

Notes

REINING IN THE MINISTER OF JUSTICE: PROSECUTORIAL OVERSIGHT AND THE SUPERSEDER POWER

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ABSTRACT

Virtually immune from judicial sanction, professional discipline, and civil liability, prosecutors enjoy limitless, unmonitored, and, for the most part, unreviewable power. This power and insulation from review invite abuse and public mistrust, shaking confidence in the criminal justice system. With the system in need of a means of curbing errant prosecutors and restoring public confidence, this Note explores a neglected mechanism of prosecutorial oversight—the superseder power—and argues for increased use of this oversight mechanism, coupled with explicit guidelines for its use and a public review process.

INTRODUCTION

In 2006, citizens of Durham, North Carolina, witnessed firsthand the full breadth of prosecutorial power in the American criminal justice system and its impact on public trust and community relations. In March of that year, an African-American exotic dancer accused three members of the Duke University men's lacrosse team of rape and sexual assault.¹ The case grabbed headlines, as its elements of

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1. Samiha Khanna & Anne Blythe, *DNA Tests Ordered for Duke Athletes*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 24, 2006, at A1.

race, class, and gender captivated the general public.² National media descended on the city. As racial tensions flared within the community,³ the local district attorney, Michael Nifong, conducted a barrage of media interviews and continually assured the public that a crime had occurred.⁴ The evidence that surfaced over time, however, failed to conform to his initial statements.⁵ While the case crumbled, Nifong's actions came under scrutiny, and he faced allegations of prosecutorial improprieties, including failure to disclose exculpatory evidence,⁶ inflammatory extrajudicial statements,⁷ and charges that he pursued the case for political gain.⁸ Even so, Nifong remained on the case. A firestorm of criticism followed, as public confidence in the handling of the case—and the district attorney's office—plummeted,⁹ creating distrust in the North Carolina justice system as a whole. Lacking a mechanism to remove the district attorney from the case without his approval, however, state government officials were powerless to intervene and thwart the misuse of prosecutorial power.¹⁰

The Duke Lacrosse case is just one illustration of a troubling aspect of the American legal system: the limitless, unmonitored, and,

2. Erik Brady & Mary Beth Marklein, *A Perfect Storm*, USA TODAY, Apr. 26, 2006, at C1.

3. Benjamin Niolet, Anne Blythe & Jane Stancill, *Lacrosse Players' Lawyers Object*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 30, 2006, at A1.

4. Joseph Neff, *Duke Lacrosse Files Show Gap in DA's Case*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 6, 2006, at A1.

5. *Id.*

6. Michael Biesecker, Benjamin Niolet & Joseph Neff, *DA on Spot for Comments*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 22, 2006, at A1.

7. Matt Dees, *Nifong Broke Rules, Bar Alleges*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 29, 2006, at A1.

8. Oren Dorell, *Duke Case Prosecutor's Media Whirl Raises Eyebrows*, USA TODAY, May 2, 2006, at A2; Benjamin Niolet, *Rape Case Is a Factor*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 28, 2006, at A1.

9. By the end of 2006, a host of national and regional newspapers had demanded that Nifong dismiss the charges, recuse himself from the case, or resign from office. *E.g.*, Editorial, *As Duke Rape Case Unravels, Focus Turns to Prosecutor*, USA TODAY, Dec. 27, 2006, at A12; Editorial, *Disgraceful Nifong Should Depart*, WILMINGTON STAR-NEWS, Dec. 27, 2006, at 12A; Editorial, *Investigate the Investigation*, CHARLOTTE OBSERVER, Dec. 23, 2006, at A12; Editorial, *The Prosecutor Is Guilty*, STAR-LEDGER (Newark, N.J.), Dec. 30, 2006, at A22; Editorial, *Prosecutorial Indiscretion*, WASH. POST, Dec. 31, 2006, at B6.

10. Joseph Neff, Benjamin Niolet & Anne Blythe, *DA's Critics Ask Bar, Feds to Intervene*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 3, 2006, at A1.

for the most part, unreviewable power of the local prosecutor.¹¹ With the prosecutor, and the prosecutor alone, rests the ultimate decision to prosecute or not to prosecute¹² and the authority to employ “the most terrible instruments of government”¹³ against an individual. As “the most pervasive and dominant force in criminal justice,”¹⁴ the prosecutor wields an immeasurable influence over victims, defendants,¹⁵ and the larger community.¹⁶ Indeed, as former United States Attorney General and Supreme Court Justice Robert H. Jackson once famously remarked, “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”¹⁷

Unbounded prosecutorial power is at odds with a government predicated on checks and balances¹⁸ and a legal system based on due process.¹⁹ Not surprisingly, it also invites abuse and public mistrust. Reports of wrongful convictions and wayward prosecutors who railroad defendants and bully defense attorneys saturate newspapers and scholarly commentary,²⁰ shaking public confidence in a system held up as a model to the world.²¹ While cynicism about the system has escalated, however, the crisis has been ignored, as courts and bar associations have routinely failed to provide adequate oversight of prosecutorial power and safeguards against misconduct. Indeed, the

11. See JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY*, at xxi (1980) (“A key characteristic of the American local prosecutor is the independent source of power he exercises as a result of his locally elected status. He enjoys an unreviewable discretionary power to prosecute, a power that has been consistently upheld by the courts.”).

12. *United States v. Shaw*, 226 A.2d 366, 368 (D.C. 1967).

13. *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir. 1976) (Lumbard, J., concurring) (quoting Felix Frankfurter, Letter to the Editor, N.Y. TIMES, Mar. 14, 1941, at 20).

14. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 448 (1992).

15. MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 84–85 (1975).

16. JACOBY, *supra* note 11, at 195.

17. Robert H. Jackson, Attorney Gen. of the U.S., *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. AM. JUD. SOC. 18, 18 (1940).

18. Hugh L. Carey, N.Y. Governor, *The Role of a Prosecutor in a Free Society*, Speech before the New York State Bar Association (Jan. 30, 1976), in 12 CRIM. L. BULL. 317, 317–18 (1976); John A. Lundquist, Comment, *Prosecutorial Discretion—A Re-Evaluation of the Prosecutor’s Unbridled Discretion and Its Potential for Abuse*, 21 DEPAUL L. REV. 485, 485 (1972).

19. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981).

20. E.g., Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at A1.

21. *Id.*

literature is replete with criticisms of “judicial passivity and bar association hypocrisy.”²²

This Note adds to the existing commentary by analyzing a neglected mechanism of prosecutorial oversight: the appointment of special prosecutors to supersede local prosecuting attorneys in certain criminal proceedings. Although state officials in some jurisdictions possess this “power of superseder,” they have used it sparingly;²³ in other jurisdictions, its use by independent officials is altogether unavailable.²⁴ This Note argues for increased use of the superseder power, coupled with explicit guidelines for its use and a public review process that current superseder jurisdictions lack. Part I outlines the institutional conditions that give rise to prosecutorial power and misconduct and highlights the failure of traditional remedies to provide adequate oversight. Part II reviews three approaches to removing prosecuting attorneys and appointing special prosecutors. Part III presents a legislative proposal for a powerful form of executive superseder authority, whereby governors and attorneys general would be required to intervene when prosecutorial conduct threatens the public trust, such as in cases involving conflicts of interest, allegations of prosecutorial misconduct, political controversy, and DNA exonerations.

I. PROSECUTORIAL POWER AND MISCONDUCT

The extent to which prosecutorial abuse of power and discretion occurs in the criminal justice system remains unknown,²⁵ but studies of the case law are not encouraging. In a 2003 study, the Center for Public Integrity found at least 2,012 cases since 1970 in which “individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences.”²⁶ A 1999 study by the *Chicago Tribune* yielded sobering results as well, discovering at least 381 cases

22. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT, at vi (2d ed. 2005).

23. See *infra* notes 160–61 and accompanying text.

24. See *infra* notes 116–34 and accompanying text.

25. See Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 47 (2005) (noting that “[w]hile many commentators view prosecutorial misconduct as pervasive, empirical studies have been less conclusive”).

26. Steve Weinberg, Center for Pub. Integrity, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?*, June 26, 2003, <http://www.publicintegrity.org/pm/default.aspx?act=main>.

since the Supreme Court's 1963 decision in *Brady v. Maryland*²⁷ in which courts threw out homicide convictions because prosecutors concealed exculpatory evidence or presented evidence they knew to be false.²⁸

Although abuse of prosecutorial power finds its roots in a number of institutional conditions, three forces particularly encourage the problem: the lack of transparency that accompanies a prosecutor's discretionary authority; the ambiguous ethical obligations for the prosecution function; and the absence of oversight and accountability for prosecutors.²⁹ This Part will analyze each of these contributing factors, focusing in particular on the failure of traditional remedies to monitor and check the conduct of prosecuting attorneys.

A. *Vast Discretionary Authority with Little or No Transparency*

Although the vast prosecutorial power of local district attorneys is well entrenched in the American legal system, the source of such power is somewhat of a curiosity. The office of local prosecutor finds its origin in either explicit constitutional provisions or statutes, depending on the jurisdiction,³⁰ but the boundless discretionary power associated with it is more a result of "default rather than a conscious legislative judgment,"³¹ finding legitimacy in a combination of statutory interpretation, the common law, "ambiguous substantive criminal laws," and "intentional legislative over-generalization."³² Instead of narrowing this power, the judicial branch has contributed to its development, as the courts have "endowed [the prosecutor] with great power" over time.³³ Moreover, legislatures have declined to

27. *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Id.* at 87.

28. Armstrong & Possley, *supra* note 20.

29. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400.

30. DAVID M. NISSMAN & ED HAGEN, *THE PROSECUTION FUNCTION* 2 (1982).

31. James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 680. *But see* N.C. CONST. art. IV, § 18 ("The District Attorney shall advise the officers of justice in his district [and] be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district . . .").

32. Lundquist, *supra* note 18, at 490.

33. JACOBY, *supra* note 11, at 295.

articulate any limitations on prosecutorial discretion.³⁴ As a result, modern prosecutors “wield vastly more power than ever before” and are increasingly “more insulated” from review.³⁵

This vast discretionary authority is accompanied by little or no transparency.³⁶ Indeed, prosecutors determine whom to charge, what charges to file, and how to obtain convictions for those charges in secret.³⁷ This situation breeds potential for impropriety, as it vests in one official the power to “invoke society’s harshest sanctions on the basis of ad hoc personal judgments,”³⁸ which can often be “capricious or politically induced.”³⁹ Furthermore, because most cases never reach the trial stage, the motives for these decisions, and any accompanying misconduct, rarely come to light.⁴⁰ Even in cases that do make it to trial, prosecutorial misconduct “can take extraordinary efforts to uncover.”⁴¹ Lack of transparency and “rampant” hidden misconduct⁴² in the prosecutorial process provide striking irony in a system based upon the principles of fairness and due process.⁴³ Thus, not surprisingly, these institutional ills reach beyond any individual defendant, breeding public distrust in local law enforcement⁴⁴ and shaking confidence in our justice system as a whole.⁴⁵

34. JAY DOUGLASS, *ETHICAL ISSUES IN PROSECUTION 2* (1988).

35. Gershman, *supra* note 14, at 393.

36. Joy, *supra* note 29, at 400.

37. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 207–08 (1969).

38. Vorenberg, *supra* note 19, at 1555.

39. DAVIS, *supra* note 37, at 224.

40. *See* Vorenberg, *supra* note 19, at 1522 (“The fate of most of those accused of crime is determined by prosecutors, but typically this determination takes place out of public view—in the hallways of the courthouse, in the prosecutors’ office, or on the telephone.”).

41. Armstrong & Possley, *supra* note 20; *see also* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45, 106 (1991) (“A prosecutor’s ethical breach rarely will appear clearly on the trial record. Often it will be known only to the prosecutor herself.”).

42. Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 *CRIM. L. BULL.* 550, 562 (1987).

43. *See* Vorenberg, *supra* note 19, at 1555 (“[P]rosecutors are not held to anything remotely like what due process would require if they were engaged in an acknowledged rather than a hidden system of adjudication.”).

44. NISSMAN & HAGEN, *supra* note 30, at 2.

45. Armstrong & Possley, *supra* note 20.

B. *Ambiguous Ethical Guidelines*

Lack of transparency in the prosecutorial process constitutes just one of the institutional conditions that have contributed to the current crisis. Indeed, in theory, a comprehensive set of ethical guidelines, coupled with effective professional discipline, could combat the distrust generated by the hidden nature of the prosecutorial process, providing prosecutors with explicit boundaries of conduct and reassuring the public that attorneys who crossed these bounds would be checked. Quite the contrary exists in practice, though, as vague ethical rules and inadequate remedies for prosecutorial misconduct actually exacerbate the problem by “provid[ing] ambiguous guidance to prosecutors” and “creat[ing] perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct.”⁴⁶

The failure of the ethical codes to provide guidance to prosecutors has been the source of exhaustive commentary.⁴⁷ The American Bar Association articulated its first set of ethical guidelines for prosecutors in 1908 with the adoption of the Canons of Professional Ethics (Canons),⁴⁸ which stated that “[t]he primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.”⁴⁹ Nearly a century later, this ethical guideline has remained largely unchanged, despite its vague, if not contradictory, decree. Indeed, although the ABA’s most recent promulgation of ethical guidelines, the Model Rules of Professional Conduct (Rules), prescribes a handful of special ethical obligations for prosecutors,⁵⁰

46. Joy, *supra* note 29, at 400.

47. See, e.g., FREEDMAN, *supra* note 15, 79–98 (describing how the Code of Professional Responsibility and the ABA Standards Relating to the Prosecution Function fail to establish rules of ethical conduct); Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415, 436–68 (1993) (discussing the failure of the ethical codes to address prosecutorial conflicts of interest); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1587–97 (2003) (exploring the inadequacies of Model Rule 3.8); H. Richard Uviller, *Commentary: The Virtuous Prosecutor in Quest of an Ethical Standard*, 71 MICH. L. REV. 1145, 1145–66 (1973) (discussing a number of ethical concerns that prosecutors face and arguing that the ABA ethics projects inadequately deal with these problems); Zacharias, *supra* note 41, at 53–66 (noting the vagueness of the “do justice” decree and attempting to provide clarity to the ethical codes).

48. Brenner & Durham, *supra* note 47, at 436.

49. ABA CANONS OF PROF’L ETHICS Canon 5 (1908).

50. Specifically, the Model Rules require that prosecutors 1) refrain from prosecuting charges that they know are not supported by probable cause; 2) make “reasonable efforts” to assure the accused has the opportunity to obtain counsel; 3) not seek the waiver of pretrial

the Rules still rely on the Canons' basic theme of seeking or doing justice.⁵¹ Yet the "seek justice" decree, practically speaking, is not a guideline at all,⁵² and as a result, "the prosecutor is thrown back on his own subjective value and notions about fundamental fairness."⁵³

Not only do the ethical codes fail to provide guidelines for seeking justice, but they also contribute to the "fuzzy" self-image⁵⁴ of prosecutors by conflicting with their institutional responsibility to seek convictions.⁵⁵ The political nature of the district attorney's office reinforces the prosecutor's role as zealous advocate. As elected officials,⁵⁶ district attorneys use high conviction rates as measures of success,⁵⁷ currying public favor for their current political office and, in some cases, future aspirations, such as advancement to the bench or Congress.⁵⁸ Even low-level prosecutors are not immune from the importance of convictions, as they seek promotion within the legal field.⁵⁹ Thus, one part zealous advocate, one part "minister of justice,"⁶⁰ prosecutors are cast into "schizophrenic muck"⁶¹ and must

rights from the accused without legal representation; 4) make timely disclosure of exculpatory evidence; 5) not subpoena defense counsel as a witness except in extenuating circumstances; and 6) refrain from making inflammatory extrajudicial statements regarding the accused. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2003).

51. The commentary to the Model Rules states, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." *Id.* cmt. 1.

52. Gershman, *supra* note 14, at 445; Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607, 622 (1999).

53. Green, *supra* note 52, at 622.

54. JACOBY, *supra* note 11, at xv.

55. Joy, *supra* note 29, at 416; Zacharias, *supra* note 41, at 106.

56. The chief prosecutor is an elected official in every state except Alaska, Connecticut, and New Jersey. STEVEN W. PERRY, PROSECUTORS IN STATE COURTS, 2005, at 2 (Bureau of Justice Statistics, Bulletin No. NCJ No. 213799, July 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf>. In the District of Columbia, the chief prosecutor is also unelected. *Id.*

57. Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 205 (1988).

58. Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 30 HOFSTRA L. REV. 121, 125–26 (2001). As Harvard University Professor Alan Dershowitz quipped, "Winning has become more important than doing justice. Nobody runs for the Senate saying I did justice." Armstrong & Possley, *supra* note 20.

59. See Dunahoe, *supra* note 25, at 49 ("[I]ndividual low-level prosecutors are responsible for a significant percentage of prosecutorial misconduct, and, further . . . these prosecutors seek primarily to maximize professional gains.").

60. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2003).

61. Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 982 (1985).

bend into “psychological pretzels”⁶² to fulfill the duties of their office. As one commentator notes, “Maintaining the ‘justice’-oriented stance that the dual role implies is one of the most psychologically difficult tasks that lawyers are asked to perform”⁶³ Some commentators even believe it is impossible to reconcile these competing ethical and institutional duties.⁶⁴

C. *Lack of Oversight and Accountability*

A system with little transparency and ambiguous ethical guidelines produces opportunities for abuse of power and discretion, even on the part of well-meaning prosecutors.⁶⁵ Despite this potential for abuse, prosecutors face little accountability for their conduct. This lack of oversight further contributes to the pervasive nature of prosecutorial misconduct,⁶⁶ providing the individual who has “more control over life, liberty, and reputation than any other person in America”⁶⁷ with “every incentive, and little disincentive, to engage in violations that will help . . . produce convictions.”⁶⁸ But is the existing framework of prosecutorial oversight truly “meaningless or nonexistent”?⁶⁹

The legal system offers a number of mechanisms that, in theory, provide oversight of the prosecution function. First, the courts can directly limit errant prosecutorial conduct within a criminal

62. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695, 1697 (2000).

63. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 13.10 (1986).

64. See Uviller, *supra* note 62, at 1718 (“Passion and dispassion are not cut from the same mentality.”); Zacharias, *supra* note 41, at 104 (“[A]sking prosecutors simultaneously to advocate within a process and assure that the process is fair is inherently contradictory—and perhaps hopeless.”).

65. See generally Jonakait, *supra* note 42, at 556 (“These pressures are omnipresent. They are not aberrations in the system, but part of the system itself. They operate in the routine case on the well-meaning prosecutor, the prosecutor seeking the correct result. The ethical prosecutor is told that he must believe in the defendant’s guilt, but the irony is that because he believes that, he is inevitably pushed toward misconduct. The venal prosecutor seeking the wrong result may be a danger, but the forces described here are more dangerous, because they will be strongest on the self-righteous prosecutor, and everything in our criminal justice system compels the prosecutor to believe the rightness of his cause. In other words, these pressures for misconduct come when the prosecutor acts like a prosecutor.” (internal citation omitted)).

66. Joy, *supra* note 29, at 426.

67. Jackson, *supra* note 17, at 18.

68. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. REV.* 721, 771 (2001).

69. GERSHMAN, *supra* note 22, at vi.

proceeding, either remedying the offending action at the trial level⁷⁰ or overturning a conviction on appeal.⁷¹ These remedies aim not to discipline the offending prosecutor, but rather to correct any constitutional wrongs to the individual defendant.⁷² Conversely, professional discipline by bar associations targets prosecutors who have violated the ethical codes, having little or no impact on wronged defendants.⁷³ Finally, in addition to judicial remedies and professional discipline, a wronged defendant may seek damages from a prosecutor in a civil lawsuit.⁷⁴ In reality, the effective use of any of these corrective mechanisms is rare.⁷⁵ Furthermore, even if employed more frequently, these remedies possess limitations that make them inadequate mechanisms for prosecutorial oversight and ineffective safeguards against misconduct.

1. *Judicial Remedies.* In theory, trial courts serve an important prosecutorial oversight function, boasting an arsenal of tools through which to curb prosecutorial misbehavior, such as the power to suppress evidence and quash charges.⁷⁶ In addition, appellate courts may overturn convictions procured, in part, by prosecutorial misconduct.⁷⁷ Yet because the courts employ the exclusionary rule in suppressing evidence at trial and “harmless error” analysis on appeal, both of which focus on violations of a defendant’s rights rather than

70. See Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1086 (1994) (noting suppression of evidence and dismissal of charges as possible remedies).

71. DOUGLASS, *supra* note 34, at 77.

72. See *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (“[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.”); Morton, *supra* note 70, at 1102 (discussing how the exclusionary rule is “primarily designated for constitutional violations”).

73. See Morton, *supra* note 70, at 1102 (“Ethical rules . . . were designed to subject attorneys to discipline, not to supply grounds for remedying breaches of the substantive rights of the accused.”).

74. JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 13.02 (3d ed. 2003).

75. See, e.g., GERSHMAN, *supra* note 22, § 14:9 (discussing the rare use of contempt charges to sanction errant prosecutors); Gershman, *supra* note 14, at 454 (rare use of professional discipline); Green, *supra* note 47, at 1585 (rare use of civil liability); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time To Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 291–92 (2005) (rare appellate reversal).

76. Morton, *supra* note 70, at 1086.

77. DOUGLASS, *supra* note 34, at 77.

the prosecutor's culpability,⁷⁸ judicial remedies do not address the full scope of prosecutorial misconduct and thus are an inadequate check on errant prosecutors.⁷⁹ Indeed, although courts may lament improper actions by prosecutors that fall short of constitutional violations,⁸⁰ their failure to punish prosecutorial misconduct recalls, as one judge said, "the bitter tear shed by the Walrus as he ate the oysters."⁸¹ One professor amusingly describes the courts' approach to prosecutorial misconduct as "[t]he prosecutor screwed up but the defendant is guilty, so what the hell."⁸² The possibility that wronged defendants can also be guilty, however, reveals a theoretical flaw with judicial remedies. Specifically, if courts accounted for the full range of prosecutorial misconduct by suppressing evidence, dismissing charges, or overturning convictions accordingly, society would suffer the consequences of a guilty person going free while the prosecutor effectively would receive no "more than a personal slap on the wrist."⁸³ Neither judges nor the public are willing to accept such a high price to address what both regard as collateral harm at best.

Aside from suppressing evidence or overturning convictions, a court may hold an offending prosecutor in contempt.⁸⁴ This remedy, unlike the ones previously mentioned, goes more to punishing the prosecutor than relieving the criminal defendant, and thus provides an avenue for supervising prosecutorial conduct that does not reward a guilty person with freedom. Its effectiveness, however, is limited to

78. See GERSHMAN, *supra* note 22, § 14:3 ("Under the harmless error rule, appellate courts are authorized to ignore trial errors that did not prejudice the defendant's substantive rights."); Morton, *supra* note 70, at 1100 ("Suppression [under the exclusionary rule] is . . . reserved for constitutional violations which infringe basic rights of defendants in criminal trials.")

79. See Zacharias, *supra* note 41, at 48. ("Constitutional appeals neither guide prosecutors who overestimate their obligations to defendants nor effectively rein in overaggressive attorneys.")

80. Fisher, *supra* note 57, at 199 (citing *United States v. Skandier*, 758 F.2d 43, 44 (1st Cir. 1985)).

81. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

82. DOUGLASS, *supra* note 34, at 84.

83. *Id.* at 77; see also *United States v. Lotsch*, 102 F.2d 35, 37 (2d Cir. 1939) ("[The prosecutor made] plainly an improper remark, and if a reversal would do no more than show our disapproval, we might reverse. Unhappily, it would accomplish little towards punishing the offender, and would upset the conviction of a plainly guilty man.")

84. Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 673 (1972).

cases that reach the trial level.⁸⁵ Furthermore, excessive use of the contempt power may violate the separation of powers doctrine. Not surprisingly, “trial courts are very reluctant to institute sanctions against prosecutors, seen as functionaries from another branch of government with distinct roles of their own to play for the system to stay in equilibrium.”⁸⁶ In fact, the separation of powers doctrine underlines much of the judiciary’s permissive approach to prosecutorial power and misconduct—in particular, review of the charging function⁸⁷—and poses a major obstacle to the judiciary fulfilling an active role in disciplining prosecutors. Thus, judicial remedies, whether because of their emphasis on wronged defendants or because of their inherent constitutional limitations, fail to serve as proactive checks on prosecutorial power and misconduct.

2. *Professional Discipline.* Professional discipline by bar associations provides another means of checking the power of local prosecuting attorneys.⁸⁸ Indeed, some commentators have described professional sanctions and disbarment as the only effective safeguard against prosecutorial misconduct.⁸⁹ In practice, however, this remedy, like trial sanctions and appellate reversal, is “so infrequent as to appear non-existent”⁹⁰ and thus presents only a “slight” threat to a misbehaving prosecutor.⁹¹ Among the 381 homicide conviction reversals for prosecutorial misconduct discovered in a *Chicago Tribune* study, the newspaper reported that none of the offending prosecutors was subsequently barred from practicing law.⁹² Sanctions are even more uncommon in ongoing proceedings.⁹³ “[C]onsequently,

85. See Vorenberg, *supra* note 19, at 1523 (“But the existence of trials cannot check prosecutorial powers not dependent on trial.”).

86. Steele, *supra* note 61, at 981.

87. Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

88. WOLFRAM, *supra* note 63, § 13.10.2.

89. E.g., Green, *supra* note 47, at 1584–85 (citing NIKI KUCKES, REPORT TO THE ABA COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT CONCERNING RULE 3.8 OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 8–11 (1999)).

90. Gershman, *supra* note 14, at 454.

91. DOUGLASS, *supra* note 34, at 77.

92. Armstrong & Possley, *supra* note 20.

93. See Zacharias, *supra* note 68, at 758 n.130 (surveying the various ways in which state bar associations respond to complaints filed during ongoing proceedings). Although unprecedented, state bar disciplinary charges levied during the middle of a criminal case eventually forced Durham County District Attorney Michael Nifong to ask for a special prosecutor in the Duke Lacrosse case. Anne Blythe, Joseph Neff & Michael Biesecker, *Nifong*

prosecutors may have developed a sense of insulation from the ethical standards of other lawyers.”⁹⁴

Bar associations face two hurdles in employing disciplinary sanctions as a means of monitoring prosecutorial conduct. For one, the ethical codes provide little guidance on what constitutes improper conduct on the part of prosecutors;⁹⁵ they thus proscribe only a narrow range of sanctionable actions.⁹⁶ Not surprisingly, “in the absence of clearly proscribed conduct,” disciplinary authorities are not “likely to enter the debate over when lawyers have acted too aggressively, or not aggressively enough, in prosecuting crimes.”⁹⁷ In addition, because they derive their power from the judiciary, bar disciplinary committees, like the courts, may run afoul of the separation of powers doctrine when disciplining prosecutors.⁹⁸ In this way, disbarment or other sanctions that limit the power of a prosecutor serve as a “de facto impeachment,” subverting the will of the public, which voted the prosecutor in office, and the legislature, which vested expansive powers in the district attorney’s office.⁹⁹ In some jurisdictions, prosecutors have used this argument to challenge

Steps Aside, NEWS & OBSERVER (Raleigh, N.C.), Jan. 13, 2007, at A1; *see also infra* notes 131–34 and accompanying text. Nifong’s downfall, however, may have resulted more from the unique confluence of a number of factors—top-notch defense attorneys, actual innocence, and the need to rehabilitate the reputation of North Carolina’s criminal justice system—than any desire of behalf of the state bar to crack down on prosecutorial misconduct. *See* David Feige, *One-Off Offing: Why You Won’t See a Disbarment Like Mike Nifong’s Again*, SLATE, June 18, 2007, <http://www.slate.com/id/2168680> (“[I]t took a perfect storm of powerful defendants, a rapt public, and demonstrable factual innocence to produce the outcome that ended Mr. Nifong’s career.”); *see also* Mark Johnson, *Disbarment of Nifong Rare Move by Bar: Protection of Peers or Few Violations the Reason?*, CHARLOTTE OBSERVER, June 26, 2007, at A1 (noting the possible influence of two other high profile cases of prosecutorial misconduct on the state bar’s actions).

94. Steele, *supra* note 61, at 966.

95. *See supra* Part I.B.

96. Zacharias, *supra* note 68, at 738. Professor Zacharias articulates just three areas “in which disciplinary authorities are likely to have both the wherewithal and inclination to proceed.” *Id.* They are: “(1) pretrial and trial conduct that is specifically forbidden in the codes; (2) engaging in pretrial publicity; and (3) the implementation of prosecutors’ obligations to report other lawyers.” *Id.*

97. *Id.* at 736 n.62.

98. *Id.* at 761.

99. *See* Steele, *supra* note 61, at 968–69 (“Whenever a disciplinary sanction makes it impossible for a prosecutor to function, that sanction has assumed the role of the impeachment process in a way that may very well be contrary to the will of both the electorate and the legislature.”).

disciplinary sanctions—and won.¹⁰⁰ Thus, because it does not recognize the scope of prosecutorial misconduct and may violate the separation of powers doctrine, professional discipline serves as an inadequate method by which to regulate prosecutorial power, both in theory and in practice.

3. *Civil Liability.* The threat of civil liability may also curb prosecutorial power. Under 42 U.S.C. § 1983, any state official who

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.¹⁰¹

In *Imbler v. Pachtman*,¹⁰² however, the Supreme Court significantly curtailed the use of § 1983 actions as redress for prosecutorial misconduct, granting prosecutors absolute immunity in initiating a prosecution and presenting the state's case.¹⁰³ Subsequent decisions have employed *Imbler's* functional approach¹⁰⁴ to define the scope of prosecutorial immunity, carving out some instances in which the prosecutor fulfills an administrative or investigative role and thus enjoys only qualified immunity.¹⁰⁵

The *Imbler* Court recognized the importance of shielding the prosecutor from civil liability, noting that “[t]he public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.”¹⁰⁶ It added, “If the prosecutor could be

100. *Id.* at 968 (citing *Simpson v. Alabama State Bar*, 311 So. 2d 307 (Ala. 1975), and *Snyder’s Case*, 152 A. 33 (Pa. 1930)).

101. 42 U.S.C. § 1983 (2000).

102. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

103. *Id.* at 430–31. Ironically, the Court noted a prosecutor’s “amenability to professional discipline” as “undermin[ing] the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.” *Id.* at 429. In reality, prosecutors are hardly amenable to professional discipline. *See supra* notes 88–100 and accompanying text.

104. *E.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

105. *See Kalina v. Fletcher*, 522 U.S. 118, 129–30 (1997) (swearing to the truth of facts in a certification for determination of probable cause); *Buckley*, 509 U.S. at 275, 278 (manufacturing false evidence and making statements to the press); *Burns v. Reed*, 500 U.S. 478, 493 (1991) (advising police in the investigative phase of a criminal case).

106. *Imbler*, 424 U.S. at 424–25.

made to answer in court each time [a defendant] charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.”¹⁰⁷ Such considerations provide a powerful argument against calls to reevaluate absolute immunity for prosecutors¹⁰⁸ and illustrate why civil liability provides only a limited check on prosecutorial power and misconduct.

* * *

Prosecutors enjoy unparalleled discretionary power and authority within the American legal system. This power often leads to abuse and misconduct, though, because of the lack of transparency in the prosecutorial process, the vague ethical duties imposed on prosecutors, and the failure of existing remedies to provide accountability and oversight. Given the ineffectiveness of judicial sanctions, professional discipline, and civil liability, the task becomes finding a means of oversight that protects defendants’ rights, punishes errant prosecutors, and restores public confidence in the system. Part II addresses another potential oversight mechanism—the appointment of special prosecutors.

II. SPECIAL PROSECUTORS

An additional means of prosecutorial oversight is the use of special prosecutors to supersede local prosecuting attorneys in criminal proceedings.¹⁰⁹ Such a mechanism presents a proactive approach to the issue of prosecutorial accountability. “Totally uninvolved with any social/political complexities attending the particular case, the special prosecutor [can] concern himself with but one thing: the efficient and ethical prosecution of the case.”¹¹⁰ Furthermore, because this form of oversight allows an independent party (i.e., the special prosecutor) to review a local prosecuting attorney’s files, it provides transparency for the process and deters errant prosecutorial conduct. Appointments of special prosecutors

107. *Id.* at 425.

108. For a critique of the absolute immunity that prosecutors enjoy, see generally 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 (1996).

109. Lawrence Taylor, *A Needed Legal Specialty: The Special Prosecutor*, 61 JUDICATURE 220, 221 (1977).

110. *Id.* at 224.

arise in these ways: requests by prosecutors,¹¹¹ court order,¹¹² and executive superseder.¹¹³ This Part will explore each of these approaches as a means of curbing prosecutorial power.

A. Appointment by the District Attorney

Special prosecutors may be appointed at the request of the district attorney. Although the ethical codes have failed to develop clear guidance on when prosecutors should make such requests,¹¹⁴ mechanisms through which prosecuting attorneys may recuse themselves from cases and request special prosecutors are not uncommon.¹¹⁵

In some jurisdictions, though, these mechanisms are the only means by which a special prosecutor may be appointed to a case. North Carolina provides one such example. In North Carolina, an attorney from the state's Special Prosecution Division "shall be available to prosecute or assist in the prosecution of criminal cases," but only "when requested to do so by a district attorney and the Attorney General approves."¹¹⁶ Ironically, North Carolina's Special Prosecution Division was formed not to combat prosecutorial conflicts of interest or misconduct, but rather to "expedite Justice and provide speedy trials"; to help with the "tremendous caseloads" encountered in local prosecuting offices; and to provide time and resources to cases that "involve complex legal questions, extensive research and expert trial assistance."¹¹⁷ Over time, however, the office has evolved as a mechanism by which local prosecutors can decline to participate in controversial matters involving a conflict of interest.¹¹⁸

111. *See infra* Part II.A.

112. *See infra* Part II.B.

113. *See infra* Part II.C.

114. *See infra* notes 122–28 and accompanying text.

115. *See, e.g.*, COLO. REV. STAT. § 20-1-107 (2006) (stating that district attorneys may be disqualified upon their own request, at which point "the court having criminal jurisdiction may appoint a special prosecutor to prosecute or defend the cause"); KY. REV. STAT. ANN. § 15.733(4) (2006) ("In the event that a prosecuting attorney is disqualified, he shall certify such fact in writing to the Attorney General who may direct another Commonwealth's attorney or county attorney or an assistant attorney general as a special prosecutor to represent the Commonwealth in that proceeding.");

116. N.C. GEN. STAT. § 114-11.6 (2006).

117. H.B. 670, 1973 Gen. Assem., Reg. Sess. (N.C. 1973).

118. Andrea Weigl, *State Steps in When Cases Defy the Ordinary*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 14, 2007, at A12.

The North Carolina attorney general's office has stated that its Special Prosecution Division handles "dozens of cases a year."¹¹⁹ Yet when used as the sole means through which to appoint special prosecutors, systems such as the one in North Carolina are inadequate for a myriad of reasons. First, most recusal statutes provide little guidance as to when a prosecutor should request a special prosecutor. North Carolina's statute, for example, is silent on the matter.¹²⁰ Other states' recusal statutes do somewhat better, focusing on when prosecutors have a "personal interest in the cause."¹²¹ Commentators, however, have noted the difficulty in defining prosecutorial conflicts of interest.¹²² Such difficulty arises from the nature of the prosecutorial function itself:¹²³ rather than advocating for one client, the prosecutor represents a number of constituencies—including the community, the victim, the defendant, and the state.¹²⁴ As such, professional disciplinary boards and courts have only imposed sanctions for conflicts of interest when the prosecutor has "an axe to grind"¹²⁵ or a direct personal interest in the litigation.¹²⁶

Prosecutors, however, may face situations, short of a direct personal interest in a case, in which their conduct still constitutes a

119. *Id.*

120. N.C. GEN. STAT. § 114-11.6.

121. *E.g.*, LA. CODE CRIM. PROC. ANN. art. 680 (2006).

122. *See, e.g.*, Uviller, *supra* note 47, at 1160 ("Of the several formulations directly or indirectly instructing the prosecutor in the ethical imperatives of his calling, none . . . has come close to dealing clearly or comprehensively with the problem of conflicting interests."); *cf.* Brenner & Durham, *supra* note 47, at 436 (arguing that past attempts to codify prosecutorial ethics have not paid sufficient attention to conflicts of interest).

123. Brenner & Durham, *supra* note 47, at 471–72 ("Not having an identifiable client, [the prosecutor] does not have a readily available benchmark to be used in determining whether he has a conflict.").

124. Zacharias, *supra* note 41, at 57.

125. *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984).

126. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) ("In a case where a prosecutor represents an interested party, however, the ethics of the legal profession *require* that an interest other than the Government's be taken into account. Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence."); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980) ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."); *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (affirming the reversal of a domestic dispute conviction when the prosecuting attorney was retained to represent the wife of the defendant in a divorce proceeding).

conflict of interest:¹²⁷ for example, prosecuting a case in which the prosecutor has previously committed misconduct or undertaking an explosive case in an election year, among others. The ethical codes provide no instruction for prosecutors in these situations, and courts have held that political bias does not constitute an impermissible conflict of interest.¹²⁸ These situations, though, are the ones in which the public trust may be most shattered, and the appointment of a special prosecutor most needed.

Furthermore, even if states such as North Carolina clearly articulated the conflicts of interests that would necessitate the appointment of a special prosecutor, the system would be only as good as the prosecutors it was designed to check.¹²⁹ Specifically, without an independent means by which to appoint special prosecutors, jurisdictions are at the mercy of local prosecutors, who may be disinclined to open their case files to an outside party for fear of disciplinary or political repercussions.¹³⁰

Indeed, the Duke Lacrosse case illustrated these concerns and exposed major flaws in North Carolina's oversight of local prosecuting attorneys and appointment of special prosecutors. Despite allegations of prosecutorial improprieties, Durham County District Attorney Michael Nifong refused to turn the matter over to the state's Special Prosecution Division.¹³¹ As public distrust and criticism of the district attorney's conduct grew, complaints flooded

127. Professors Susan W. Brenner and James Geoffrey Durham differentiate between "generic conflicts"—that is, those arising from prior representations or personal interests—and "systemic conflicts." Brenner & Durham, *supra* note 47, at 417. The latter are "inherent in [a prosecutor's] distinct responsibilities: the political reality of having to please the electorate; the necessity of being an advocate; and the ethical requirement of being an 'administrator of justice.'" *Id.*

128. *Azzone v. United States*, 341 F.2d 417, 419 (8th Cir. 1965); *United States v. Terry*, 806 F. Supp. 490, 497 (S.D.N.Y. 1992) ("[T]he undisputed fact that Abrams sought to obtain political gain from his prosecution of Terry is not enough to disqualify him.").

129. Commentators have advanced a similar argument regarding the inadequacy of the existing ethical obligations of prosecutors. *See Vorenberg, supra* note 19, at 1545 ("[S]uch limits are likely to be no stronger than the determination of the men and women who abide by them to limit their own discretion."). Thus, in effect, states that vest the sole means of appointing a special prosecutor with the district attorney are preserving the ethical status quo—that is, self-regulation.

130. *See Brenner & Durham, supra* note 47, at 444 ("The prosecutor . . . is faced with making the decision [to withdraw] on his own, followed by the political reality of having to make his reasons for withdrawal public, thus placing his decision in the political arena.").

131. John Stevenson & Adam Playford, *Nifong: Some Criticism May Be Justified*, HERALD-SUN (Durham, N.C.), July 29, 2006, at A1.

the office of Attorney General Roy Cooper.¹³² Under North Carolina's system for appointing special prosecutors, however, the attorney general was powerless to act. Ultimately, after the state bar filed an ethics complaint against Nifong for his conduct in the case, the beleaguered district attorney acknowledged an unmistakable conflict of interest and asked Cooper to intervene,¹³³ seven months after legal commentators first suggested that he do so.¹³⁴

Thus, as the Duke Lacrosse case demonstrates, in systems in which only local prosecuting attorneys may ask for removals, the use of special prosecutors as a check on prosecutorial power ends up not being a check at all.

B. Judicial Order

Some jurisdictions vest the judicial branch with the authority to remove a prosecuting attorney from a case and to appoint a special prosecutor.¹³⁵ Theoretically, the courts could invoke this power of appointment in cases in which the prosecutor has committed misconduct or failed the public trust. If used in this way, the judicial appointment of special prosecutors has two existing parallels. First, viewed broadly, prosecutorial misconduct interferes with the functioning of the courts,¹³⁶ and thus a court's removal of an offending attorney and appointment of a special prosecutor is akin to its exercise of the contempt power.¹³⁷ Second, the appointment of special prosecutors in cases in which prosecuting attorneys have abused their

132. Anne Blythe & Jim Nesbitt, *Lacrosse Case in State Hands*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 14, 2007, at A1.

133. Duff Wilson, *Attorney General in North Carolina Agrees to Take Duke Case*, N.Y. TIMES, Jan. 14, 2007, at A20.

134. James E. Coleman, Jr., Letter to the Editor, *Special Prosecutor Should Take Over Duke Case*, NEWS & OBSERVER (Raleigh, N.C.), June 13, 2006, at A10.

135. *E.g.*, W. VA. CODE § 7-7-8 (2006) ("If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney.").

136. *See* Paul Lowell Haines, Note, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J. 445, 462 (1990) ("Inherent judicial powers are those powers not expressly granted to the courts by a constitution but recognized to exist merely because they are necessary for the court's proper functioning.... The court... must have the powers necessary to maintain its integrity as an institution.").

137. *See* *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.").

discretion by committing misconduct or undermining the public trust is only a natural extension of the various “private challenge statutes”¹³⁸ that call for courts to appoint special prosecutors when prosecuting attorneys have abused their discretion in refusing to prosecute.¹³⁹ Thus, just as when a victim alleges prosecutorial abuse of discretion, a defendant could request a special prosecutor upon a showing to the court that the prosecuting attorney has committed misconduct and that the appointment of a special prosecutor is necessary.¹⁴⁰

In practice, however, the judicial power to remove prosecuting attorneys and to appoint special prosecutors has not been given such an expansive scope. For instance, in West Virginia, a state in which the judiciary is vested with such authority,¹⁴¹ if “there is any factual question as to the propriety of the prosecutor acting in the matter, he must be afforded notice and an opportunity to be heard.”¹⁴² Furthermore, the West Virginia Supreme Court has “narrowly drawn” the authority of the courts to appoint special prosecutors, limiting its use to “only particular cases in which the prosecutor is disqualified for any of the standard reasons for disqualifying judicial or quasi-judicial officers.”¹⁴³ Those “standard reasons” are sanctionable conflicts of interest, which only arise in limited situations in which the prosecutor has a direct personal interest in the proceeding.¹⁴⁴

138. Stuart P. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488, 493 (1988).

139. *E.g.*, TENN. CONST. art. 6, § 5; ALA. CODE § 12-17-186 (2006); COLO. REV. STAT. § 16-5-209 (2006); MICH. COMP. LAWS § 767.41 (2006); NEB. REV. STAT. § 29-1606 (2006); N.D. CENT. CODE § 11-16-06 (2006); 16 PA. CONS. STAT. § 1409 (2006); WIS. STAT. § 968.26 (2006); *see also* MINN. STAT. § 388.12 (2006) (allowing a district court judge to appoint an attorney to assist or serve in place of the county attorney). In *State ex rel. Wild v. Otis*, 257 N.W.2d 361 (Minn. 1977), the Minnesota Supreme Court suggested that, under the relevant statute, “[a]rguably, a private citizen could petition the district court for action . . . and the court could appoint a special prosecutor if it decided that this was necessary.” *Id.* at 365. The court, however, noted the possible constitutional infirmity of such a use. *Id.*

140. *See* Comment, *Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction*, 65 YALE L.J. 209, 215 (1955) (“Following a showing by a private citizen that the public prosecutor has abused his discretion through inaction or improper action, the court would have the power to appoint a privately hired attorney to act as the public prosecutor for a single action.”).

141. W. VA. CODE § 7-7-8 (2006).

142. *State ex rel. Preissler v. Dostert*, 260 S.E.2d 279, 287 (W. Va. 1979).

143. *State ex rel. Brown v. Merrifield*, 389 S.E.2d 484, 487 (W. Va. 1990).

144. *See supra* notes 125–26 and accompanying text.

Indeed, the statutory authority for courts to remove prosecutors and appoint special prosecutors may need to be “narrowly drawn” to avoid violating the constitutional doctrine of separation of powers. Specifically, a broad interpretation of these statutes would enable trial courts to appoint special prosecutors over the objections of prosecuting attorneys, stripping the executive branch of its power to prosecute and transferring that power to the judiciary.¹⁴⁵ Thus, not surprisingly, the doctrine of separation of powers has invalidated private challenge statutes in at least one state¹⁴⁶ and formed the basis of criticisms of the jurisdictions that continue to allow victims to petition trial courts for private prosecutors.¹⁴⁷

Even if a broad interpretation of the judiciary’s authority to remove prosecuting attorneys and appoint special prosecutors passed constitutional muster, the scheme would still fail to check prosecutorial misconduct because it would vest the power of prosecutorial regulation in a branch of government that historically has been reluctant to police prosecuting attorneys directly,¹⁴⁸ even for contempt of court.¹⁴⁹ Thus, resting such power on the shoulders of the judiciary would be an ineffective means of combating prosecutorial misconduct, both because such authority violates the separation of powers doctrine and because courts routinely fail to exercise their existing powers to rein in errant prosecutors.

C. *Executive Superseder*

Executive superseder power, either by a governor or an attorney general, provides the third means by which to remove a local prosecuting attorney from a case and appoint a special prosecutor. Some jurisdictions vest this power directly with attorneys general as part of the duties of their office, either because they share concurrent

145. See *United States v. Shaw*, 226 A.2d 366, 368 (D.C. 1967) (“The trial court should remember that the District Attorney’s office is not a branch of the court, subject to the court’s supervision. It is a part of the executive department, separate and apart from the judicial department.”).

146. *In re Padget*, 678 P.2d 870, 873–74 (Wyo. 1984).

147. *Green*, *supra* note 138, at 504. In lieu of “[p]rivate challenge statutes that allow courts to order a prosecutor to proceed or to appoint a special prosecutor to take his place,” which he rejects as “constitutionally unsound,” *id.* at 498, *Green* advocates for the courts to issue declaratory judgments that a prosecutor has abused his discretion not to prosecute, creating “public pressure” on the prosecutor and giving the plaintiff “political leverage,” *id.* at 489.

148. *Gershman*, *supra* note 14, at 409; *Steele*, *supra* note 61, at 981.

149. *GERSHMAN*, *supra* note 22, § 14:9.

authority to prosecute crimes with district attorneys¹⁵⁰ or because they possess supervisory powers over local prosecutors.¹⁵¹ For example, in setting forth the duties of the office of attorney general, section 12550 of California's Government Code states:

When [the attorney general] deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may . . . take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney¹⁵²

This provision has been interpreted as bestowing broad and unilateral powers of superseder on the attorney general when required by the public interest.¹⁵³

Even in some states in which their duties do not include the power to intervene in a local matter on their own initiative, attorneys general still may, on request by the governor, remove a local prosecutor from a case and appoint a special prosecutor.¹⁵⁴ New York has such a mechanism for appointing special prosecutors; section 63(2) of the state's Executive Law grants the governor sweeping authority to direct the attorney general to "attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement."¹⁵⁵

New York's system for appointing special prosecutors occasionally has led to litigation, with most challenges dealing with notice and reasonableness of superseder orders.¹⁵⁶ Relying on the state's constitutional mandate that the governor "shall take care that

150. *E.g.*, CAL. GOV'T CODE § 12550 (2006).

151. *E.g.*, WASH. REV. CODE § 43.10.090 (2006).

152. CAL. GOV'T CODE § 12550.

153. Attorney General May Supersede District Attorneys in Justices' Courts Prosecutions as Well as Those in Superior Courts, 46 Op. Att'y Gen. Cal. 385 (1947).

154. *E.g.*, COLO. REV. STAT. § 24-31-101(1)(a) (2006); N.Y. EXEC. LAW § 63(2) (McKinney 2006).

155. N.Y. EXEC. LAW § 63(2).

156. *See, e.g.*, Johnson v. Pataki, 691 N.E.2d 1002, 1003 (N.Y. 1997) (supersession in a potential death penalty case); Mulroy v. Carey, 396 N.Y.S.2d 929, 929-30 (N.Y. App. Div. 1977), *aff'd*, 373 N.E.2d 369, 369 (N.Y. 1977) (supersession in an investigation involving allegations of corruption among public officials).

the laws are faithfully executed,”¹⁵⁷ the New York courts, however, have repeatedly upheld the validity of the governor’s power of superseder under Executive Law section 63(2).¹⁵⁸ Indeed, the courts have found that this provision, together with article IV, section 3 of the New York Constitution, provides the governor with unlimited authority to supersede a local prosecuting attorney in any matter.¹⁵⁹ Even with this broad grant of power, New York governors have historically been reluctant to exercise the power of superseder, stating that the office should only supersede the local prosecuting attorney in “extraordinary emergencies” and “unusual circumstances or conditions.”¹⁶⁰ Professor Robert Pitler notes, “The power of superseder has been used rarely, and such is its design.”¹⁶¹

Despite their reluctance to exercise the power of superseder and its correspondingly rare use, governors have not entirely disregarded and neglected the mechanism. Between 1907 and 1973, New York governors employed the power of superseder in at least seventy-nine cases.¹⁶² Governor Hugh Carey ordered the supersession of a district attorney on five occasions during his two terms as governor,¹⁶³ and Governor Mario Cuomo exercised the power of superseder sixteen times between 1983 and 1994.¹⁶⁴ Governor George Pataki used the power sparingly, ordering the attorney general to supersede a local prosecuting attorney just four times during his tenure as governor from 1995 to 2006 and exercising the power last in 1996.¹⁶⁵

When they have exercised the power of superseder, New York governors have not limited its use to traditional cases of disqualification, such as when the local prosecuting attorney possesses

157. N.Y. CONST. art. IV, § 3.

158. *Johnson*, 691 N.E.2d at 1005.

159. *Id.* at 1006. The Johnson court noted, “No such limitation appears in the Constitution or statutes, and none has been found in prior case dealing with these very issues.” *Id.*

160. *See, e.g.*, 1894 PUBLIC PAPERS OF GOVERNOR FLOWER 66–67.

161. Robert M. Pitler, *Superseding the District Attorneys in New York City—The Constitutionality and Legality of Executive Order No. 55*, 41 FORDHAM L. REV. 517, 522 (1973).

162. Lawrence T. Kurlander & Valerie Friedlander, *Perilous Executive Power—Perspective on Special Prosecutors in New York*, 16 HOFSTRA L. REV. 35, 49 n.103 (1987).

163. N.Y. COMP. CODES R. & REGS. tit. 9A, §§ 3.14, 3.31, 3.42, 3.50, 3.78 (2006).

164. *Id.* §§ 4.83, 4.89, 4.106, 4.110, 4.115, 4.122, 4.124, 4.128, 4.138, 4.144, 4.165, 4.174, 4.175, 4.180, 4.183, 4.184. Neither Governor Carey nor Governor Cuomo’s tallies include any appointments made pursuant to §§ 1.55–.59, in which Governor Rockefeller ordered the Attorney General to investigate and prosecute public corruption in New York City beginning in 1972. After eighteen years, Governor Cuomo terminated those orders in 1990. *Id.* § 4.139.

165. *Id.* §§ 5.6, 5.9, 5.27, 5.42.

a direct personal interest. Rather, they have employed the power in a variety of situations that threatened the public trust, including cases involving police corruption,¹⁶⁶ racial tension,¹⁶⁷ and the death penalty.¹⁶⁸ Because of their unlimited authority to supersede, New York governors also have the power to remove a local prosecuting attorney and appoint a special prosecutor upon allegations of prosecutorial misconduct.¹⁶⁹ Indeed, believing that the boundless power and discretion afforded to prosecuting attorneys was at odds with American ideals of officials with limited powers,¹⁷⁰ Governor Hugh Carey viewed the power of superseder as a means of checking errant prosecutors.¹⁷¹ In a speech to the New York Bar Association, Governor Carey remarked, “A Chief Executive is inevitably tempted to abdicate any responsibility for law enforcement and to leave to the people, the prosecutors, and the courts the thankless chore. I will not do so. A constitutional form of government is at stake.”¹⁷²

Because the district attorney “is a state executive officer performing a state function and is therefore subject to the exercise of the governor’s executive power,”¹⁷³ New York’s method of removing prosecuting attorneys and appointing special prosecutors does not possess the same constitutional infirmities as a model that affords the judicial branch the same power.¹⁷⁴ Likewise, it vests an independent party (i.e., the governor and/or attorney general) with an oversight function, thus avoiding the inevitable conflicts of interest that arise when local prosecuting attorneys have the sole authority to remove themselves and ask for special prosecutors in certain cases.¹⁷⁵ The executive power of superseder, however, is not without its share of

166. *Id.* §§ 1.55–59.

167. *Id.* § 4.89. For a detailed summary of the “Howard Beach incident,” in which surviving victims of a racial attack refused to cooperate in an investigation due to mistrust of the police and local district attorney, a stalemate that eventually required the governor to appoint a special prosecutor to handle the investigation, see Kurlander & Friedlander, *supra* note 162, at 56–58.

168. N.Y. COMP. CODES R. & REGS. tit. 9A, § 5.27.

169. See Maurice H. Nadjari, *New York State’s Office of the Special Prosecutor: A Creation Born of Necessity*, 2 HOFSTRA L. REV. 97, 116 (1974) (“The Attorney General could also undertake investigation and prosecution of misconduct by a district attorney, if the Governor issues an Executive Order superseding the district attorney’s local prosecutorial power.”).

170. Carey, *supra* note 18, at 317–18.

171. *Id.* at 323.

172. *Id.* at 318.

173. Pitler, *supra* note 161, at 545.

174. See *supra* notes 145–47 and accompanying text.

175. See *supra* notes 129–34 and accompanying text.

concerns. Part III will address those concerns as part of a comprehensive legislative proposal that calls for states to adopt an executive power of superseder.

III. A PROPOSED METHOD OF APPOINTING SPECIAL PROSECUTORS

The unlimited power of local prosecutors and the lack of effective and timely remedies for prosecutorial misconduct demand a means of oversight through which independent executive officers may employ a power of superseder in certain criminal proceedings to remove a local prosecutor and appoint a special prosecutor. Yet officials with this power rarely have exercised it, even in states in which the power enjoys expansive scope and potential application.¹⁷⁶ Furthermore, some jurisdictions have tied the hands of state officials so they cannot employ the superseder power at all.¹⁷⁷ The infrequent use of this form of prosecutorial oversight is unfortunate, and legislatures and executive officers should reconsider this policy of deference to local prosecuting attorneys. This Part argues that state legislatures should establish an executive superseder power and provides a framework through which this mechanism can serve an important prosecutorial oversight function while also minimizing the problems that arise when “unfettered discretion”¹⁷⁸ shifts from one public official to another.

Legislatures should implement an executive power of superseder because such power directly targets the institutional conditions that contribute to prosecutorial abuse of power and misconduct. First, it provides a form of prosecutorial oversight that, unlike appellate reversals or professional discipline,¹⁷⁹ addresses *both* the wronged defendant and the errant prosecutor. By placing a case in the hands of a special prosecutor, the mechanism provides the defendant a fair process, affording the defendant an impartial prosecutor who is unassociated with any of the events surrounding the case.¹⁸⁰ At the same time, removal from a case also may serve as a public reprimand of the offending prosecutor: in contrast to appellate reversals that

176. See *supra* notes 160–61 and accompanying text.

177. See *supra* notes 116–34 and accompanying text.

178. *Johnson v. Pataki*, 691 N.E.2d 1002, 1016 (N.Y. 1997) (Smith, J., dissenting).

179. See *supra* notes 72–73 and accompanying text.

180. Taylor, *supra* note 109, at 224.

often shield prosecutors from shame by omitting their names from opinions,¹⁸¹ the names of prosecutors removed from cases by independent parties are public knowledge. Moreover, the appointment of special prosecutors also introduces transparency in the prosecutorial process. Specifically, special prosecutors who have access to the files of the original prosecuting attorneys may unearth prior misconduct or improper actions that would have remained hidden without review by an independent party.

The scope of the executive power of superseder must be broad and extend beyond cases in which the prosecutor has a direct personal interest in the litigation.¹⁸² Supersession statutes should provide that the governor or attorney general's office must employ the superseder power to remove a local prosecutor when the prosecutor faces "a difficult case beyond his investigative and legal abilities."¹⁸³ Additionally, such statutes should grant the executive branch the power to appoint special prosecutors in cases involving allegations of prosecutorial misconduct¹⁸⁴ or police abuse.¹⁸⁵ The statutory authority of the governor or attorney general's office to appoint a special prosecutor also should extend to second trials of cases in which misconduct by the prosecuting attorney resulted in a mistrial of the first trial¹⁸⁶ and situations involving DNA exoneration.¹⁸⁷

181. See Armstrong & Possley, *supra* note 20 ("In their written opinions, appeals courts rarely name prosecutors, even those found to have acted abominably.").

182. See *supra* note 126 and accompanying text.

183. Taylor, *supra* note 109, at 221.

184. Carey, *supra* note 18, at 323.

185. FREEDMAN, *supra* note 15, at 93.

186. In *Oregon v. Kennedy*, 456 U.S. 667 (1982), the Supreme Court stated that the bar of double jeopardy under the United States Constitution only attached in situations in which a prosecutor's misconduct was intended to "goad" the defendant into moving for a mistrial in the first trial. *Id.* at 676. Thus, Professor Gershman notes:

[A] prosecutor with a weak or damaged case is encouraged to commit prejudicial conduct. If he gets away with it, he has a better chance of winning. If the defendant objects, and succeeds in obtaining a mistrial, the prosecutor will be able to retry the defendant with a better-prepared case

Gershman, *supra* note 14, at 440. The appointment of a special prosecutor in these cases could limit this abuse.

187. Alan Hirsch, *The Tragedy of False Confessions (And a Common Sense Proposal)*, 81 N.D. L. REV. 343, 348–50 (2005) (reviewing MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON JR. (2003)). Specifically, "[w]hen a credible case of DNA exoneration is made, responsibility for the defendant should automatically be transferred to a different office from that which prosecuted him." *Id.* at 349.

An oversight mechanism, however, that transfers the boundless power of one public official to another raises its own set of concerns—specifically, the potential for abuse, especially in politically controversial situations. New York Governor George Pataki's removal of Bronx County District Attorney Robert Johnson from a potential death penalty case involving a slain police officer in 1996 provides one such example.¹⁸⁸ Almost exactly one year after he succeeded in reinstating New York's death penalty after eighteen years,¹⁸⁹ Governor Pataki unilaterally decided to remove Johnson from the case, stating:

The murder of a police officer is a stain on society. The individual who commits such a crime, and who was proven in a court of law beyond a reasonable doubt to have perpetrated this crime, should face a jury of twelve men and women to determine whether the death penalty is appropriate. A prosecutor who refuses to consider that course must be superseded.¹⁹⁰

Although the New York Court of Appeals validated Governor Pataki's actions under Executive Law section 63(2) in *Johnson v. Pataki*,¹⁹¹ Judge Smith's dissent voiced concern over the power of superseder in death penalty cases, noting that “[w]hatever evils may flow from the exercise of unfettered discretion in the decision-making process, they are not addressed or remedied by the self-appointed transfer of discretion from one individual to another.”¹⁹² In addition, governors may improperly use the power “to immunize political friends and even to prevent scrutiny of corruption in a governor's own administration.”¹⁹³ Political pressures may also lead governors

188. See N.Y. COMP. CODES R. & REGS. tit. 9A, § 5.27 (2006) (executive order requiring Attorney General Dennis Vacco to supersede District Attorney Robert Johnson).

189. James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1.

190. Press Release, Office of the Governor, Governor Pataki Signs Executive Order to Supersede Bronx District Attorney Johnson (Mar. 21, 1996) (on file with the *Duke Law Journal*). Ironically, Governor Pataki noted Johnson's political philosophy against the death penalty improperly influenced Johnson's exercise of prosecutorial discretion, and thus was a reason for supersession. *Id.* (“The law states that we have a death penalty. District Attorney Johnson refuses to enforce this law. I have no choice but to replace District Attorney Johnson with someone . . . who will not allow political philosophy to control his professional responsibility and judgment . . .”).

191. *Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997).

192. *Id.* at 1016 (Smith, J., dissenting).

193. Pitler, *supra* note 161, at 547.

not to use the power of superseder, such as when its use may offend influential constituencies or threaten political allies.

Because of the potential for such abuse, a system that enables a governor or attorney general to supersede a local prosecuting attorney must include guidelines articulating when such power may be exercised,¹⁹⁴ as well as a means of reviewing its use.¹⁹⁵ Specifically, the governor or attorney general's office must implement a means by which defendants, local public officials, and even members of the general public may make requests for special prosecutors as well as a framework to review these requests in a uniform manner. New York Governor Mario Cuomo initiated such a process, creating a committee that, when called upon by the governor, was to "consider and evaluate individual requests for the appointment of a special prosecutor"; "obtain the response of the local district attorney"; "report to the Governor the nature of the request and the response of the local district attorney"; and "recommend to the Governor whether additional action pursuant to section 63 of the Executive Law should be taken."¹⁹⁶

The governor or attorney general's office should also create a separate grievance committee to examine cases of alleged prosecutorial misconduct.¹⁹⁷ This committee would make recommendations to the governor or attorney general for the appointment of special prosecutors upon a finding of prosecutorial impropriety. It would also require that the governor or attorney general report any violation of the Model Rules of Professional Conduct to the state bar grievance board, thus serving as a powerful deterrent for errant prosecutorial conduct. To provide transparency for the superseder process, the recommendations of both committees

194. See Taylor, *supra* note 109, at 224 (discussing "the need to formulate procedures to deal with the substitution of prosecutors in a more uniform and effective way").

195. See Kurlander & Friedlander, *supra* note 162, at 62 ("[A] regular procedure and consistent standard for review of special prosecutor requests will serve to highlight the extraordinary nature of the power and to add a level of review assistance to the Governor's exercise of the appointment power.").

196. N.Y. COMP. CODES R. & REGS. tit. 9A, § 4.109 (1995).

197. Such a committee could be modeled loosely after Texas' short-lived Prosecutor Council. TEX. REV. CIV. STAT. ANN. art. 332d (Vernon 1977) (repealed 1985); see also Steele, *supra* note 61, at 982-88 (proposing an independent commission to handle allegations of prosecutorial misconduct); Yaroshefsky, *supra* note 75, at 297-98 (same). Unlike the Prosecutor Council of Texas or other proposed independent prosecutorial commissions, however, the committee's mission would be limited to advising the executive in the appointment of special prosecutors, not disciplining errant prosecutors.

should be made available to the public in an annual report issued by the governor or attorney general's office.

In addition to the executive branch's internal safeguards, the judiciary must take an active role in reviewing the executive's use of the superseder power. Review by the courts would enable prosecutors to challenge removal from a case. It also would protect communities from unwarranted usurpation of the duties of locally elected public officials by governors or attorneys general. In his analysis of New York's power of superseder, Professor Pitler argues for such a review, noting that "some narrow standard of review would not interfere too greatly with the executive power, and yet could protect the public from arbitrary and capricious executive action."¹⁹⁸ Indeed, although they have bestowed seemingly limitless superseder power on the governor, the New York courts have "reserved the possibility that in some undefined circumstance, the courts could invalidate this executive action."¹⁹⁹ With its broad superseder mandate, New York Executive Law section 63(2) does not define the circumstances in which a governor may act beyond the scope of the superseder authority. As such, to assist judicial review of the process, state legislatures must clearly delineate the scope of the power of superseder and the instances in which governors or attorneys general may use such power in the supersession statutes.

An additional safeguard against potential abuse by the executive branch may be to vest the power of executive superseder with attorneys general instead of governors.²⁰⁰ Although popularly elected

198. Pitler, *supra* note 161, at 547.

199. *Johnson v. Pataki*, 691 N.E.2d 1002, 1005 (N.Y. 1997) (citing *Mulroy v. Carey*, 373 N.E.2d 369, 369 (N.Y. 1977)). The court in *Johnson v. Pataki* declined to define the standard by which to review the executive superseder power, questioning whether "one [was] applicable at all." *Id.* at 1007. In his dissent, Judge Smith argued for a "rational basis" standard of review. *Id.* at 1014 (Smith, J., dissenting).

200. Vesting the power of superseder with attorneys general raises constitutional concerns in some jurisdictions. Specifically, a number of state constitutions expressly grant district attorneys the exclusive authority to prosecute crimes in their districts. *E.g.*, N.C. CONST. art. IV, § 18. In these jurisdictions, a statute that grants the power of superseder to the governor would not be unconstitutional because of the governor's constitutional duty to "take care that the laws be faithfully executed." *Id.* art. III, § 5, cl. 1. A jurisdiction that vested such superseder power with the attorney general, absent an amendment to the state constitution, might be, however.

to office²⁰¹ and driven by their own political aspirations,²⁰² attorneys general still enjoy a lower public profile than their gubernatorial counterparts. Furthermore, as lawyers, they may possess greater knowledge of the legal system and thus may take a more informed approach in exercising the power of superseder.

Even with established standards and procedures for appointing special prosecutors and judicial review of such appointments, the executive superseder power may still possess some limitations. For one, a mechanism that allows for the removal of prosecuting attorneys and the appointment of special prosecutors may invite abuse by defense attorneys eager to undermine the authority of the local prosecutor.²⁰³ Such abuse, if rampant, could potentially cripple the power of local prosecuting attorneys: preoccupied with fear of offending influential defense attorneys, prosecutors might temper their duty to prosecute in certain situations.²⁰⁴ It also could drain the resources of the state's highest executive offices by overwhelming the system with frivolous requests for special prosecutors. Given the natural reluctance of governors and attorneys general to remove prosecutors from cases,²⁰⁵ however, this concern is likely insignificant and almost certainly outweighed by the benefits of an independent oversight mechanism. Furthermore, any potential misuse of the system by parties with improper motives may be deterred by assessing costs for reviewing such complaints or even levying fines against aggressive defense attorneys.²⁰⁶

201. Attorneys general are popularly elected in all but seven states. Nat'l Ass'n of Attorneys Gen., *How Does One Become an Attorney General?*, http://www.naag.org/how_does_one_become_an_attorney_general.php (last visited Sept. 27, 2007).

202. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2246, 2253 (2006) (noting "the political reality that the Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor's office").

203. See WOLFRAM, *supra* note 63, § 13.10.2 (discussing how complaints to disciplinary agencies "may be motivated by a desire to compromise the political power of the prosecutor's office"); Zacharias, *supra* note 68, at 758 (noting the potential for defense attorneys to make allegations of prosecutorial misconduct to "manipulate bar proceedings for tactical purposes").

204. The Supreme Court expressed the same fears with respect to civil liability in *Imbler v. Pachtman*, 424 U.S. 409 (1976), noting that exposing prosecutors to civil 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.

205. See *supra* notes 160–61 and accompanying text.

206. Private challenge statutes, such as those discussed in Part II.B, face similar abuse. To thwart unfounded actions by individuals eager to reap financial rewards in subsequent civil actions, one recommended victims' private challenge proposal has advocated assessment of such

Finally, the appointment of special prosecutors as a means of checking prosecutorial power and combating misconduct may prove only to be a Band-Aid remedy for a broken institution that, as some commentators have noted, begs for a drastic overhaul.²⁰⁷ Indeed, limited resources on the part of the governors and attorneys general²⁰⁸ as well as public defenders and court-appointed defense attorneys may restrict the use of superseder to only the most egregious instances of prosecutorial misconduct and community distrust. These cases, however, are the ones most likely to grace front pages of newspapers and taint the general public's perception of the prosecutorial process. As such, an independent check on local prosecutors in these cases will help repair public confidence in the legal system. Moreover, the specter of superseder may force prosecutors to account for their conduct in all cases—including the less visible ones—lest a special prosecutor ever review a case file and, upon discovering misconduct, report such improprieties to the appropriate officials.²⁰⁹

CONCLUSION

On April 11, 2007, nearly three months after his office received Michael Nifong's request and assumed control of the case, North Carolina Attorney General Roy Cooper dismissed all charges in the Duke Lacrosse case, declared the three indicted players innocent, and called the incident "the tragic result of a rush to accuse."²¹⁰ Two months later, the North Carolina State Bar disbarred Nifong, finding that his conduct during the case constituted prosecutorial dishonesty

costs to the victim's private prosecutor to discourage malicious prosecutions. Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, *supra* note 140, at 233.

207. See Jonakait, *supra* note 42, at 565 (advocating "systemic reform").

208. See Taylor, *supra* note 109, at 224 (discussing the costs of both retaining private attorneys to serve as special prosecutors and increasing the size of the attorney general's office to accommodate a larger special prosecutions division).

209. The Model Rules of Professional Conduct require that attorneys report misconduct on the part of their peers: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2003).

210. Attorney Gen. Roy Cooper, Comments by Attorney General Roy Cooper: State v. Finnerty, Evans, Seligmann 1 (Apr. 11, 2007), <http://www.ncdoj.com/DocumentStreamerClient?directory=PressReleases/&file=Dismissal%20Statement%20Press.pdf>.

and misconduct.²¹¹ In the aftermath of the tumultuous affair, Durham governmental leaders created a committee to review the handling of the case,²¹² and the North Carolina General Assembly considered a number of bills addressing criminal justice reform.²¹³ The tragedy of the case, though, is that an earlier intervention by the North Carolina Attorney General could have avoided the toll it took on the defendants' lives and the public's confidence in the criminal justice system. Indeed, Attorney General Cooper recognized the need for prosecutorial oversight in North Carolina when he dismissed charges in the Duke Lacrosse case, noting "the enormous consequences of overreaching by a prosecutor" and calling for a form of judicial superseder to remove errant prosecutors from cases.²¹⁴

As this Note has argued, however, that power should rest with the executive office, rather than with the judiciary. Prosecutors bear the burden of maintaining order and confidence in the criminal justice system, working to punish the guilty but also striving to protect the innocent. Many perform their duties with the utmost integrity. But the public, as well as prosecutors themselves, demand more of the system than internal controls and an individual's "own attitudes and beliefs on inner morality."²¹⁵ Enhanced use of special prosecutors, appointed by independent executive officials, provides a means of curbing errant prosecutors and restoring public confidence in the criminal justice system. This mechanism has largely been ignored by members of the state executive and legislative branches. State officials, however, should reconsider this option in limiting the power of local prosecutors. The integrity of the American legal system demands it.

211. Joseph Neff, Anne Blythe & Mandy Locke, *Nifong Stripped of Law License for Lacrosse Case Misconduct*, NEWS & OBSERVER (Raleigh, N.C.), June 17, 2007, at A1.

212. Joseph Neff, *Lacrosse Probe Has Much Fodder*, NEWS & OBSERVER (Raleigh, N.C.), July 1, 2007, at B1.

213. Anne Blythe, *Bills Would Let DAs Sit on Some Records*, NEWS & OBSERVER (Raleigh, N.C.), May 4, 2007, at A1.

214. Attorney Gen. Roy Cooper, *supra* note 210, at 2.

215. Armstrong & Possley, *supra* note 20 (quoting Bennett Gershman, Professor of Law, Pace Univ.).