previously is problematic for three reasons: professionalism standards are vague, their application is frequently uncertain, and existing professional rules do not encompass all forms of prosecutorial misconduct that directly implicate the concern of protecting, system-wide, the right of an accused to receive a fair trial.

Regarding their vague nature, it has been suggested that "the lawyer obtains as much precise direction from his guide to professional responsibility as a heart surgeon could usefully derive from examination of a valentine."¹²⁹ The application of numerous professional rules has been challenged under the constitutional void

129. Letter from Professor Anthony G. Amsterdam to the Grievance Committee of the District of Columbia, as it appears in Charles L. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281 (1979) (citing *Professional Ethics: Lies and Lawyers*, TIME, May 13, 1966, at 81); see also WOLFRAM, *supra* note 127, at 87 (providing a general discussion of vagueness in lawyer codes of professional conduct and faulting both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct for "contain[ing] vague provisions"); Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 668 (2001) (noting that although professional "codes have migrated away from broad standards and toward clearly defined rules[,] . . . many standards still prevail").

for vagueness doctrine with moderate success.¹³⁰ More specific to prosecutors, the application of state rules modeled after Model Rule of Professional Conduct 3.8 has been challenged as both unconstitutionally vague and overbroad.¹³¹ All of this implicates over-deterrence concerns. Depending upon the professional sanction imposed, the private cost of disciplinary sanctions may not exceed the social cost of the misconduct, but the vague nature of the professional requirements may still lead prosecutors to exercise unnecessary caution, with resultant social opportunity costs.¹³² The uncertain application of professionalism rules merely bolsters this point. At a minimum, when professional rules are unclear, the judge's *ex post facto* sense of professional integrity, not the law, supplies the legal standard. Meaningful appellate review is similarly unlikely where the standards are uncertain. Finally, the failure of professional rules to cover all prosecutorial misconduct implicating the fair trial guarantee suggests that employing professional discipline alone will inevitably under-deter certain categories of misconduct.¹³³ In such situations no corresponding incentive exists to counteract the professional gain incentive influencing transitory prosecutors.

Setting aside these problems, for a moment, the imposition of incapacitating disciplinary sanctions implicates the Pareto-superiority efficiency criterion by imposing avoidable economic deadweight losses. For example, considering the previously discussed hypothetical, suppose that in addition to violating the state counterpart of Federal Rule of Criminal Procedure 6(e)(2), the prosecutor who

130. *See, e.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (involving both a facial and applied First Amendment challenge to a Nevada professional rule; the Court's decision rejected the facial challenge, but concluded that parts of the rule were too vague to satisfy First Amendment standards in their application); *Rapp v. Disciplinary Bd. of the Haw. Supreme Court*, 916 F. Supp. 1525, 1536–37 (D. Haw. 1996) (striking down a professional rule that barred *ex parte* communications with jurors “except as permitted by law” because the rule at issue was unconstitutionally vague and not well-tailored); *Wachsman v. Disciplinary Counsel*, No. C-2-90-335, 1991 WL 735079 (S.D. Ohio 1991) (prohibition against media comment in civil trials unconstitutional on its face because both vague and overbroad); *In re Keller*, 693 P.2d 1211 (Mont. 1984) (disciplinary charge against criminal-defense lawyer dismissed on ground that professional rule was unconstitutionally overbroad and failed to state a clear standard by which lawyers can gauge their conduct).

131. *See, e.g.*, *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001).

132. Where an analysis of the costs of under-deterrence and over-deterrence indicates that the costs of under-deterrence are greater, then this concern may be somewhat alleviated.

133. *See supra* text accompanying notes 99–108.

leaked information to the media concerning the grand jury proceeding also violated the state equivalent of Model Rule of Professional Conduct 3.8(f).¹³⁴ If such conduct is referred to the appropriate disciplinary body, several alternative methods for achieving the desired level of deterrence exist. The disciplinary body may, in principle at least, deliver some combination of a reprimand and/or monetary sanctions that will be the exact equivalent of a term of suspension or permanent disbarment in the sense that the sanction will impose the same private cost on the offending prosecutor. However, the social cost of the public reprimand will likely be smaller than the social cost of the equivalent suspension or disbarment. The extra economic deadweight loss accompanying the suspension or disbarment comes in the form of losses that are not received as gains by anyone else; namely, the prosecutor's foregone legitimate prosecutorial activity, the earnings that flow from his employment, and the costs of replacing him (either temporarily or permanently). Therefore, from the standpoint of economic theory at least, suspension or disbarment is less favored.¹³⁵

Additionally, the suspension or disbarment in this hypothetical implicates over-deterrence concerns. Suppose that the prosecutor's extra-judicial statement was made in response to an earlier statement by defense counsel that mischaracterized the grand jury deliberations. The comments to Model Rule 3.6 suggest that such statements may be appropriate in certain circumstances as they "may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding."¹³⁶ When the unrealistic assumption of perfect certainty is dropped—as it should be when the allegation of misconduct involves a violation of ambiguous professionalism standards—it becomes clear that the threat of a very large sanction will induce prosecutors to avoid lawful behavior at the

134. The Model Rules provision states that "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, [the prosecutor shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule." MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2002).

135. This analysis ignores, for the moment, the social costs associated with the potential for recidivist incidents of prosecutorial misconduct. While such concerns lie at the heart of incapacitating disciplinary sanctions, the only point I am interested in making with this hypothetical is that, from a purely theoretical standpoint, a combination of expressive and/or monetary sanctions may be preferable.

136. MODEL RULES OF PROF'L CONDUCT R. 3.6, cmt. 7 (2002).

edge of the “forbidden zone” in order to minimize the possibility of falling prey to Type I error.¹³⁷

It would be a mistake to conclude, however, that the imposition of professional discipline for prosecutorial misconduct is always (or even usually) inefficient, even where incapacitating sanctions are involved. Incapacitating sanctions are generally reserved for particularly egregious violations of the professional rules. In this context, a comparison of the costs of over-deterrence with the costs of under-deterrence may lead us to conclude that the latter costs are greater for several reasons. A higher sanction is required to achieve optimal deterrence as the expected harmfulness of an act increases.¹³⁸ This is true for three reasons. First, society values the increased deterrence of conduct that creates a greater expected harm; thus, society should be more willing to bear the costs (including deadweight losses) of imposing a higher sanction. Second, higher expected harms frequently indicate a corresponding increase in the expected private benefits of the conduct in question, and, in order to be optimal, a sanction must exceed the private benefits. And, third, raising the sanction as the expected harmfulness increases allows for marginal deterrence. In other words, the sanction gives parties who are not deterred an incentive to commit less harmful acts, such as when a prosecutor makes a prejudicial extra-judicial statement concerning grand jury deliberations to the press, but declines repeated requests for an interview regarding the same.¹³⁹

Thus, an incapacitating sanction may not be excessive in a broader economic sense, as the choice that disciplinary bodies (or the rules drafters) are left with is between either providing for the optimal amount of deterrence or providing too much deterrence.¹⁴⁰ Additionally, if no alternative sanction will achieve the desired level of deterrence, the economic dead weight losses that accompany incapacitating sanctions would not violate the Pareto criterion of efficiency, because that criterion forbids imposing an *avoidable* deadweight loss.

This discussion demonstrates the importance of tailoring the sanction imposed to the misconduct established. The efficient use of professional disciplinary sanctions depends on the compromise of three related goals: (1) imposing private (and social) costs on

137. See Posner, *supra* note 57, at 637 and text accompanying note 61 *supra*.

138. See Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1240–46 (1985).

139. *Id.*

140. See *id.* at 637–38.

the prosecutor which exceed the private benefits flowing from the misconduct; (2) avoiding over-deterrence problems that might flow from the uncertain nature or application of the rules and create incentives for inefficient behavior; and (3) minimizing social costs (particularly those accruing in the form of dead-weight losses). Ultimately, however, because professional rules may not be applied to encompass all constitutional and statutory strictures applicable to the transitory prosecutor's official conduct, in order to avoid under-deterrence problems this sanctioning mechanism is best used in combination with other alternatives.¹⁴¹

C. Criminal Sanctions

In addition to professional discipline, the Court in *Imbler*¹⁴² also pointed to the possibility of regulating prosecutorial misconduct through criminal sanctions under 18 U.S.C. § 242,¹⁴³ the criminal counterpart to section 1983. This sanction has received the least attention by both courts and scholars.¹⁴⁴ Several practical difficulties prevent section 242 from becoming a major vehicle for curbing prosecutorial abuse. First, because section 242 forbids only the *willful* deprivation of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,

141. See, e.g., Williams, *supra* note 123, at 3464 (“[S]ome of the alleged behavior of which plaintiffs complained in the civil suits . . . is unconstitutional and actionable under section 1983 and *Bivens*, but it is neither unethical nor illegal.”).

142. The Court in *Imbler* stated,

We emphasize that the immunity of prosecutors from liability in suits under section 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of section 1983.

Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976); see also *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) (noting that where dismissal of indictment is unwarranted, prosecutor may be punished with contempt charges or professional disciplinary proceedings, or discomfited through a court's published opinion).

143. 18 U.S.C. § 242 (2000); see also 18 U.S.C. § 241 (2000) (prohibiting conspiracy against rights).

144. See Rosen, *supra* note 123, at 718–20, 726 (conducting a search of reported decisions for cases involving criminal charges against prosecutors for *Brady*-type violations and finding only one case involving criminal charges). *Brady* violations are among the most serious forms of prosecutorial misconduct, thus, we can speculate that if few decisions impose criminal sanctions in this context, it is unlikely that charges are numerous elsewhere.

thorny issues of intent arise. The state must prove not only that the prosecutor violated the defendant's rights, but that the prosecutor did so knowing that his or her actions would deprive the defendant of these rights.¹⁴⁵

Second, even where a knowing deprivation is proven, many judges and juries are hesitant to impose criminal sanctions for "technical" constitutional violations. This provision would, thus, be reserved for only the most extreme cases of prosecutorial abuse resulting in what are perceived to be the most serious deprivations. Even in the context of extreme prosecutorial abuse, however, judges may prefer to use a less severe, quasi-criminal remedy available to sanction the misconduct, such as the contempt power.¹⁴⁶ Finally, like the professional discipline sanction discussed above, criminal sanctions are not available to punish all categories of misconduct that might implicate the fair trial guarantee, thus leaving certain categories susceptible to problems of under-deterrence.

Using the three-part analysis employed to consider the usefulness of judicial censure and professional discipline, the following sections analyze sanctions under section 242 and the related quasi-criminal contempt power.

1. Congruency of the Cost-Benefit Calculus

Initially, we might speculate that criminal sanctions indirectly (but nonetheless powerfully) impact the professional gain incentive

145. See Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 81–82 (2002). Hence, in this and similar situations the existence of qualified immunity is irrelevant. See *infra* notes 190–198.

146. A judge may use the contempt power when a prosecutor exhibits willfully disobedient, contemptuous, or contumacious conduct in court that threatens the administration of justice. See *United States v. Giovanelli*, 897 F.2d 1227, 1230 (2d Cir. 1990). Although generally less severe, the contempt power is just as infrequently used to sanction prosecutorial misconduct. In his seminal 1972 study of the subject, Albert Alschuler wrote the following: "In preparing this article, I surveyed the reported decisions for the past twenty-five years. Although I uncovered a large number of cases in which defense attorneys had been punished for contemptuous courtroom behavior, I did not find a single case in which a prosecutor had been so disciplined." Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 674 (1972). An online search for reported decisions imposing contempt sanctions in the last thirty years suggests that there is little reason to believe that the use of contempt proceedings has increased considerably in the time since Alschuler wrote. In fact, there may be cause to believe that the power of state and federal judges to hold prosecutors in contempt has actually diminished in recent years. In *The Civil Regulation of Prosecutors*, Williams, *supra* note 123, at 3474, Lesley E. Williams argues that, in recent years, a number of Supreme Court cases have limited the grounds on which prosecutors may be held in contempt.

of the transitory prosecutor, and that the threat of criminal sanction will usually greatly exceed the expected professional gains accruing from prosecutorial misconduct. As long as the record is made public, criminal sanctions carry a stigma which negatively affects the transitory prosecutor's future marketability in either the private or public sectors.¹⁴⁷ And, particularly when criminal sanctions are imposed for action taken while in the scope of an attorney's professional duties, it is probably safe to assume that such sanctions will weigh heavily against future professional advancement. Further streamlining the cost-benefit calculus is the cost of uncovering a former prosecutor's criminal background, which will generally be lower than the cost of uncovering instances of judicial censure or publicity sanctions.¹⁴⁸

The quasi-criminal contempt citation also indirectly impacts the professional gain incentive of the transitory prosecutor, but the variety of potential punishments—ranging from a nominal fine to actual jail time—suggest that in some instances the benefits accruing from the misconduct may outweigh the expected costs of the sanction. Likewise, the information costs in this context will be more akin to those seen in the judicial censure and publicity contexts.

2. Personal Nature of the Sanction

Similarly, criminal sanctions and contempt citations are an inherently personal method for addressing prosecutorial misconduct. Like professional discipline and judicial censure, the imposition of a criminal fine or imprisonment impacts, almost exclusively, the individual prosecutor. While the personal nature of criminal sanctions make it an extremely effective deterrent device where the goal is achieving bottom-up change, a personal sanction may be less appropriate where the misconduct stems from internal policies or procedures. For certain violations, such as those that can be traced to inadequate training or supervision, a personal sanction should be disfavored. Although the intent requirement is likely to filter out most of these cases, a consideration of the source of the miscon-

147. Historically, many state professional codes have required attorneys to report the criminal violations of their peers when such violations raise a substantial question of honesty, trustworthiness or fitness to practice law. *See, e.g.*, N.Y.S. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 1-103(A) (2002). Hence, criminal sanctions frequently serve to spark a disciplinary investigation.

148. While the same information cost analysis applicable to judicial censure and professional discipline remains relevant here, the advent of online databases to check the criminal history of future employees suggests that such costs may be less than those inherent in both discipline and censure methods.

duct involved—particularly, whether it results from the specific professional gain incentive of the individual prosecutor or, alternatively, whether it results from the political gain incentive of the prosecuting agency as a whole—remains relevant to the choice of sanctions.¹⁴⁹

3. Efficiency Analysis

From the perspective of the twin efficiency goals outlined earlier, criminal sanctions and contempt citations must be analyzed separately. Furthermore, within both of these categories, non-monetary (i.e., imprisonment) and monetary (i.e., fines) criminal sanctions must be distinguished. For ease of analysis, I shall first examine nonmonetary criminal and quasi-criminal sanctions, followed by an analysis of their monetary counterparts.

Nonmonetary sanctions imposed under section 242 and through contempt proceedings may potentially violate both senses in which a sanction may be excessive from an economic standpoint. In the first, and most obvious sense, a term of imprisonment violates the Pareto-criterion by imposing an avoidable economic dead-weight loss—namely, the foregone legitimate earnings of the prosecutor and the cost of replacing him during his imprisonment—if a fine could have been set at some level to achieve the same optimal (which is not to say 100 percent) deterrence. Second, criminal sanctions may produce over-deterrence because the private (and social) costs imposed on the prosecutor may greatly exceed the social cost of the misconduct. The latter problem best explains the hesitancy to employ 28 U.S.C. § 242 to sanction prosecutorial misconduct.

To use the above example, assume that a prosecutor's prejudicial comments to the media are deemed to have been made in an effort to willfully deprive the defendant of his Sixth Amendment right to be tried by an impartial jury.¹⁵⁰ Further, assume that the illegal comments impose a cost of \$1,000 on the criminal defendant in terms of time spent countering the comments or moving for a change of venue. To this we might add a social cost, in terms of the damage to public confidence in the integrity or impartiality of the criminal justice system, valued at \$500. If the probability of appre-

149. Additionally, it is worth noting that the state practice of defense and indemnification in the context of section 1983 civil suits is generally influenced by the threat or imposition of criminal sanctions. See Jeffries, *supra* note 83, at 50 ("State officers who become targets of criminal prosecution are unlikely to receive financial subvention for civil liability.").

150. U.S. CONST. AMEND. VI.

hending and convicting the prosecutor is one, then a fine of \$1,500 would provide optimal deterrence. The much larger sanction that may be imposed via imprisonment (or through any fine exceeding \$1,500) will over-deter, with resultant social opportunity costs.¹⁵¹ Yet this conclusion will not always follow.

To illustrate when the imposition of nonmonetary criminal sanctions would be optimal, suppose that the prosecutor's intentional withholding of *Brady* material imposes a cost of \$100,000 on the defendant in terms of the damages flowing from his wrongful conviction and imprisonment, and to this we add another \$50,000 of social cost, in terms of damage to public confidence, flowing from the misconduct. Assume also that the prosecution involved a high profile defendant with enormous courtroom publicity such that the expected professional gains to the prosecutor for the conviction could be valued at \$75,000. If the prosecutor's total assets were valued at \$40,000, imprisonment may very well prove optimal for several reasons.¹⁵² First, the expected harm resulting from the suppression of exculpatory materials (valued at \$150,000) is great, thus, society values increased deterrence and is more willing to bear the costs (including the costs of imprisonment and replacement) of imposing a higher sanction. Second, since the optimal sanction rises with the expected private benefits flowing from the misconduct (because parties become harder to deter) an increase in both the expected harm and expected benefits requires a corresponding increase in sanction. Third, a costly sanction, such as imprisonment, will encourage marginal deterrence. Finally, and perhaps most importantly, no monetary deterrence can prove optimal in this instance, because the social costs of the misconduct exceed the total assets of the offending prosecutor.¹⁵³ Additionally, it is worth

151. In this example, the opportunity costs will most likely come in the form of foregone lawful activity on the edge of the forbidden zone, such as those comments permitted by Model Rule 3.6, for their "salutary effect of lessening any resulting adverse impact on the adjudicative proceeding." MODEL RULES OF PROF'L CONDUCT R. 3.6, & cmt. 7 (2002).

152. It is worth noting that in this instance an imprisonment sanction would not necessarily violate the Pareto-criterion because that principle forbids only the imposition of avoidable economic deadweight loss. If the prosecutor's total assets are less than the social cost of the misconduct and the total cost of the sanction that is necessary to deter him from committing such misconduct, then a fine would not be a feasible alternative and some incapacitating sanction (along with its concomitant deadweight loss) is unavoidable.

153. Upon reflection, however, we might conclude that nonmonetary sanctions, such as imprisonment in this example, are appropriate only after the imposition of a monetary sanction equal to the prosecutor's wealth. See Shavell, *supra* note 138, at 1236. This approach suggests that the prosecutor in the above exam-

mentioning that the cost of under-detering the intentional suppression of exculpatory material may frequently outweigh the costs of over-detering such misconduct. Unlike media statements regarding grand jury deliberations, the willful suppression or withholding of exculpatory material implicates concerns that suggest that society is (or should be) more concerned with under-deterrence of such misconduct because the consequences, in the form of wrongful convictions, are particularly serious. If overdeterrence, and specifically a prosecutor's overproduction of potential *Brady* material, is a concern, it is certainly not one that the Supreme Court has echoed, since the Court in *Agurs* advised "prudent prosecutor[s to] resolve doubtful questions in favor of disclosure."¹⁵⁴ Hence, even those sanctions that are deemed to be excessive under a more traditional analysis may not prove actually excessive, and thus inefficient, when viewed in the broader economic sense.

Monetary criminal (and quasi-criminal) sanctions are much simpler to calibrate, and, therefore, easier to manipulate with reference to the misconduct established. For example, a fine of \$1,500 in the first example (and \$40,000 plus some combination of other sanctions totaling \$110,000 in the second example) offered in this section would provide for optimal deterrence of the misconduct involved. Additionally, the imposition of monetary sanctions is generally believed to involve lower social costs than the imposition of its nonmonetary counterpart.¹⁵⁵ Hence, monetary sanctions would avoid violating the Pareto-criterion in both of the above examples by supplanting a fine for what would otherwise be an economic dead-weight loss. Despite these advantages, however, over-deterrence concerns remain highly relevant. These concerns are exacerbated by the uncertain nature of the contempt power and many constitutional rights.

The uncertain and limited contempt remedy is designed primarily to address affronts to the court's dignity. While this power may be effectively used to combat prosecutorial abuse, no coherent body of law exists to educate prosecutors regarding that conduct which would be considered contemptuous. Because of this uncertainty, if the contempt power is connected to a very large fine (or term of imprisonment) incentives for inefficient behavior may re-

ple should be fined \$40,000, subsequent to which a nonmonetary sanction equal to \$110,000 (the social cost of the misconduct) should be imposed.

154. *United States v. Agurs*, 427 U.S. 97, 108 (1976).

155. *See, e.g.*, Shavell, *supra* note 138, at 1235-36 ("Social welfare will be greater if only the less costly monetary sanctions are used to deter undesirable acts.").

sult. The same problem exists with respect to section 242, which predicates guilt on the willful deprivation of any “rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,”¹⁵⁶ the outer boundaries of which are frequently ambiguous.

This analysis suggests that, in order to efficiently combat prosecutorial misconduct through the use of monetary and non-monetary criminal and contempt citations, careful attention must be devoted to ascertaining the private and social costs of the misconduct, the private and social costs of the sanction, and the private benefits (to the prosecutor) of the misconduct involved. An appropriate criminal or quasi-criminal sanction for prosecutorial misconduct is one that avoids unnecessary economic dead-weight losses, and ensures both that the private and social costs of the misconduct exceed the private cost of the sanction imposed, and that the private cost of the sanction exceeds the private benefits (in terms of professional gains) that the prosecutor may expect to realize as a result of the misconduct. Additionally, because of the inherently uncertain nature of these sanctioning mechanisms, combined with the difficulty in quantifying the variables above, special care must be taken to determining whether the social costs accompanying under-deterrence are greater than those that accrue from over-deterrence in the context of the specific misconduct at issue. If the costs of under-deterrence are greater—as they are likely to be where the intentional suppression of Brady material is alleged—a fine that would otherwise appear excessive (from an economic standpoint) may be justifiable in a broader economic sense.

D. Reversal

Reversal is commonly viewed by scholars as a highly effective method for sanctioning prosecutorial misconduct.¹⁵⁷ Recent empirical studies suggest that judges may share this view. In a study of 5,760 capital cases from 1973 to 1995, Professor James Liebman and researchers at Columbia University found a reversal rate of ap-

156. 28 U.S.C. § 242 (2000).

157. See, e.g., Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L.REV. 311, 336 (1985) (“[S]ignificant progress toward containing the problems of prosecutorial excess awaits a greater willingness of reviewing courts to reverse criminal convictions when serious and deliberate misbehavior by prosecutors is involved.”).

proximately sixty-eight percent.¹⁵⁸ Liebman's findings led him to conclude that the two main reasons for reversals in capital cases were "(1) egregiously incompetent defense lawyers who didn't even look for—and demonstrably missed—important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who did discover that kind of evidence but suppressed it, again keeping it from the jury."¹⁵⁹ Regarding misconduct in particular, Liebman's study indicates that sixteen percent of the cases where there have been reversals are traceable to prosecutorial suppression of evidence and an additional three percent of the reversals are traceable to other forms of prosecutorial misconduct. This data suggests that about one out of every five of the total reversals in capital cases are traceable to prosecutorial misconduct.¹⁶⁰

Generally, to obtain reversal, a criminal defendant must prove two things: first, that the prosecutor's conduct was actually improper; and, second, that the misconduct, taken in the context of the trial as a whole, violated the defendant's due process rights.¹⁶¹

158. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1846–50 (2000). The national error rate for non-capital cases during the same period was fifteen percent. *Id.* at 1854.

159. JAMES S. LIEBMAN ET. AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995 ii (2000), available at <http://ccjr.policy.net/cjedfund/jpreport/finrep.PDF>.

160. Some may dispute Liebman's central thesis that the system is broken by arguing that high reversal rates demonstrate precisely the opposite; that is, reversals suggest that the system is working. Alternatively, we might even speculate that high reversal rates are a product of the increased scrutiny devoted to capital cases. Despite which conclusion one reaches, however, the instances of reversal for prosecutorial misconduct suggest that, at a minimum, certain prosecutorial abuse was viewed as prejudicial enough to invalidate the verdict. This discussion is restricted to an evaluation of the usefulness of conviction reversal as a deterrent device.

161. *See, e.g.*, *United States v. Flaharty*, 295 F.3d 182, 202 (2d Cir. 2002); *United States v. Wilson*, 135 F.3d 291, 297 (4th Cir. 1998); *United States v. Wyly*, 193 F.3d 289, 298–99 (5th Cir. 1999); *Macias v. Makowski*, 291 F.3d 447, 452 (6th Cir. 2002); *United States v. Sandoval-Gomez*, 295 F.3d 757, 762 (7th Cir. 2002); *United States v. Wadlington*, 233 F.3d 1067, 1077 (8th Cir. 2000); *United States v. Aichele*, 941 F.2d 761, 765 (9th Cir. 1991); *United States v. Maynard*, 236 F.3d 601, 606 (10th Cir. 2000). The circuit courts of appeal have adopted different tests for determining the seriousness of the prosecutorial misconduct alleged. *See generally Prosecutorial Misconduct*, 91 GEO. L.J. 556 (2003). Currently, nine circuits employ a three-prong analysis to evaluate the seriousness of the misconduct, and will find harmless error if the misconduct was not severe, was effectively cured by the trial court, or if the weight of evidence made conviction certain absent the improper conduct. *See, e.g.*, *United States v. Gonzalez-Gonzalez*, 258 F.3d 16, 25 (1st Cir. 2001); *United States v. Elias*, 285 F.3d 183, 190 (2d Cir. 2002); *Moore v. Morton*, 255 F.3d 95, 113 (3d Cir. 2001); *United States v. Virgen-Moreno*, 265 F.3d 276,

The harmless error doctrine frequently enters into this analysis.¹⁶² This doctrine requires the defendant to first show that a constitutional error occurred, at which point the burden shifts to the state to demonstrate that the error was harmless beyond a reasonable doubt.¹⁶³ The state's burden is met by a showing that there is no reasonable possibility that the error contributed to the defendant's conviction.¹⁶⁴

In order to assess the usefulness of reversal sanctions for deterring prosecutorial misconduct, a discussion of the same three-part analysis applied to judicial censure, professional discipline and criminal sanctions is warranted. At the outset, however, it is worth reemphasizing that this analysis only pertains to the usefulness of conviction reversals as a deterrent device. Reversals are both a useful and necessary method for redressing constitutional error that undermines reasonable confidence in a criminal verdict, yet for purposes of this discussion those advantages are irrelevant. The following sections seek to ascertain only the power of conviction rever-

290–91 (5th Cir. 2001); *United States v. Vallie*, 284 F.3d 917, 921 (8th Cir. 2002); *United States v. Garcia-Guizar*, 160 F.3d 511, 521 (9th Cir. 1998); *United States v. Maynard*, 236 F.3d 601, 606–07 (10th Cir. 2000); *United States v. Creamer*, 721 F.2d 342, 345 (11th Cir. 1983); *United States v. Watson*, 171 F.3d 695, 700 (D.C. Cir. 1999). The remaining circuits employ a similar analysis, but also consider whether the misconduct was deliberately or accidentally made (*see, e.g., Wilson*, 135 F.3d at 299), the extent to which the defense was able to counter the improper conduct with rebuttal (*see, e.g., United States v. Sandoval-Gomez*, 295 F.3d 757, 763 (7th Cir. 2002)), or both (*see, e.g., United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)), in their evaluation of the seriousness of misconduct.

162. The Federal Rules of Criminal Procedure provide that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” FED. R. CRIM. PRO. 52(a). Thus, in *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946), the Supreme Court, interpreting the statutory precursor to this rule, developed a harmless error standard for application to nonconstitutional errors in federal criminal proceedings. Similarly, every jurisdiction in the United States has a harmless error rule. In *Fahy v. Connecticut*, 375 U.S. 85 (1963), and *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court established a harmless error standard applicable to constitutional errors in criminal proceedings.

163. *Chapman*, 386 U.S. at 24. The burden of proving harmlessness rests on the state for both constitutional and nonconstitutional errors. *See Darden v. Wainwright*, 477 U.S. 168, 197 (1986) (Blackmun, J., dissenting) (“Every harmless-error standard that this Court has employed . . . [shifts the burden] to the beneficiary of the error to show that the conviction was not tainted.”). However, the two categories of error differ in the amount or likelihood of impact-on-the-outcome that may predicate reversal. *Compare Chapman*, 386 U.S. at 24 (constitutional error: whether there is a reasonable possibility that the error contributed to the outcome), *with Kotteakos*, 328 U.S. at 765 (1946) (nonconstitutional error: “whether the error itself had substantial influence” on the outcome).

164. *Chapman*, 386 U.S. at 24; *Fahy*, 375 U.S. at 86–87.

sals to deter prosecutorial misconduct by low-level transitory prosecutors.

1. Congruency of the Cost-Benefit Calculus

Of the four sanctions addressed thus far, conviction reversals offer the most roundabout method for impacting the professional gain incentive of the transitory prosecutor. In order to conclude that a conviction reversal will impact the cost-benefit calculus of the transitory prosecutor, we must first assume that high conviction rates are a measure of professional competence that is evaluated by the potential future employers or professional organizations with whom the transitory prosecutor seeks favor. Second, we must assume that a conviction reversed for prosecutorial misconduct will negatively impact the transitory prosecutor's professional goals so as to cause the expected professional costs of the misconduct (in terms of reversal of the conviction) to exceed the expected professional gains. Both assumptions are questionable.

While the conventional wisdom has certainly been that prosecutors seek to maximize conviction rates,¹⁶⁵ there is little reason to believe, particularly with respect to future private sector employers, that conviction rates are either known or evaluated. Even were such information available, the costs of obtaining it may lead a significant percentage of employers to resort to professional references within the prosecutorial agency as a more feasible proxy. Additionally, even assuming that conviction reversals predicated on prosecutorial misconduct are considered by future employers, the negative impacts may not be significant enough to warrant a change of behavior.

Moreover, the practice of the vast majority of states is to assign the handling of appeals and post-conviction proceedings to an office separate from the primary prosecuting agency.¹⁶⁶ Hence, the costs of reversal are generally not experienced by the prosecutor (or even the agency) responsible for the misconduct. For all of

165. See, e.g., Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106 (1968-69); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 966 (1997); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 51 (1988).

166. See Liebman, *supra* note 70, at 2120 & n.224 (2000) ("In all but one or two states, appeals and post-conviction proceedings are handled by lawyers in the state attorney general's office—attorneys who, in my experience, believe themselves to have less clout and status within the state's law enforcement apparatus than district attorneys, or even assistant district attorneys.").

these reasons the incongruency of the cost-benefit analysis suggests that the deterrence potential of reversal is suspect.

2. Personal Nature of the Sanction

Likewise, reversals for misconduct are an indirect method of punishing individual prosecutors. While chief prosecutors frequently campaign on their “records,” including office-wide conviction rates, low-level transitory prosecutors are unelected and largely insulated from the political process by virtue of state civil service regulations. Consequently, a chief prosecutor can be removed from office, perhaps due to high reversal rates, yet following election day the incoming prosecutor would likely assume his role among the same group of assistant attorneys and personnel that were employed by the previous chief.

It would be wrong to conclude, however, that this sanctioning mechanism serves no useful deterrent purpose. Conviction reversals may be particularly appropriate in situations where the misconduct involved stems from internal policies and procedures that require modification through top-down change. For instance, where the misconduct is found to be a product of inadequate training or supervision, or where the offending prosecutor is found to have acted in accordance with internal agency policies, an inherently personal sanction will not inspire agency-wide change. In such situations reversal, which tends to more directly impact the prosecuting agency’s incentive to maximize political gains, may be necessary to prompt agency action.

3. Efficiency Analysis

Recalling the twin efficiency goals outlined earlier, reversals for misconduct must be evaluated for its effectiveness in inducing both the appropriate level of behavior and the appropriate level of activity. Initially, it is apparent that, from an efficiency standpoint, reversal carries several obvious disadvantages.

In a Pareto sense, reversal (when double jeopardy does not apply) imposes a dead-weight loss—the costs of retrying the defendant—that would have been avoided if the misbehaving prosecutor were sanctioned through some other mechanism; namely, if he were fined instead. Additionally, reversal implicates over-deterrence concerns because the private (and social) cost imposed on the offending prosecutor and the state, in terms of the costs of a new trial, may greatly exceed the social cost of the misconduct involved. Yet, the doctrine of harmless error generally operates to mitigate both of these efficiency concerns.

Remarking on the stamp of economic analysis that the concept bears, one scholar has proclaimed that the “economic pigeons of Judge Posner . . . have come home to roost in the constitutional nest of the harmless error doctrine.”¹⁶⁷ The idea underlying the doctrine is that society should not bear the costs of retrying a defendant when a second trial would invariably result in another conviction even without the prosecutor’s misconduct. However, given the frequency with which appellate courts engage in harmless error analysis, we can hardly pretend that prosecutors shape their trial actions absent some understanding of this trend. Moreover, this understanding may influence the prosecutorial cost-benefit calculus in unanticipated ways, thereby defeating any efficiency-based justification for the doctrine.¹⁶⁸ Nonetheless, we might view the harmless error doctrine as an attempt to ensure that reversals are reserved for those situations in which the governmental misconduct creates social costs which are much higher than the social costs of overturning the conviction and forcing a retrial. It is against this backdrop, that the deterrence potential of reversals should be analyzed.

From this perspective, however, it is apparent that the deterrence potential of reversals is extremely limited. To use an example employed previously, suppose that the prosecutor’s prejudicial statements to the media impose a cost of \$1,000 on the criminal defendant (in terms of the prejudice to potential jury members, stigma, time spent countering the comments and/or moving for a

167. Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 510 (1990).

168. For instance, Professor Goldberg has argued that the doctrine of harmless error encourages prosecutors to engage in risky prosecutorial conduct:

Every time an error is declared harmless in a particular situation, it diminishes the risk to the prosecutor in the use of the evidence or the technique. The lessening of the risk is added into a formula which favors risk-taking based upon the [harmless error] doctrine alone. In a sense, the doctrine encourages the prosecutor to use the evidence or the technique in every case.

Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 439 (1980); see also Carissa Hessick, Note, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 255, 263 (2002) (“[A]n intelligent prosecutor, who must weigh the benefit of perjured testimony only against the risk of appellate reversal, can see the practical benefits in occasionally suborning perjury—especially in light of the harmless error rule.”). Additionally, if the rule of harmless error is consistently applied to certain categories of prosecutorial misconduct, we might speculate that this analysis, to the extent that it factors into the prosecutorial cost-benefit calculus, might create an incentive to engage in certain types of constitutional error. See Campbell, *supra* note 167, at 511.

change of venue) and to this we might add a social cost, in terms of the damage to public confidence in the integrity or impartiality of the criminal justice system, valued at \$500. Assuming that the overwhelming weight of the evidence indicates the defendant's guilt, if the costs of retrial exceed \$1,500, then reversal is inefficient from an economic standpoint. If, however, the damage to public confidence in the integrity or impartiality of the criminal justice system were valued at \$50,000, and this cost exceeded the costs of retrial, then reversal might be viewed as serving an economic purpose wholly divorced from the harmless error rule.

In the latter situation, we might argue that because the costs of the misconduct exceed the costs of retrial, conviction reversal is necessary to deter future misbehaving prosecutors regardless of the guilt or innocence of the criminal defendant. This is the argument primarily advocated by scholars who favor reversal for its deterrence benefits, and herein lies the inefficiency: When reversal is imposed to deter prosecutorial misconduct without some type of causation analysis—some inquiry into the probable effect that the misconduct had on the verdict—economic waste ensues. Rather than imposing the costs of the misconduct directly on the offending prosecutor, these costs are indirectly transferred to society in the form of deadweight losses.¹⁶⁹ The deadweight losses—in terms of the costs of retrying the defendant—are generally justified on the grounds that they are necessary to impact the political gain incentives of misbehaving government officials. Yet the Pareto-criterion forbids the imposition of deadweight losses when an alternative method for achieving optimal deterrence exists.¹⁷⁰ As the previous sections have outlined, a number of alternative deterrence methods short of reversal exist for sanctioning prosecutorial misconduct, and several of these methods, arguably, more precisely counter the incentives of misbehaving prosecutors.¹⁷¹

169. Additionally, the delay in the appellate courts' reaction to prosecutorial misconduct further diminishes the deterrent effect of reversal. These delays (which are an average of five to eleven years after the initial trial) mean that by the time a reversal is finally rendered, particularly where transitory prosecutors are involved, the individual responsible for the misconduct will frequently have left the prosecuting agency. See Liebman, *supra* note 70, at 2119–20.

170. When the prosecutorial error significantly influenced the jury's verdict, the costs of retrial are unavoidable because the reliability of the verdict is suspect. Hence, in such situations, no violation of the Pareto-criterion exists.

171. Of course, one can imagine a rather simple solution to this inefficiency that involves the application of double jeopardy principles to bar retrials where prosecutorial misconduct is proven. This would simply replace the social costs of

In sum, reversal is an inherently inefficient deterrence method when the harmless error calculus suggests that the prosecutor's misconduct did not affect the outcome of the trial because it demonstrates both senses in which a sanction should be considered excessive from an economic standpoint. When the opposite is true—when the harmless error calculus suggests that the prosecutor's misconduct did significantly affect the outcome of the trial—reversal is defensible wholly apart from its deterrence justifications.

E. *Civil Penalties*

Returning full circle to the topic that introduced this article, the conventional wisdom of deterrence theorists has been that civil penalties represent the most effective method for directly sanctioning prosecutorial misconduct. These scholars generally bemoan the operation of absolute prosecutorial immunity from civil suits brought under section 1983 because it serves to insulate prosecutors from the natural deterrence that civil damages provide in other contexts.¹⁷² Other commentators view the sensitive nature of the prosecutorial function as justifying the immunities by protecting the effective functioning of the criminal justice system.¹⁷³ Still others view the almost universal scheme of state indemnification for damage awards levied against state officers acting in their official

retrial with an even larger set of societal losses resulting from the impossibility of convicting the truly guilty.

172. See, e.g., Williams, *supra* note 123, at 3463 (“Broad grants of immunity leave wronged individuals without redress. . . . Thus, factual questions about a prosecutor’s alleged misconduct are never resolved, and doubts about the propriety of the prosecutor’s conduct are never publicly addressed.”).

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173. See, e.g., Jerry L. Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, 42 LAW & CONTEMP. PROBS. 8, 26 (1978) (stating that the major explicit reason for insulating individual government officials from damage actions is the fear that damage exposure will induce timidity in executing duties); Schuck, *supra* note 83, at 71–79 (arguing that governmental liability best serves the purposes of section 1983 and the Constitution, particularly because some officials may be risk-adverse, and therefore may not take appropriate action, all to the detriment of the general public); see also George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1177–78 (1977) (praising the trend towards continued erosion of sovereign immunity that enhances the chances of recovery against government for torts committed by government agents); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers’ Misconduct*, 87 YALE L.J. 447, 455–58 (1978) (advocating a broadening of governmental liability).

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capacity as defeating the deterrence potential of monetary awards.¹⁷⁴

Aside from section 1983, other federal statutes provide courts with a limited authority to fine prosecutors for misconduct¹⁷⁵ and, in a few jurisdictions, courts may interpret their inherent authority as permitting the same.¹⁷⁶ In order to fully assess the deterrence potential of civil monetary sanctions, a thorough analysis of the congruency, individuality and efficiency of civil monetary awards for prosecutorial misconduct is warranted. This analysis will attempt to ascertain the effectiveness of civil money damages as a deterrent device both in light of the operation of prosecutorial immunities and apart from those doctrines. The goal of this inquiry is to determine, first, whether civil money damages deter prosecutorial misconduct under the current regime and, second, whether the abolition or modification of the doctrine of prosecutorial immunity would increase their deterrence potential.¹⁷⁷

1. Congruency of the Cost/Benefit Calculus

Civil money damages, like reversal, are an indirect method of sanctioning prosecutorial abuse. While the individual prosecutor is the named defendant in a section 1983 suit, as noted previously, nearly all states step in to defend and indemnify their agents where official misconduct is alleged.¹⁷⁸ In light of this indemnification, the civil deterrence remedy is most seriously (although not exclu-

174. 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 (1997).

175. See, e.g., 28 U.S.C. § 1927 (2000) (permitting courts to charge any attorney who “unreasonably and vexatiously [multiplies the proceedings]” with “excess costs, expenses, and attorneys’ fees reasonably incurred”); FED. R. CIV. P. 37(b), (d) (permitting courts to assess monetary sanctions for discovery abuses in civil cases).

176. See, e.g., *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 567–69 (3d Cir. 1985) (analyzing the judicial debate regarding the fining issue and concluding that the inherent power encompasses the power to impose fines for attorney misconduct); *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 357 (D. Conn. 1981) (concluding that the authority to fine lawyers was within the district court’s inherent authority).

177. It should be noted, preliminarily, that because the rationale for absolute prosecutorial immunity from suits brought under section 1983 appears to rest in general policy concerns, and not so much in separation of powers doctrine, Congress could accordingly override this immunity.

178. See *supra* note 83 and sources cited therein.

sively) felt by the state, and, where absolute immunity applies, the suit will have little impact whatsoever.

However, even under the current regime of prosecutorial immunity, one indirect deterrence effect of civil suits under section 1983 can be observed. That is, where prosecutorial misconduct serves as the basis for a section 1983 suit, some factual inquiry into the prosecutor's alleged misbehavior is required. The nature of the misconduct will, thus, potentially appear in a reported decision, thereby creating publicity effects similar to judicial censure in the sense that the suit brings the conduct of the misbehaving prosecutor to light for all who care to know. Whether this factual inquiry, alone, serves to influence the professional gain incentive of the transitory prosecutor is highly suspect. For one thing, the doctrine of absolute prosecutorial immunity from civil suits under section 1983 is well-settled, leaving a plaintiff's attorney with little incentive to assume the costs of bringing a suit that is likely to be summarily dismissed. Additionally, because the moment that a prosecutor is deemed to have been acting in his quasi-judicial capacity the affirmative defense of absolute immunity kicks in, section 1983 suits are frequently dismissed without extensive factual inquiry into the alleged misconduct. Even if intensive factual analysis is provided, judges frequently omit the prosecutor's name,¹⁷⁹ thereby defeating the publicity effects altogether. And, finally, the infrequency with which future private or public sector employers evaluate this information as a measure of professional competence—combined with the potentially high costs of obtaining this information relative to other more frequently used proxies—suggests that an individual low-level transitory prosecutor may not view the reputational harm accompanying section 1983 suits as a cost that should be seriously balanced against the professional gains they might realize as a result of their misconduct.

Taking the current regime out of the picture for a moment, it would seem that the threat of actual money damages to be paid out of the prosecutor's own pocket would likely exert an extremely powerful deterrent effect. While not directly tailored to the professional gain incentive, monetary penalties impact something even more central. Indeed, the foundation of economic analysis of tort law is that a person's utility (welfare, happiness, satisfaction) fre-

179. See, e.g., Catherine Ferguson-Gilbert, Comment, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 300 (2001) ("When the appellate courts reverse their convictions due to prosecutor misconduct, they receive 'professional courtesy.'").

quently depends on a single composite good called income or wealth.¹⁸⁰ Yet, even with respect to a hypothetical non-immunized and non-indemnified civil money damage award, practical difficulties thwart its deterrence potential. Like appeals, civil suits are generally heard many years after the alleged misconduct took place. Thus, the punishment does not come contemporaneously with the violation, as deterrence theory requires for optimal effect.¹⁸¹ Likewise, because of the inherent incongruency, unless the damage award is sufficiently large, or it is accompanied by significant negative publicity, there is no assurance that the prosecutor's professional gain incentive will be influenced. A prosecutor who stands to profit very much, in terms of professional gains, as a result of his or her misbehavior will only be deterred by civil money damages if they are likely to create costs that exceed these benefits. Hence, because in the context of money damages the costs and benefits come in a different currency, special care must be taken to ensuring that the monetary awards exceed the expected professional gains.

2. Personal Nature of the Sanction

Similarly, under the current regime of almost universal state indemnification, civil money damages are an indirect method for sanctioning an individual prosecutor. In the context of reversals, I noted that impersonal, agency-directed sanctioning mechanisms are particularly appropriate deterrence devices when top-down change is needed. However, this analysis requires modification where civil money damages are involved.

Unlike reversals, which create immediate implications for a prosecuting agency's (or agency head's) incentive to maximize political gain, monetary sanctions borne by the state through a policy of officer indemnification may or may not influence the prosecuting agency's individual budget, and hence they may or may not stimulate agency change. Theoretically, a state legislature might reduce a prosecuting agency's budget by the amount of damages awarded, but this does not appear practically (or politically) feasible for several reasons. Most obviously, subjecting an agency's actions to the budgetary axe is politically costly for elected policymakers. This political cost is only multiplied when the agency involved performs a socially necessary and widely supported law enforcement function.

180. LANDES & POSNER, *supra* note 26, at 54.

181. See JAMES Q. WILSON, THINKING ABOUT CRIME 117–21 (rev. ed. 1983); see also Liebman, *supra* note 70, at 2119–20.

When considering modifications of the current regime, however, we might envision curing this deterrent defect by simply forcing a prosecuting agency to pay civil money damage awards from its existing appropriations. This is essentially the deterrence solution that has been proposed in the takings context where “just compensation” judgments are entered against state agencies.¹⁸² The inherent problem with proposals of this sort is that they conflict with traditional budgeting practices. Agencies do not typically retain discretion to use money appropriated for one purpose—say, paying salaries—for an entirely unrelated purpose—say, paying off judgments—without specific authorization from the legislature.¹⁸³ This is because the task of budget allocation and appropriation is quintessentially legislative—“only the legislature has the democratic legitimacy necessary to make controversial policy choices about how public money ought to be spent.”¹⁸⁴ In sum, even under a top-down deterrence model, the efficacy of civil money damages is thwarted by the fact that prosecuting agencies do not pay damage awards and there is no obvious way to make them pay such awards.

While we might further argue that individual officers should pay the damage awards out of their own pockets with no indemnification, this inherently personal sanction implicates over-deterrence concerns that have predominantly motivated courts since *Imbler* to provide absolute immunity. Thus, even assuming that this modification does not exceed the realistic scope of judicial authority to reexamine settled doctrines, a thorough efficiency analysis is warranted.

3. Efficiency Analysis

As outlined in the previous sections, fines are generally preferable from both efficiency perspectives employed in this article. First, a fine is, by its nature, a transfer payment involving relatively little dead-weight loss. Second, fines are naturally susceptible to calibration and manipulation by courts to achieve the desired level of deterrence. However, civil monetary sanctions import unique over-

182. See, e.g., H.R. Rep. No. 104-925, § 5(F), at 2 (1995) (“Any payment made under this section to an owner, and any judgment obtained by an owner in a civil action under this section shall, notwithstanding any other provision of law, be made from the annual appropriation of the agency whose action occasioned the payment or judgment.”).

183. See Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1246–49 (2001).

184. *Id.* at 1247.

deterrence problems that deserve special attention in the context of prosecutorial misconduct.

Assuming a regime in which prosecutors were neither indemnified nor immunized from civil suits stemming from their official misconduct, those prosecutors would bear the full social costs of their mistakes. Yet, as noted by Levinson,¹⁸⁵ Posner¹⁸⁶ and countless other commentators, prosecutors do not receive the full social benefits of their blameless performances. Hence, non-indemnified non-immunized civil sanctions for prosecutorial misconduct create an imbalance: zealous prosecutors bear “the full social costs of their mistakes through the tort system but do not receive the full social benefits of their successes through the compensation system.”¹⁸⁷ The doctrine of prosecutorial immunity, both absolute and qualified, may be viewed, then, as an effort to rectify this imbalance by externalizing some of the social costs of the misconduct in order to eliminate the prosecutor’s disincentive to engage in socially beneficial behavior.¹⁸⁸

But to say that prosecutors do not receive the full social benefits of their good performances is not the same as saying that they receive no benefits at all. As the previous sections have outlined, prosecutors do receive benefits, in the form of professional gains, from their performance, and these benefits will tend to increase with the quality of performance rendered.¹⁸⁹ The problem of civil sanctions, then, is that the amount of damages assessed will frequently be disproportionate to the monetary value of the professional gains accruing to prosecutors. For instance, were a defendant to successfully sue a state prosecutor for misconduct resulting in a wrongful conviction, the damages awarded would be the costs (to the defendant) of whatever punishment had been im-

185. See Levinson, *supra* note 19, at 360–369.

186. See Posner, *supra* note 57, at 640–41.

187. *Id.* at 640.

188. *Id.* at 641. In the context of police misconduct, Posner has argued that the solution to this problem would be to hold the agency fully liable even in instances where the officer was found to have acted in good faith (and thus be deserving of qualified immunity). Posner states that this solution would give the agency an incentive to prevent misconduct by its officers. However, this proposal ignores the problem of translating state costs into agency costs. See *supra* text accompanying notes 181–85.

189. Obviously, other factors besides quality of performance will influence the amount of professional gains that prosecutors realize for their official actions. Namely, the publicity devoted to their activities—which generally accompanies a high profile trial (either because the defendant or the crime has a certain amount of notoriety)—will proportionately increase or decrease the professional gains accruing to prosecutors.

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posed. In many circumstances, this figure will vastly outweigh even the total aggregate professional gains that an individual state prosecutor has received during their entire tenure in office, a disparity which is only exacerbated by the transitory prosecutor's relatively short tenure. Hence, the Supreme Court's immunity case law may be viewed as an attempt to respond to the paralyzing costs of compensation while operating from the premise that alternative mechanisms for remedying prosecutorial misconduct are preferable to civil damages in most cases.¹⁹⁰ In the limited context of investigatory prosecutorial functions, the Supreme Court's immunity case law appears to deviate from this premise to allow the imposition of civil monetary sanctions under a regime of qualified immunity.¹⁹¹

However, when considering the efficiency of potential modifications of the current regime of prosecutorial immunities we must narrow our focus to those cases in which qualified immunity might dictate the outcome of a section 1983 claim. For instance, where the underlying constitutional violation requires an illicit motivation, qualified immunity is functionally irrelevant.¹⁹² The most obvious example of this is Fourteenth Amendment Equal Protection, which requires a showing of discriminatory purpose in order to prove a violation. Additionally, a violation of procedural due process, which requires an intentional deprivation of life, liberty or property, frequently renders the defense of qualified immunity immaterial.¹⁹³ Hence, in the realm of constitutional torts, qualified immunity will not make a difference where the constitutional viola-

190. While the Supreme Court's immunity case law pays scant attention to the general state practices of defense and indemnification, as well as the problem of translating state costs into agency costs, the *Imbler* progeny appears to rest primarily on concerns of over-deterrence. When considering a modification of the current regime of absolute and qualified prosecutorial immunities toward non-immunized and non-indemnified sanctions, then, this concern is especially relevant.

191. See, e.g., *Burns v. Reed*, 500 U.S. 478 (1991) (affirming absolute prosecutorial immunity from civil suits flowing from actions closely related to the judicial function but declining to extend the same immunity to investigatory prosecutorial functions, such as the furnishing of legal advice to the police, and concluding that investigatory prosecutorial activities are deserving of qualified immunity).

192. See *Jeffries*, *supra* note 83, at 69.

193. See *id.* at 55-56. However, qualified immunity may still be an available defense to a section 1983 suit that is based on a violation of procedural due process when government officials reasonably, but mistakenly, believe that the process provided was all that was due. See *McGhee v. Draper*, 564 F.2d 902, 915 (10th Cir. 1977) (affirming a directed verdict for school officials who dismissed a teacher without adequate procedural safeguards because earlier decisions "did not stake out the extent of the procedural rights which we now recognize").

tion serving as the basis for the section 1983 claim requires something more than mere negligence. Arguments for abrogating absolute prosecutorial immunity in favor of a qualified immunity regime, thus, will impact only those constitutional protections which may be negligently infringed.

Within this category of constitutional violations, we can further conceptualize absolute and qualified immunities by drawing from the analogous liabilities observed on a typical tort spectrum. Where prosecutorial immunity is qualified or absolute, section 1983 liability is akin to a regime of negligence or no liability, respectively; where it has been abrogated, the liability is essentially strict. This analogy requires some elaboration. While the inquiries into qualified immunity have become increasingly particularized in recent years,¹⁹⁴ in all cases the immunity turns on the reasonableness of a mistake as to constitutionality.¹⁹⁵ The ability to take due care to prevent a constitutional violation is similar to the corresponding inquiry made in the qualified immunity context which asks if the prosecutor could have possessed a good faith belief as to the constitutionality of his or her actions. In such cases, the defendant is immune from an award of money damages “if a reasonable officer could have believed” in the legality of the act which caused the plaintiff’s injury.¹⁹⁶ Hence, when the defense is available, qualified immunity only shields civil rights defendants if the law was not clearly established or if the prosecutor’s investigatory actions were objectively reasonable (the same negligence standard that applies in personal injury or accident law). Absolute immunity, on the other hand, purports to establish a rule of no liability, which is ap-

194. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974). In *Scheuer*, the Court observed:

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id.

195. See *Jeffries*, *supra* note 83, at 55; see also *Jeffries*, *supra* note 90, at 264–66 (discussing and critiquing the “unified-field theory” of qualified immunity advanced by the Supreme Court).

196. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (holding Secret Service agents entitled to qualified immunity for unconstitutional arrest “if a reasonable officer could have believed” that the arrest was lawful); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (employing the same standard).

plicable only to those categories of prosecutorial misconduct that are functionally related to the judicial task. This immunity prohibits the imposition of liability regardless of the absence of due care or the intentionally malfeasant nature of the violation alleged. Yet, when prosecutors are afforded no immunity—either absolute or qualified—for their constitutional mistakes, the liability is that imposed by the plain terms of section 1983. That section establishes a species of liability wholly divorced from notions of fault. Section 1983 provides simply that any person who, acting under color of state law, deprives the defendant of any rights, privileges or immunities secured by the Constitution “shall be liable to the party injured . . .”¹⁹⁷ The absence of fault renders the liability essentially strict as that term is used for purposes of this analysis, which is to say that section 1983 imposes liability for constitutional violations regardless of the fault of the prosecutor.¹⁹⁸

Against this backdrop, we can judge the efficiency of prosecutorial immunities by drawing from the large body of legal economic scholarship analyzing the subject of when a rule of strict liability, as opposed to a negligence rule or a no liability rule, is appropriate to ensure both the optimal level of activity and the optimal level of behavior—in this context, the level of criminal prosecutions and prosecutorial misconduct respectively.¹⁹⁹ Clearly, a negligence standard, which is grounded in notions of due care, puts pressure on prosecutors to act prudently because it confronts them with potential liability payments that exceed the cost of taking precautions. However, the negligence standard does not provide prosecutors with a financial incentive to limit their activity levels (i.e., to limit the number of criminal prosecutions instituted). Under a qualified immunity (or negligence) regime, prosecutors will generally not be liable for constitutional violations as long as they act with a reasonable, good faith belief as to the legality of their conduct. Thus, they will consider only the individual gains associated with each increment of behavior, not the total costs of their activities.²⁰⁰ A regime of strict liability, or the wholesale abrogation of prosecutorial immunities, would create precisely the opposite pattern. In this context, prosecutors will be faced with incentives both to act with the appropriate level of care and, simul-

197. 42 U.S.C. § 1983 (2002).

198. For purposes of this article, I use the term “strict liability” to refer only to the liability rule that would obtain if the fault requirement of qualified immunity were removed from section 1983.

199. See *generally* LANDES & POSNER, *supra* note 26, at 54–85.

200. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 26–28 (1987).

taneously, to control the level of activity which exposes them to the threat of monetary sanctions.²⁰¹ The imposition of strict liability under section 1983 forces governments to internalize their external costs of “production”—or the costs of constitutional violations associated with criminal prosecutions. This regime would not only induce prosecutors to take more precautions to avoid violations, it would also depress activity levels for conduct that is likely to involve constitutional error despite the exercise of reasonable care.²⁰²

This analysis, which is generally employed to examine the economic structure of accident law, carries important implications for the debate concerning the propriety of various prosecutorial immunities. A strong argument can be made that a constitutional tort system based on fault is wise policy as applied to the problem of sanctioning prosecutorial misconduct.²⁰³ While a depression in activity levels is often welcomed in the private sector, the general consensus is that government is different, and that “requiring the government to bear the costs of all constitutional violations would reduce legitimate governmental activities to suboptimal levels.”²⁰⁴ The social costs that would be incurred were prosecutors to systematically depress the level of prosecutorial activities that they engaged in—that debilitating caution which probably lies at the heart of the Supreme Court’s fears—is readily apparent and requires no further elaboration here.²⁰⁵ Less apparent, however, is the desirability of absolute, rather than qualified, immunity for prosecutorial misconduct, or a no liability rule, rather than a negligence rule.

201. See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 164–65 (1997) (discussing the effect of strict liability on activity levels); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 6–7 (1980) (concluding that, on average, activity levels of “injurers” tend to be lower under a strict liability regime than that which would be observed under a fault-based regime).

202. See Jeffries, *supra* note 90, at 266.

203. See also Jeffries, *supra* note 83, at 53 (arguing for the propriety of a fault-based constitutional tort regime in general).

204. Jeffries, *supra* note 90, at 266; see also SCHUCK, *supra* note 83, at 59–81; Posner, *supra* note 57, at 638–40.

205. Additionally, empirical analyses suggest that public employees may be, on average, more risk-averse than their private sector counterparts. See Don Belante & Albert N. Link, *Are Public Sector Workers More Risk Averse Than Private Sector Workers?*, 34 INDUS. & LAB. REL. REV. 408, 411–12 (1981) (reporting results of empirical study that suggest that risk-averse workers are more likely to seek government work); see also SCHUCK, *supra* note 83, at 57 (opining that government employees subject to civil service protections “probably tend to be more risk-averse with respect to litigation and liability than individuals generally”). These analyses reinforce the over-deterrence concern.

Just as a simple rule of strict liability is optimal when the optimal solution is for the injurer to take measures to avoid damage and for the victim to do nothing, in general, a no liability rule is only optimal in the case of alternative care, or where the potential victim is the more efficient accident avoider.²⁰⁶ Since, in the realm of constitutional torts, prosecutors are generally in the best position (perhaps the only) to avoid the damage, and no victim care measures appear feasible or realistic, a no liability rule seems counterintuitive at best, and potentially inefficient from an economic perspective.

In this context, the usual fear of civil monetary sanctions appears to be based on something other than the overdeterrence that might result were prosecutors (or their employing agencies or states) required to internalize all non-legitimate external costs of criminal prosecutions. The discussion of the qualified immunity alternative in *Imbler* suggests that the primary concern motivating that Court focused on the costs accompanying section 1983 litigation, which are present even under a regime of qualified immunity.²⁰⁷ These costs come not only in the form of actual expenditures for defense counsel, but also in terms of the time during which the prosecutor's attention is diverted away from the state's business and toward defending against a civil suit. Indeed, the principal benefit of a no liability rule is that it is cheaper to administer—sometimes even costless—and this savings, in the realm of absolute prosecutorial immunity, accrues to the whole of society.²⁰⁸

206. LANDES & POSNER, *supra* note 26, at 29–54, 62–63. Hence, a no liability rule, interposed into the context of accidents which both parties may take measures to avoid, typically produces a situation in which victims take more than the optimal level of precautions. For example, if it is optimal for prosecutors to take some care to avoid violating the constitutional rights of criminal defendants, a victim will probably take more than the optimal level of care if prosecutors are not liable for violating their rights. *See id.*

207. *See Imbler v. Pachtman*, 424 U.S. 409, 425–428 (1976). According to the *Imbler* majority, qualified immunity inadequately protected the public policy goals motivating the Court for several reasons: suits against prosecutors for initiating and conducting prosecutions “could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate,” (*id.* at 425), lawsuits would divert prosecutors’ attention and energy away from their important duty of enforcing the criminal law, prosecutors would have more difficulty than other officials in meeting the standards for qualified immunity, and potential liability “would prevent the vigorous and fearless performance of the prosecutor’s duty that is essential to the proper functioning of the criminal justice system.” *Id.* at 427–28.

208. *See LANDES & POSNER, supra* note 26, at 62–63.

We might speculate, however, that another unarticulated concern was also motivating the *Imbler* Court, a concern that involves the dissonance between constitutional rights and tort remedies. Aside from the Takings Clause, constitutional requirements, guarantees, and protections were not explicitly envisioned to serve as predicates for money damages.²⁰⁹ Rather, they were conceived as defensive remedies aimed at “empowering the target of a government prosecution or enforcement proceeding to resist that action on the ground that it violated the superior law of the Constitution.”²¹⁰ This dissonance between right and remedy—which is exacerbated by the myriad of rules and doctrines encompassing interests that are frequently distant from the underlying constitutional concern—may have secretly invited judicial caution in *Imbler*, where the Court was confronted with the possibility of extending the tort remedy to the host of prophylactic strictures that even the most well-meaning prosecutor may infringe.²¹¹ While the Court was not empowered to deny recognition to the “species of tort liability” that section 1983 affords,²¹² extending absolute immunity to prosecutors alleged to have violated constitutional requirements inserts an atmosphere of certainty into an uncertain realm. Absolute immunity, thus, serves to mitigate the effect that ambiguous constitutional doctrines create by wholly insulating prosecutors from civil sanction.²¹³

If we conceptualize the range of potentially sanctionable prosecutorial activities as actions that lie at various points along a continuum, it is clear that the litigation-cost and uncertainty fears are interrelated. Were qualified immunity the norm, if a prosecutor’s actions are certain to have violated explicit constitutional requirements, such that the misconduct lies at one extremity on the certainty continuum, the costs of litigation will be high because an objective good faith belief as to the legality of the misconduct will be difficult to establish on a motion for summary judgment. Where the conduct lies at the opposite end of the certainty spectrum, such that the prosecutor’s conduct is unquestionably consistent with a good faith belief as to legality, the costs of litigation will be minimal,

209. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 n.244 (1991) (stating that the Takings Clause “can be read as expressly requiring a damages remedy (‘just compensation’) when a taking has occurred”).

210. Jeffries, *supra* note 90, at 279.

211. *Id.*

212. *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (quoting *Imbler*, 424 U.S. at 417).

213. See *supra* text accompanying notes 58–62 & 92–110.

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because the case is appropriate for summary dismissal on grounds of qualified immunity. If, however, the unconstitutionality of the conduct is more ambiguous, such that it lies at the midpoint of the certainty continuum, the litigation costs are more difficult to predict. In some instances, judges might defer to the prosecutor on grounds of qualified immunity, and in other instances they may deem the case appropriate for trial. The costs of litigation, of course, will turn on this determination.

The functional test established in *Imbler* only exacerbates the problem of uncertainty and undermines the litigation cost alternative justification for absolute prosecutorial immunity. By granting absolute immunity to some, but not all, prosecutorial activities that may violate constitutional strictures, the Supreme Court has left room for courts to conclude, based on various fact-sensitive determinants, that an individual prosecutor was acting in one or the other role at the time of the alleged violation. This discretion provides an incentive to bring suit that would not exist were prosecutors, like judges, entirely immune from civil suit based on official misconduct.²¹⁴ A result of a dual system in which uncertainty exists is that substantial litigation costs will be incurred. Hence, while the concerns underlying the Supreme Court's immunity case law—namely, the costs of litigation and the problem of uncertainty—are not exclusively economic norms, the consequences of the choices made are nonetheless economic, and the efficiency, from any perspective, of the functional test for absolute immunity is questionable.

While the preceding discussion has endeavored to analyze the regime of prosecutorial immunity apart from the state practices of defense and indemnification, as well as state budgeting practices that make it nearly impossible to translate civil judgments into agency costs, a complete analysis of the deterrence potential of civil monetary sanctions cannot ignore these realities. If a modification of the current regime exceeds the realistic scope of judicial authority to reexamine settled doctrines—which it very likely would—a coherent view of monetary deterrence must acknowledge the impossibility of directly sanctioning either misbehaving prosecutors or their agencies through civil remedies.²¹⁵ Thus, while we may still defend the imposition of civil monetary sanctions for the compen-

214. Under the doctrine of absolute judicial immunity, “judges of courts of superior or general jurisdiction are not liable in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.” *Bradley v. Fisher*, 80 U.S. 335, 351 (1871).

215. See *supra* text accompanying notes 181–185.

satory purposes it serves,²¹⁶ the individual or even agency-wide deterrence that such remedies accomplish is doubtful at best.

CONCLUSION

The prosecutor's power is subject to numerous sanctions and restrictions that serve equally numerous purposes. State and federal constitutional requirements, sentencing guidelines, the supervisory powers doctrine, the doctrine of separation of powers, professional discipline, and the political process frequently operate to curtail the potential for prosecutorial abuse. Beyond the boundaries of these limitations, however, many commentators have noted a growing disregard for constitutional guarantees. The "win-at-all-costs" mentality is cited as the culprit, and the fair trial guarantee is said to be the casualty. The preceding analysis suggests that the truth is quite a bit more complex.

In reality, prosecutors are just as varied as their sanctions, and the incentives motivating their conduct may be equally diverse. While cataloguing the innumerable individual and agency-wide incentives at work is far too complex for the task at hand and far too difficult to accurately analyze, some broad observations about low-level transitory prosecutors and their responsibility for the problem of prosecutorial misconduct have been offered. Further empirical analysis of the advancement patterns and turnover rates of state prosecutors is both warranted and vital. Yet, in light of recent statistics, the assumption that low-level state prosecutors are responsible for a significant percentage of prosecutorial misconduct does not appear unrealistic. The harder question, however, involves the problem of tailoring prosecutorial sanctions in such a way as to influence the incentives motivating these officers.

Analysis of the congruency, individuality and efficiency of the spectrum of available prosecutorial sanctions demonstrates that a penalty for prosecutorial misconduct that is optimal in one case may prove highly inefficient in the next. From a congruency perspective, an effective sanction must be capable of responding to the professional gain incentives motivating prosecutors. Where the congruency is less direct, the sanction tends to less effectively influence the cost-benefit analysis of those targeted. Individuality, then, inserts the problem of ensuring that the sanction imposed adequately impacts the source of the misconduct. If the source is the individual, a personal sanction is required, and bottom-up change should be the goal. Alternatively, if the source is internal policies

216. See Levinson, *supra* note 19, at 379–80.

or procedures that foster or encourage prosecutorial misconduct, then the sanction must target internal policymakers in order to combat the incentives facing those officers. Finally, efficiency introduces the simultaneous goals of ensuring optimality both with respect to the level of behavior exhibited by prosecutors and the level of activity that follows the imposition of sanctions. Behavior and activity levels will be influenced to varying degree by the imposition of sanctions that impose economic deadweight losses and over-deter prosecutorial misconduct. Unnecessary societal losses and social opportunity costs are a product of inefficient prosecutorial sanction, and in an arena as sensitive as law enforcement special attention must be devoted to avoiding this waste. All of this has been prefatory to determining the appropriate sanction that should be imposed in a given case of prosecutorial misconduct. This article takes the first step toward providing a framework for analyzing and differentiating among the spectrum of available prosecutorial sanctions, and a recurring theme of this analysis has been that the particular sanction imposed should vary with respect to the misconduct at issue. Future efforts, by judges and legislators alike, to deter instances of prosecutorial misconduct should begin by ascertaining the individual and agency-wide costs and benefits accruing to the prosecutors in question, the nature and source of the misconduct involved, and the efficiency of the sanctioning mechanism under consideration.