

Regulating Prosecutors' Courtroom Misconduct

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Trial prosecutors' visible misbehavior, such as improper questioning of witnesses and improper jury arguments, may not seem momentous. Sometimes, the improprieties are simply the product of poor training or overenthusiasm. In many cases, they pass unremarked. As the Chicago Eight trial illustrated, trial prosecutors' improprieties may also be overshadowed by the excesses of other trial participants—the witnesses, the defendants, the defense lawyers, or even the trial judge. And when noticed, prosecutors' trial misbehavior can ordinarily be remedied, and then restrained, by a capable trial judge. It is little wonder that disciplinary authorities, having bigger fish to fry, are virtually indifferent to the problem. And yet, in the obvious absence of disciplinary regulation, prosecutors and their offices have less motivation to play by the rules.

The challenge for disciplinary regulation is to find a proportional response to trial misconduct—one that does not punish prosecutors undeservedly, unnecessarily, or too harshly but that nevertheless serves regulatory ends. Building on the Supreme Court's observation that a prosecutor's repeated improprieties should be met with "stern rebukes," this Article proposes that prosecutorial improprieties that are deserving of judicial rebuke should not be forgotten. Rather, repositories—or rebuke banks—should be maintained to preserve transcripts of prosecutors' on-the-record misconduct, even when it is committed unintentionally. Maintaining these records, which would be relatively easy in the computer age, would serve salutary regulatory ends while maintaining the necessary sense of proportionality.

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INTRODUCTION

Decades of writings have addressed prosecutors' "[v]isible, forensic misconduct,"¹ such as their improper questioning of witnesses, introduction of inadmissible evidence, and improper arguments to the jury.² It is unsurprising that so much attention has been drawn to prosecutors' efforts to put improper considerations before the jury and to comparable courtroom excesses, since this misconduct is recorded in trial transcripts and often challenged on appeal, generating published appellate opinions.³ No doubt, the problem is perennial and unceasing⁴—indeed, it appears to be the most commonly reported species of prosecutorial misconduct.⁵ But it is not necessarily the most serious

1. Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 563 (1987).

2. See, e.g., H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51 (2013); Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887 (2018); Robert W. Clifford, *Identifying and Preventing Improper Prosecutorial Comment in Closing Argument*, 51 ME. L. REV. 241 (1999); James W. Gunson, *Prosecutorial Summation: Where Is the Line Between "Personal Opinion" and Proper Argument?*, 46 ME. L. REV. 241, 246 (1994); Frederick J. Ludwig, *The Role of the Prosecutor in a Fair Trial*, 41 MINN. L. REV. 602, 613–15 (1957); Richard G. Singer, *Forensic Misconduct by Federal Prosecutors—and How It Grew*, 20 ALA. L. REV. 227 (1968); Henry Blaine Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22 (1973); J. Lyndal Hagemeyer, Note, *Statements by Prosecuting Attorneys to Juries Which Demand Improper Considerations for Verdict or Punishment*, 39 VA. L. REV. 85 (1953); Praatika Prasad, Note, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091 (2018).

3. For a discussion of trial prosecutors' improprieties, together with extensive citations to appellate case law, see BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT chs. 10–11 (2d ed. 2018–2019), and JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT: LAW, PROCEDURE, FORMS chs. 9–10 (4th ed. 2018).

4. See *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting) ("This court has several times used vigorous language in denouncing government counsel for such conduct as that of the United States Attorney here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable."); Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 115–17 (1999) (noting "the abuse and disregard of forensic propriety which threatens to become staple in American prosecutions" (quoting ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 187 (1930))).

5. See KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 (2010); Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Conduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U.

problem of prosecutorial misconduct. Relatively few criminal cases go to trial nowadays. When prosecutors engage in visible forensic misconduct, it is often a result of prosecutors' negligence, overexuberance, or inadequate training,⁶ not a calculated decision to violate procedural norms governing courtroom behavior.⁷ And it is assumed that this misconduct is not ordinarily prejudicial, because capable trial judges can ordinarily reduce or avert its impact by sustaining an objection and issuing a curative instruction.⁸ One might be forgiven for thinking that other aspects of prosecutorial misconduct are more serious and therefore worthy of study and reform.⁹

Nevertheless, this Article argues that courts should take prosecutors' courtroom misconduct more seriously. While many relevant writings focus on how courts remedy prosecutorial misconduct,¹⁰ this Article joins

ILL. L. REV. 1455.

6. See, e.g., *Bell v. State*, 723 So. 2d 896, 897 (Fla. Dist. Ct. App. 1998) (Altenbernd, J., concurring) (observing that “[t]here are about a dozen bad tactics that this court sees with regularity in closing arguments” and suggesting that continuing legal education videotapes be made for prosecutors and criminal defense lawyers demonstrating improper arguments), quoted in Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 OHIO N.U. L. REV. 67, 131 (2001). The vagueness of the relevant standards, in some cases, may also contribute to the prosecutor's transgression. See Hagemeyer, *supra* note 2, at 97.

7. See Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 141 (1988) (noting that, particularly in rebuttal arguments, prosecutors may make improper statements because of the lack of time for deliberation in selecting one's wording). *But see* Spiegelman, *supra* note 4 (discussing cases of intentional and recurring prosecutorial wrongdoing).

8. See Green, *supra* note 7, at 139–40 (noting “that most prosecutorial errors in summation, viewed individually, are not serious enough to affect the outcome of a trial”).

9. Contemporary writings on prosecutors' work do increasingly focus on prosecutors' “serious misconduct.” See, e.g., Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881 (2015). These include writings on various conduct that is invisible and less easily detectable, such as prosecutors' failure to disclose evidence and information. In particular, contemporary writings on prosecutors' conduct have increasingly focused on prosecutors' compliance with their disclosure obligations. See, e.g., Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1 (2015); R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429 (2011); Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639 (2013); Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559 (2013); Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010). These also include writings on prosecutorial conduct that affects a broader array of cases, such as prosecutors' abuse of discretion in charging, plea bargaining, and sentencing. See, e.g., Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015).

10. See, e.g., Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309 (2015).

those emphasizing courts' disciplinary role.¹¹ It acknowledges that courts should respond with varying levels of severity to lawyers' trial misconduct, including that of prosecutors, and that improper questions and arguments are ordinarily minor infractions. As the Chicago Eight trial, discussed in Part I, well illustrates, trial judges deserve criticism when they overreact, as well as when they fail to react, to trial participants' perceived misconduct. Although trial and appellate courts have a regulatory responsibility, described in Part II, to set standards of proper trial conduct and to protect defendants from being prejudiced by prosecutors' misbehavior at trial, courts' sense of proportionality counsels against punishing prosecutors whose small transgressions are isolated occurrences.

But overlooking prosecutorial misconduct is not necessarily the best regulatory strategy. This Article argues in Part III that if judges do not adequately police minor prosecutorial misconduct when it occurs in plain view, prosecutors may not only continue minor transgressions but also treat more serious rules more cavalierly. This Article urges courts to play a more robust regulatory rule. The challenge is to identify a response that strikes the right balance between proportionality and deterrence.

This Article proposes in Part IV that courts or disciplinary authorities maintain "rebuke banks"—that is, repositories of trial transcripts reflecting prosecutorial misbehavior that earned or deserved a rebuke. These repositories will serve several regulatory functions, including (1) increasing the efficacy of judicial rebukes, (2) facilitating more serious discipline of prosecutors who repeatedly transgress, (3) facilitating discipline of supervisory personnel and prosecutors' offices when trial prosecutors' repeated transgressions are attributable to inadequate training and oversight, and (4) facilitating prosecutorial training. Ideally, more robust regulation of low-level prosecutorial misconduct will strengthen internal professional controls that keep more serious misconduct in check. And, incidentally, in their role as regulators, prosecutors may develop greater empathy for individuals who engage in low-level criminal wrongdoing.

I. A STARTING POINT: THE CHICAGO EIGHT TRIAL

The Chicago Eight trial (which became the Chicago Seven trial) may have been iconic,¹² but it was scarcely exemplary except in a negative

11. See, e.g., RIDOLFI & POSSLEY, *supra* note 5; David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011).

12. Martha Neil, *40 Years Later, 'Chicago 7' Trial Still an Iconic Event*, A.B.A. J. (Oct. 21, 2009, 10:00 AM), http://www.abajournal.com/news/article/40_years_later_chicago_7_trial_still

sense.¹³ Over the course of the five-month trial, all of the participants, including District Judge Hoffman, behaved badly. The trial has been held up to exemplify bad courtroom management.¹⁴ For the most part, that is because of the trial judge's hostility and repressive measures toward the defense.¹⁵ But a small part of the judge's mismanagement, and one that largely gets overlooked, was his failure to adequately regulate the prosecution.

The Chicago Eight defendants, antiwar activists with several different affiliations, were accused of conspiring to encourage rioting in connection with antiwar protests held in August 1968 to coincide with the Democratic Party's national convention in Chicago.¹⁶ The trial was closely watched and highly publicized. Observers on the left had good reason to assume that the trial, commencing in September 1969, was calculated by the Nixon administration to destroy the antiwar movement. The constitutionality of the Anti-Riot Act under which the defendants were charged was questionable,¹⁷ and the accusations seemed dubious, given that some of the defendants had publicly promoted nonviolence and that the police instigated most of the violence at the protests.

The defendants and defense lawyers were to varying degrees disrespectful and disruptive. District Judge Hoffman overreacted, demonstrating hostility toward the defense. At the outset, the judge refused to delay the trial so that defendant Bobby Seale's lawyer, who needed emergency surgery, could participate.¹⁸ Six weeks into the trial, having ordered Seale bound and gagged in response to his disruptions and insults, Judge Hoffman granted him a mistrial.¹⁹ Although moments of relative calm followed, and some defendants presented a conventional defense, defendants Abbie Hoffman and Jerry Rubin sought to turn the

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13. For accounts of the trial, see, for example, J. ANTHONY LUKAS, *THE BARNYARD EPITHET AND OTHER OBSCENITIES: NOTES ON THE CHICAGO CONSPIRACY TRIAL* (1970).

14. See, e.g., Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1337–38 (2000) (discussing how intrinsically unfair and inappropriate it was for Judge Hoffman to bind and gag Bobby Seale in the course of the trial); Michael P. Scharf, *Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials*, 39 CASE W. RES. J. INT'L L. 155, 159 (2007) (noting that the Chicago Seven trial is seen as a particularly low point in United States courtroom history).

15. See, e.g., Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 535 (2009) (noting that the reprehensibility of the Chicago Seven trial is mainly seen in the judge's hostility and actions toward the defense).

16. See *United States v. Dellinger*, 472 F.2d 340, 348–54 (7th Cir. 1972).

17. *Id.* at 409 (Pell, J., dissenting).

18. See *United States v. Seale*, 461 F.2d 345, 349–50 (7th Cir. 1972).

19. *Id.* at 350.

trial into political theater, and particularly toward the end, the trial erupted. In closing argument, the prosecutor unfairly alluded to the defendants' misbehavior and demeanor.²⁰ In the end, two defendants were acquitted on all counts; the other five were acquitted of the alleged conspiracy but convicted on substantive counts in what seemed to be a compromise verdict.²¹ Additionally, Judge Hoffman tried all eight defendants and two of the defense lawyers for criminal contempt, based on their insulting and disruptive trial conduct, and found all ten guilty.²²

The court of appeals overturned the five defendants' convictions on the substantive counts largely because of the trial judge's inappropriate reaction to perceived misconduct from the defense.²³ The appeals court was especially troubled by Judge Hoffman's "deprecatory and often antagonistic attitude toward the defense" as reflected in statements during the trial "implying . . . that defense counsel was inept, bumptious, or untrustworthy, or that his case lacked merit."²⁴ Many of Judge Hoffman's comments to the defense lawyers were gratuitous and sarcastic and occurred in the presence of the jury. Taken together, they "telegraphed to the jury the judge's contempt for the defense."²⁵ Additionally, the appellate court found, the prosecutor made arguments at or beyond "the outermost boundary of permissible inferences" and improperly referred to the defendants' "[d]ress, personal appearance, and conduct at trial [none of which were] probative of guilt."²⁶ The appellate court also set aside all ten contempt convictions and remanded the cases for trial by a new judge, finding that Judge Hoffman should never have conducted the contempt trials himself, because, as the target of the alleged contemnors' attacks, he could not be impartial.²⁷ On remand, a different judge tried the contempt cases, sustained only a handful of the charges, and imposed no punishment.²⁸

It is easy for the prosecutor's misconduct to be overlooked in this story. His improper jury arguments were isolated, momentary, possibly spontaneous, and certainly trivial compared to the extreme misbehavior of other participants, including the judge. In contrast to the defense lawyers who were tried for contempt of court, the prosecutor suffered only whatever embarrassment followed from a critical appellate opinion.

20. *In re Dellinger*, 472 F.2d at 390.

21. *Id.* at 348.

22. *Seale*, 461 F.2d 345; *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972).

23. *In re Dellinger*, 472 F.2d at 385-91.

24. *Id.* at 386-87.

25. *Id.* at 387.

26. *Id.* at 390.

27. *Seale*, 461 F.2d 345; *In re Dellinger*, 461 F.2d 389.

28. *In re Dellinger*, 370 F. Supp. 1304 (N.D. Ill. 1973), *aff'd*, 502 F.2d 813 (7th Cir. 1974).

One might wonder, however, whether the appellate court's measured response to the prosecutor's improper closing arguments adequately served the public interest in regulating prosecutors: Granted that much of what is sometimes termed "prosecutorial misconduct" is really just a minor departure from procedural norms, do prosecutorial infractions merit more than, at worst, a judicial rebuke?

II. COURTS' CONVENTIONAL ROLE IN REGULATING PROSECUTORS' TRIAL INFRACTIONS

A. Trial Courts' Role

The Supreme Court's 1935 opinion in *Berger v. United States*²⁹ defines trial courts' conventional role in regulating lawyers' trial misconduct. During cross examination and summation in *Berger*, the prosecutor bullied witnesses and mischaracterized their testimony, implied that he possessed extrajudicial knowledge and assumed facts not in evidence, and generally "conduct[ed] himself in a thoroughly indecorous and improper manner."³⁰ The Court's opinion overturning the conviction is best remembered for its observations about the prosecutor's role,³¹ but the opinion also spoke to the role of the trial judge in regulating prosecutors who misbehave. Although the district judge in *Berger* sustained some of the defense lawyer's objections and instructed the jury to disregard some of the prosecutor's improper questions and comments, this response, said the Court, was too mild. At the very least, the district judge should have met the prosecutor's misconduct with "stern rebuke and repressive measures."³² And if that did not work, a mistrial might

29. 295 U.S. 78 (1935).

30. *Id.* at 84.

31. The Court reminded prosecutors that they are "the servant of the law" whose interest in seeing "that justice shall be done" gives them a responsibility to "govern impartially," to avoid "strik[ing] foul [blows]," and to "refrain from improper methods calculated to produce a wrongful conviction." *Id.* at 88. *See also id.* ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). On the importance of the Court's statement, see Bennett L. Gershman, "Hard Strikes and Foul Blows:" *Berger v. United States 75 Years After*, 42 LOY. U. CHI. L.J. 177, 201-05 (2010).

32. *Berger*, 295 U.S. at 85. The Court observed:

We reproduce in the margin a few excerpts from the record illustrating some of the various points of the foregoing summary. It is impossible, however, without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct. The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence

have been necessary.³³

The role of the trial judge envisioned by *Berger* differs from the passive, detached, or “umpireal” role often associated with appellate judges.³⁴ Of necessity, trial judges are expected to take an active, engaged role in trials, especially criminal trials, to ensure fair process.³⁵ Among other things, this means interceding to remedy and prevent prosecutorial misconduct. Of course, trial judges must restrain misconduct not just by prosecutors but by all trial lawyers, all of whom are governed by judicial decisions and professional conduct rules regulating witness examinations and jury arguments.³⁶ Prosecutors are scarcely the only ones who sometimes engage in on-the-record courtroom improprieties such as those on display in *Berger*. Other trial lawyers also cross the line,³⁷ as the Chicago Eight trial illustrated. Indeed, one can safely assume that criminal defense lawyers are far more likely to get away with improprieties, if only because acquittals procured through courtroom misconduct are exempt from appellate review.³⁸ But trial judges have reason to be particularly vigilant in overseeing prosecutors, given their constitutional commitment to providing fair trials to those accused of crime.

Trial judges have a responsibility to respond to prosecutors’

upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.

Id. at 84–85.

33. *Id.* at 85.

34. See Bruce Green & Rebecca Roiphe, *Judicial Activism in Trial Courts*, 74 N.Y.U. ANN. SURV. AM. L. 365 (2019).

35. See *Berger*, 295 U.S. at 84–85; see also *Viereck v. United States*, 318 U.S. 236, 248 (1943).

36. See MODEL RULES OF PROF’L CONDUCT r. 3.4(e) (AM. BAR ASS’N 2015) (“A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . .”).

37. See, e.g., GLEASON L. ARCHER, *ETHICAL OBLIGATIONS OF THE LAWYER* 177–79 (1910) (addressing trial lawyers’ duties not to offer improper evidence and not to argue upon matters not in evidence); 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY* 772–73 (Resolution XLVII) (Baltimore, Joseph Neal, 2d ed. 1836) (resolving to rely only on “logical and just reasoning” and “such appeals to the sympathies of our common nature, as are worthy, legitimate, well timed, and in good taste”).

38. See *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (“Because only convicted defendants can appeal, this court in opinions tends to focus on prosecutorial misconduct. However, this court is aware from reading transcripts of trials that the problem [of improper closing arguments] is not limited to the prosecution.”). Accounts of nineteenth and early twentieth century criminal trials suggest that, in fact, testing and exceeding the limits of proper trial conduct was part of criminal defense lawyers’ art. See generally ALFRED COHN & JOE CHISHOLM, “TAKE THE WITNESS!” (1934); RICHARD H. ROVERE, *HOWE & HUMMEL: THEIR TRUE AND SCANDALOUS HISTORY* (1947); RICHARD H. UNDERWOOD, *GASLIGHT LAWYERS* (2017).

misconduct in two ways in order to protect the fairness of the trial. First, trial judges must remedy lawyers' misconduct, typically by sustaining objections and instructing jurors to disregard improper questions and arguments. There is a considerable body of judicial opinions about trial judges' curative instructions and whether they were sufficient to cure the prejudice caused by a prosecutor's attempt to influence jurors improperly.³⁹ In general, courts presume that jurors follow curative instructions. In extreme cases of prosecutorial misconduct, as *Berger* suggests, the remedy may be a mistrial.⁴⁰ But this is a rare response to prosecutorial misconduct.⁴¹

Additionally, as *Berger* also suggests, trial judges may aim to deter or prevent lawyers' further misconduct in the proceeding. In general, lawyers do not want to be on the wrong side of the judge and therefore, it will often be effective for a judge simply to tell the lawyer when particular conduct is out of bounds and should be discontinued. If more is needed, trial judges can communicate their displeasure either explicitly or in a manner that may not be fully reflected on the record, such as by an irate tone of voice or an angry stare. *Berger* advises that on top of a "stern rebuke," the trial judge can adopt "repressive measures."⁴² These might include issuing an order forbidding particular conduct and may even include a threat to hold the lawyer in contempt of court if the lawyer violates the order. However, contempt of court is an extreme response, rarely if ever invoked in cases of prosecutors' forensic misconduct.⁴³

As *Berger* illustrates, trial judges often under-regulate prosecutors' courtroom misconduct. In some cases, this is simply because trial judges do not recognize that prosecutors' conduct is improper. The judge may be inattentive or inexperienced regarding the applicable rules and law, or may credit prosecutors with knowing the bounds of propriety and staying within them. In other cases, trial judges fail to adequately police prosecutors because they do not acknowledge the extent of the

39. See, e.g., *United States v. Watson*, 171 F.3d 695, 701–02 (D.C. Cir. 1999) (finding that the prosecutor's misstatement of testimony was not sufficiently mitigated by standard instruction that closing arguments are not evidence); *id.* at 706 & n.4 (Garland, J., dissenting) (citing authority) (maintaining that under Supreme Court case law, the instructions sufficiently mitigated prejudice).

40. 295 U.S. at 84–85.

41. For an example of where the Court granted a mistrial because of the prosecutor's improper question on cross-examination, see *Oregon v. Kennedy*, 456 U.S. 667 (1982). For an unusual case where the prosecutor engaged in deliberate misconduct in closing argument in order to provoke a mistrial, see *State v. Yetman*, 516 S.W.3d 33 (Tex. App. 2016).

42. 295 U.S. at 84–85.

43. See Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 673–76 (1972). Professor Alschuler identified only one case where a prosecutor was held in contempt for an improper courtroom statement, but the sanction was reversed on appeal. *Id.* at 674 & n.167 (citing *Brutkiewicz v. State*, 191 So. 2d 222 (1966)).

prosecutor's impropriety or assume it to be inadvertent and aberrational. Judges may have an institutional interest in minimizing the likely impact of prosecutors' misbehavior to avoid the need for a retrial or, if a conviction occurs, a reversal of the conviction. In general, if trial judges pronounce prosecutorial misconduct to be insignificant, appellate courts will defer to that determination. And even when judges recognize that prosecutors engaged in misconduct that may be prejudicial, judges may be reluctant to rebuke prosecutors, whether because of sympathy for prosecutors (or lawyers generally) or, particularly where trial judges are not life tenured, out of fear of prosecutorial retaliation.⁴⁴

While some trial judges may adequately police their courtrooms by remedying prosecutorial misconduct and deterring further misconduct, this overlooks trial judges' disciplinary role. When prosecutors exceed the bounds of propriety in their questioning and arguing, trial judges conventionally focus on preserving a fair trial. It would be unusual for trial judges to refer prosecutors to the disciplinary authorities or to initiate either sanctions or contempt proceedings when prosecutors misbehave at trial. Trial judges have no obligation to report lawyers' minor transgressions to the disciplinary authority,⁴⁵ and it appears that trial judges are generally remiss in even reporting prosecutors' serious transgressions, which they are obligated to do.⁴⁶ In part, this is because judges perceive their workload to be heavy,⁴⁷ and resolving cases seems like a more important use of limited time than regulating lawyers. One may suspect that many judges have particular sympathy for prosecutors or may not want to antagonize the prosecutor's office by initiating a disciplinary inquiry against a prosecutor.

Even if conscientious trial judges seek to serve regulatory objectives, they may reasonably perceive that the objectives of the disciplinary system are adequately served through informal measures rather than by initiating a formal disciplinary inquiry. Trial judges may have confidence that their stern rebukes and other responses to misconduct in the course of a trial will educate prosecutors about proper conduct, encourage them to engage in further self-education, and motivate them to "play within the

44. For example, in states such as Missouri where lawyers can recuse the judge assigned to a case, prosecutors acting in concert may recuse a judge whom they believe to be excessively harsh, thereby precluding that judge from presiding over criminal cases.

45. See MODEL CODE OF JUDICIAL CONDUCT r. 2.15(B) (AM. BAR ASS'N 2014) ("A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority." (emphasis added)).

46. See RIDOLFI & POSSLEY, *supra* note 5.

47. See generally Bruce A. Green, *The Price of Judicial Economy in the US*, 7 ONATI SOCIO-LEGAL SERIES 790, 793–808 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035295.

lines” in future proceedings. If their confidence were well placed, trial judges might have no reason to do more, since professional discipline would seem to be unnecessarily harsh relative to the prosecutor’s minor transgression.

B. Appellate Courts' Role

Berger also reflects appellate courts’ conventional regulatory role, which is twofold—to overturn convictions that may be attributable to the prosecutor’s misconduct and to set standards of trial conduct for prosecutors in future cases. But appellate judges, like trial judges, do not conventionally serve a meaningful disciplinary function for two reasons.

First, appellate courts, in the context of reviewing convicted defendants’ appeals, provide a remedy when a prosecutor’s misconduct may have contributed to the defendant’s conviction. Appellate court decisions going back to the nineteenth century have overturned convictions where prosecutors brought improper considerations before the jury, such as by offering inadmissible evidence, asking questions without a good faith basis, referring to facts outside the record, or appealing to jurors’ sympathy or prejudice.⁴⁸

But reversals for prosecutors’ forensic misconduct are infrequent for several reasons. First, trial judges have broad discretion to decide whether and how to respond to courtroom transgressions, starting with the question of whether the lawyer’s courtroom conduct is improper.⁴⁹ Judges are given considerable leeway, in part, because the relevant facts are likely to vary, and the trial judge is best placed to ascertain them; because trial judges have many alternative ways to respond to misconduct; and because trial judges must make quick decisions with little opportunity for analysis and reflection. Moreover, appellate courts

48. *See, e.g.*, *Holder v. State*, 25 S.W. 279 (Ark. 1894) (overturning conviction based on prosecutor’s improper questions and remarks, where the trial judge’s rebuke was too mild to cure prejudice); *People v. Wells*, 34 P. 1078 (Cal. 1893) (reversing a conviction where a prosecutor repeatedly and knowingly asked objectionable questions to imply inadmissible or false information); *People v. Lee Chuck*, 20 P. 719 (Cal. 1889) (reversing a conviction where a prosecutor attempted to admit evidence by arguing its effect and using improper testimony); *State v. Williams*, 18 N.W. 682 (Iowa 1884) (reversing conviction where a prosecutor’s opening statement included detailed recitation of facts, many of which he failed to prove); *People v. Dane*, 26 N.W. 781 (Mich. 1886) (reversing conviction where a prosecutor asserted personal knowledge of defendant’s guilt); *Hardaway v. State*, 54 So. 833 (Miss. 1911) (reversing conviction where a prosecutor appealed to racial prejudice). *See also* ALEXANDER H. ROBBINS, A TREATISE ON AMERICAN ADVOCACY 125–31, 140–41 (2d ed. 1913) (addressing excesses and improprieties in prosecutors’ opening and closing statements).

49. *See* *United States v. Collins*, 920 F.2d 619, 628 (10th Cir. 1990) (discussing how trial courts must make immediate decisions when confronted by the offending conduct of an attorney in open court).

do not expect perfection.

Additionally, appellate courts rarely overturn criminal convictions merely as a sanction for prosecutors' courtroom misbehavior.⁵⁰ Most courts will not overturn a conviction if the prosecutor's misconduct was "harmless."⁵¹ If not convinced that the prosecutor's misconduct may have contributed to the jury's guilty verdict, the reviewing court will ordinarily let the conviction stand.⁵² That means, if the prosecutor's transgression was by nature unlikely to influence the jury, was adequately remedied by the trial judge,⁵³ or was unlikely to have mattered given the overwhelming evidence of guilt, the appellate court may acknowledge that the prosecutor misbehaved but conclude that it probably did not matter. In many jurisdictions, the hurdle is even higher if the defense never objected to the prosecutor's misbehavior at trial.⁵⁴

Second, in issuing opinions regarding prosecutors' trial conduct, appellate courts often establish or reaffirm standards of trial conduct, whether or not they overturn the conviction. This is an important regulatory role, because the relevant professional conduct rules, which are written at a high level of generality, do not themselves give lawyers, including prosecutors, necessary guidance. Whenever appellate courts review challenges to how prosecutors questioned witnesses or argued to the jury, the courts have the chance to say whether the prosecutor's conduct was permissible and explain why. This has an important pedagogic function. Courts expect prosecutors to become familiar with

50. See *United States v. Modica*, 663 F.2d 1173, 1183 (2d Cir. 1981) ("As a practical matter, prosecutors know that courts are reluctant to overturn convictions because of improper remarks, when the defendant's guilt is clear.").

51. See generally 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, 1301-02 (1988).

52. See, e.g., *People v. Smith*, 56 N.E. 1001, 1004 (N.Y. 1900); see generally Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 63 (2016); Lauren Morehouse, Note, *Demanding the Last Word: Why Defendants Deserve the Final Closing Argument During the Sentencing Phase of Capital Cases*, 55 AM. CRIM. L. REV. 841, 864-65 (2018). But see *State v. Salitros*, 499 N.W.2d 815, 820 (Minn. 1993) (overturning criminal conviction for prosecutorial misconduct "in the exercise of [the court's] supervisory power over the trial courts and in the interests of justice").

53. See, e.g., *State v. Hilton*, 431 A.2d 1296, 1302 (Me. 1981) ("Only where there are exceptionally prejudicial circumstances or prosecutorial bad faith will a curative instruction be deemed inadequate to eliminate the prejudice."); see generally Tara J. Tobin, Note, *Miscarriage of Justice During Closing Arguments by an Overzealous Prosecutor and a Timid Supreme Court in State v. Smith*, 45 S.D. L. REV. 186, 220-22 (2000) (discussing the "cured error doctrine" under which a prosecutor's misconduct is deemed "cured" if the trial judge took adequate remedial measures by correcting the prosecutor's improper statement or instructing the jury to ignore it).

54. See generally James A. Morrow & Joshua R. Larson, *Without a Doubt, a Sharp and Radical Departure: The Minnesota Supreme Court's Decision to Change Plain Error Review of Unobjected-to Prosecutorial Error in State v. Ramey*, 31 HAMLINE L. REV. 351 (2008).

the teachings of their opinions (if not the opinions themselves), because prosecutors' offices train their prosecutors on the law and because prosecutors (like all lawyers) have a professional responsibility to keep up with the law bearing on their work.⁵⁵ Particularly for prosecutors who prefer to learn by the case method, published opinions provide a chance to learn from prior real-life experience.⁵⁶

Justice Sotomayor's opinion in *Calhoun v. United States*,⁵⁷ where the prosecutor made "racially charged" comments while cross examining the defendant and on summation,⁵⁸ is an example of an opinion meant almost exclusively to serve a pedagogic function. The principal contested issue at trial was whether the defendant, who was in a hotel room when an acquaintance sold drugs to an undercover drug agent, knew of the deal in advance and had come to help.⁵⁹ The defendant testified that he was unaware of the drug deal.⁶⁰ The prosecutor responded that the defendant must have known that drugs were to be sold because, "You've got African-Americans, you've got Hispanics, you've got a bag full of money."⁶¹ It was wrong for the prosecutor to suggest that race should play a role in determining whether the defendant had criminal intent, said Justice Sotomayor, but the conviction had to stand because the defendant's trial lawyer failed to object at the time.⁶² Therefore, the Court did not accept the case for review. Justice Sotomayor nonetheless wrote an opinion to express her "hope never to see a case like this again."⁶³

But at the same time, appellate courts express frustration when prosecutors do not adhere to their teachings. An 1889 opinion of the California Supreme Court, bemoaning that "[w]e have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties,"⁶⁴ suggested that judges were reaching the limits of their patience 130 years ago. More than a century later, appellate courts still express frustration about prosecutors' recurring courtroom misbehavior.⁶⁵

55. On prosecutors' obligation to engage in ongoing learning, see *Connick v. Thompson*, 563 U.S. 51, 65 (2011).

56. Cf. Bruce A. Green, *There but for Fortune: Real-Life vs. Fictional "Case Studies" in Legal Ethics*, 69 *FORDHAM L. REV.* 977, 977-78 (2000) (advocating the use of real-life case studies in teaching legal ethics).

57. 568 U.S. 1206 (2013) (Sotomayor, J.) (respecting the denial of certiorari).

58. *Id.* at 1206.

59. *Id.*

60. *Id.*

61. *Id.* at 1206-07.

62. *Id.* at 1207-08.

63. *Id.* at 1209.

64. *People v. Lee Chuck*, 20 P. 719, 723 (Cal. 1889).

65. See, e.g., *United States v. Modica*, 663 F.2d 1173, 1182 (2d Cir. 1981) ("We . . . find

Notwithstanding their frustration, appellate courts are traditionally reluctant to serve an explicit disciplinary function. On top of considerations that generally discourage judges from serving a disciplinary role in cases of prosecutorial misconduct, some appellate judges may assume that disciplining prosecutors is better left to trial judges who are present when misconduct occurs and witnessed the conduct in question, rather than to appellate judges reading trial transcripts. On occasion, frustrated appellate courts have threatened prosecutors with personal sanctions, whether formal or informal, when prosecutors have ignored the teachings of prior opinions.⁶⁶ Courts have threatened to rebuke errant prosecutors by name in published opinions as a form of informal professional discipline,⁶⁷ and have even threatened disbarment.⁶⁸ But courts rarely if ever make good on their threats.⁶⁹ Appellate courts express hope that their threats will lead prosecutors to follow the rules while acknowledging that past threats have been ineffective, leaving appellate courts at a loss for how to serve a constructive disciplinary role.

III. THE NEED TO ENHANCE DISCIPLINARY REGULATION OF PROSECUTORS' IN-COURT MISCONDUCT

As described in Part II, courts' conventional responses to prosecutors'

ourselves in a situation with which this Court is all too familiar: a prosecutor has delivered an improper summation, despite this Court's oft-expressed concern over the frequency with which improper prosecution summations occur.”).

66. See, e.g., *id.* at 1186 (“[W]e hope to have made it clear that improper summations in the future, especially if done on repeated occasions by the same prosecutor, run the distinct risk of direct sanctions against the attorney.”); *Bell v. State*, 723 So. 2d 896, 897 (Fla. Dist. Ct. App. 1998) (Altenbernd, J., concurring) (urging creation of a videotape on proper jury argument to be shown to lawyers who violate the rules, and that “[a]fter two or three viewings, if an attorney still cannot argue within the rules, other more serious sanctions should be imposed either by a supervising attorney or by the trial court”).

67. Cf. *Modica*, 663 F.2d at 1185 (noting appellate courts' ability to name prosecutors in published opinions as a form of reprimand, but adding that most courts are reluctant to do so and refraining from naming the prosecutor in this specific case). On judicial shaming as a strategy for influencing prosecutors' conduct, see Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305 (2016); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059 (2009).

68. See, e.g., *Bell*, 723 So. 2d at 897 (“If trial attorneys recognize improper argument and persist in its use, they should not be members of The Florida Bar.”).

69. See Spiegelman, *supra* note 4, at 169–70 (“Other than censuring through reversals, the commonsense remedy for recidivist prosecutors is to reveal them by naming them, by reprimanding them in published opinions, and even by referring them to local bars for discipline. However, one of the striking realities of the forty-five recent federal reversals is that despite findings of intentional misconduct and extensive criticism of prosecutors' conduct, not one court ordered a prosecutor disciplined or referred a prosecutor for discipline.”).

visible forensic misconduct serve various salutary objectives. Appellate courts issue opinions establishing and elaborating on the standards governing prosecutors' behavior at trial in order to educate prosecutors about what the law expects. Both trial judges and appellate judges take steps to remedy misconduct when it occurs—trial judges by sustaining objections and issuing curative instructions, and appellate judges by overturning convictions that were tainted by prosecutorial misconduct. Trial judges can also deter prosecutors' further misbehavior in the particular trials over which the judges preside by issuing stern rebukes or through harsher measures. However, judges ordinarily overlook the disciplinary function, which aims to deter misconduct in future proceedings both by the particular lawyer who misbehaves and by other lawyers.⁷⁰ Judges rarely refer prosecutors to disciplinary authorities for low-level forensic misconduct or impose sanctions on their own.

In theory, professional discipline is a possibility when prosecutors misbehave in court.⁷¹ Disciplinary authorities can read court opinions and transcripts and initiate proceedings on their own. In practice, however, disciplinary authorities show little interest in regulating low-level prosecutorial misconduct, including prosecutors' forensic misconduct. This is not simply because disciplinary authorities are traditionally reluctant to proceed against prosecutors for *any* misconduct.⁷² It is largely because, even though prosecutors' forensic misconduct occurs on the record and is therefore easy to prove, disciplinary authorities regard this misconduct to be too insignificant to deserve formal disciplinary sanctions.

Like prosecutors themselves, disciplinary authorities exercise discretion in deciding when to bring charges.⁷³ In doing so, authorities ordinarily take account of the seriousness of the wrongdoing and the

70. See, e.g., *Comm. on Prof'l Ethics & Conduct v. Havercamp*, 442 N.W.2d 67, 69 (Iowa 1989) (noting that the determination of "whether and to what extent discipline should be imposed. . . is guided by certain well-recognized standards: the nature of the alleged violations, the need for deterrence, protection of the public, maintenance of the reputation of the law as a whole, and the respondent's fitness to continue in the practice of law").

71. See, e.g., Rebecca L. Farrell, Note, *Advocacy, Justice, and Prosecutorial Misconduct: The Death of the Prosecutor's Reasonable Inference on Credibility Issues*, 41 WASHBURN L.J. 299, 321–23 (2002) (asserting that the courts should not reverse convictions as a deterrent for prosecutorial misconduct that was harmless, because prosecutors are subject to professional discipline).

72. This may be changing. See Green & Levine, *supra* note 9, at 144–45 (discussing how recent high-profile disciplinary cases have spurred a more serious response by disciplinary agencies to prosecutorial misconduct); Green & Yaroshefsky, *supra* note 52, at 78–83 (discussing various ABA rules, state bar ethics committee resolutions, and state court holdings that have increased regulations on prosecutorial misconduct).

73. See generally Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307 (1998).

extent of the wrongdoer's culpability. There are few cases of public discipline imposed against civil litigators for low-level misconduct such as discovery abuse or frivolous filings, notwithstanding the perception that this misconduct is rife. Disciplinary authorities reserve their efforts for more serious wrongdoing. Because prosecutors' forensic misconduct is often unpremeditated and its impact is often insignificant, disciplinary authorities tend to disregard it.⁷⁴ In other words, disciplinary authorities act out of the same sense of proportionality as trial judges. Therefore, if the trial judge did not refer the prosecutor's conduct to the disciplinary authority, the disciplinary authority might understandably defer to the trial judge's presumed judgment that a disciplinary sanction would be excessive.

Although proportionality is an important principle, it is questionable whether minor, but visible, prosecutorial infractions should be ignored entirely in the disciplinary process. Contemporary social science teachings offer reasons to worry that this strategy fosters not only recurring low-level misconduct but more serious wrongdoing.⁷⁵

There is no one reason why people violate rules in general, and no one reason why prosecutors do so in particular. But studies identify factors that may have the effect of discouraging or encouraging wrongdoing. Ordinary intuition suggests that, if disciplinary authorities do not sanction lawyers for improper questioning and arguments, then prosecutors will lose respect for the underlying rules and judicial rulings and violate them more frequently than if the rules were enforced through sanctions.⁷⁶ Social science scholarship accords with that intuition.

One reason why judicial indifference is problematic is that, insofar as prosecutors engage in an implicit balancing of risks and rewards, courtroom misconduct comes with no personal risk. The costs of misbehavior are all externalized. If wrongdoing contributes to a conviction, the defendant suffers. In the unlikely event that a trial court grants a mistrial or an appellate court overturns a conviction, the prosecutor's office bears a cost. While the office may impose some internal sanction on the prosecutor in such a case, it is just as likely that, for any of several reasons, the office will support the trial prosecutor. Punishing the prosecutor may undermine group solidarity and lead

74. For notable exceptions, see *In re Zawada*, 92 P.3d 862, 866–67, 871 (Ariz. 2004) (suspending a prosecutor for improper trial tactics), and *In re Weber*, 2012 Ill. Atty. Reg. Disc. LEXIS 75, 139, 141–43 (May 3, 2012) (recommending that the prosecutor be censured for improprieties in jury arguments).

75. See *infra* notes 77–84 and accompanying text.

76. See, e.g., Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 739 (2003) (“[W]hen rule violations that are visible or well-known go unsanctioned, such failure to prosecute undermines the professional standard as a credible threat. It encourages other lawyers to violate the particular standard or the codes as a whole.” (footnotes omitted)).

prosecutors to act in an overly cautious manner. Therefore, if the question is a close one, the office may defend the prosecutor's behavior, and even if the trial prosecutor's behavior was clearly wrongful, the office may excuse it on the theory that a suitably aggressive prosecutor cannot help but get carried away occasionally.

One might hope that, for the individual prosecutor who misbehaves, a judge's rebuke on the trial record will have a lasting impact, thereby serving as a deterrent beyond the trial in which the rebuke is issued. But the greater likelihood is that a judge's rebuke will have, at most, a momentary sting. Various cognitive factors may undermine the longevity of its impact. Where prosecutors have no lasting reminder of the rebuke, they may experience "unethical amnesia": The memory of their professional misbehavior and whatever embarrassment resulted may fade over time.⁷⁷

The literature also suggests the possibility that institutional tolerance of small acts of misconduct can lead to bigger ones. This is the problem of "ethical slippage,"⁷⁸ also known as "incrementalism" or the "slippery slope."⁷⁹ If prosecutors, while vigorously trying cases, can get away with overreaching in little visible ways, they may grow less hesitant to commit more serious, but less visible, misconduct.

Even if one disputes that judges tolerate prosecutorial misconduct, the absence of a disciplinary consequence effaces the ethical dimension of prosecutors' in-court behavior. Improprieties in examining witnesses, evidentiary offers, and arguments may be perceived to be an evidentiary problem, not an ethical problem. The consequence is that prosecutors may lose, or never gain, a "moral awareness"⁸⁰—an awareness of the

77. See generally Maryam Kouchaki & Francesca Gino, *Memories of Unethical Actions Become Obfuscated Over Time*, 113 PNAS 6166 (2016), <http://www.pnas.org/content/pnas/113/22/6166.full.pdf>; see also Lisa L. Shu & Francesca Gino, *Sweeping Dishonesty Under the Rug: How Unethical Actions Lead to Forgetting of Moral Rules*, 102 J. PERSONALITY & SOC. PSYCHOL. 1164, 1164 (2012) (describing a study showing "moral forgetting"—that is, that those engaging in unethical behavior are more likely to forget the moral rules).

78. Cf. Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209, 1214 (2011) ("[E]thical slippage is often the precursor to what later becomes a violation of law: moral rationalization leads to small levels of opportunism about which no guilt is felt, leading to sequentially bigger levels of cheating before the reality of legal wrongdoing becomes clear.").

79. See Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757, 780 n.93, 791–93 (observing that "[r]esearch demonstrates that it is easier for people to engage in unethical behavior incrementally—that is, by gradually increasing the severity of infractions over time—rather than abruptly and all at once" (citing authority)); Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1120–24 (2013) (discussing how ethical slippery slopes "contribute to a process of *ethical fading* or *moral disengagement*").

80. See generally Robert A. Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) Be*

ethical implications of their courtroom conduct—and may simply perceive the question presented by their questionable conduct as one of admissibility. Well-intentioned prosecutors are more likely to take evidentiary risks than ethical risks, and are more likely to skirt the bounds of inadmissibility than of moral propriety.

One might worry about the impact of disciplinary indifference not only on the individual prosecutor but on the culture of the prosecutor's office. In addressing ethical questions, lawyers are influenced by their peers.⁸¹ Consequently, the cultures of the institutions in which people work significantly influence the extent of their compliance with rules.⁸² This is true for the culture of lawyers' offices,⁸³ including those of prosecutors.⁸⁴ If judges do not adequately police minor prosecutorial misconduct occurring in plain view, they may permit an institutional culture to develop or persist where prosecutors treat more serious rules equally cavalierly.

None of this is to suggest that prosecutors should be disbarred for forensic misconduct. It is simply to suggest that courts should look for a response to prosecutors' low-level courtroom misbehavior that, although not excessive, adequately serves the regulatory objectives of professional discipline—and, in particular, deterrence.

IV. A PROPOSAL: "REBUKE BANKS"

When prosecutors engage in visible forensic misconduct, courts seeking to serve a disciplinary role face the challenge of discouraging future prosecutorial misconduct without punishing prosecutors too harshly. The sanctions afforded by the formal disciplinary process—disbarment, suspension, public reprimand, or private censure—may seem too harsh, especially for what may appear to the judge before whom the misconduct occurs to be an isolated, unpremeditated, and harmless infraction. Prosecutors, like all lawyers, are imperfect. An occasional

Their Best Selves?, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 35, 47–49 (2015) (discussing moral awareness in the context of lawyers' ethics).

81. See Bruce Green & Jane Campbell Moriarty, *Rehabilitating Lawyers: Perceptions of Deviance and its Cures in the Lawyer Reinstatement Process*, 40 FORDHAM URB. L.J. 139, 160 n.79 (2012) (citing authority).

82. See generally Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933 (2017).

83. See Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective*, 15 NEV. L.J. 671, 681 (2015); Milton C. Regan, Jr., *Nested Ethics: A Tale of Two Cultures*, 42 HOFSTRA L. REV. 143, 155–60 (2013).

84. See, e.g., Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 269 (Leslie C. Levin & Lynn Mather eds., 2012).

improper question, attempt to offer inadmissible evidence, or improper argument, will typically appear to be an innocent mistake, undeserving of a sanction that will stain the prosecutor's entire career. Erring on the side of leniency, courts typically settle at most for on-the-record rebukes, which provide little, if any, deterrence.⁸⁵

This Article proposes an initiative that may strike a better balance between the competing interests in proportionality and deterrence: that courts establish repositories of trial transcripts reflecting prosecutors' misbehavior. When the trial judge rebukes a prosecutor, or concludes in retrospect that the prosecutor deserved rebuke, the relevant portion of the trial transcript should be added to a searchable database. The purpose would be to enable courts and disciplinary authorities to track cases in which a particular prosecutor misbehaves as well as cases in which prosecutors from a particular office or unit of an office engage in similar misbehavior.

These repositories—or “rebukey banks”—would be intended to serve several functions.

First, they would serve a pedagogic function by compiling concrete examples of prosecutorial misbehavior. Although some instances of courtroom misconduct are already reflected in published appellate opinions, many are not. There is no appellate review if defendants are acquitted; convicted defendants may not raise prosecutors' forensic misconduct as a point on appeal if there is no likelihood that the appellate court will find it to be prejudicial; and appellate courts do not publish opinions in all cases where prosecutors acted improperly at trial. The trial transcripts in the repositories will therefore add significantly to training material now made available in published opinions.

Second, the rebukey banks would enable courts and disciplinary authorities to punish serious and repeat offenders. Courts and commentators recognize that prosecutors who repeatedly flout the rules should be sanctioned.⁸⁶ But courts have not necessarily taken the initiative to learn whether a particular prosecutor's misbehavior is an isolated occurrence or one in a series of similar wrongs. If prosecutors' occasional transgressions can be overlooked, their transgressions in trial after trial should not be. At some point, a prosecutor who repeatedly misbehaves, even if out of ignorance or indifference, should be

85. Some have regarded courtroom rebukes as a form of sanction, albeit the most ineffectual. See Singer, *supra* note 2, at 273–74.

86. See, e.g., Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 628 (2017) (“Given that repeat offenders represent—or at least appear to represent—a significant problem in the realm of prosecutorial misconduct, disciplinary bodies should prioritize apprehending and punishing those prosecutors who have violated the rules on multiple occasions.”).

sanctioned.

Third, to the extent that rebukes are meant to have some deterrent effect on the individual prosecutor beyond the particular trial in which a judge issues it, preserving records of rebukes will amplify their impact. That is because the slate is not wiped clean once the trial is over. The prosecutor will be reminded that the record of misconduct is preserved. The rebuke functions like a demerit—it is not itself a sanction, but added together, a succession of rebukes may justify a sanction.

If individual rebukes have greater sting in themselves, and recurring rebukes can lead to formal professional sanctions, the cost of misconduct will no longer be externalized. Trial prosecutors engaging in cost-benefit analyses will have a greater incentive to comply with the rules.⁸⁷ Once rebuked, the prosecutor will have a motivation to learn the applicable standards of courtroom behavior, to practice employing them rather than falling back on intuitive conduct, and ultimately to act more carefully in future trials. New prosecutors seeking to avoid having their misconduct memorialized may be motivated to take care even before receiving a first judicial rebuke.

Fourth, keeping records of prosecutors' low-level misconduct will allow courts and disciplinary authorities to ascertain when an office, or unit of an office, is responsible for a disproportionate amount of misbehavior. Judicial or disciplinary authorities can then explore whether repeated offenses reflect a failure on the part of particular managerial or supervisory prosecutors to make reasonable efforts to ensure trial prosecutors' compliance with the relevant rules. If so, authorities can impose discipline or adopt other regulatory measures.⁸⁸ Further, the risk of discipline may motivate managers and supervisors in the prosecutor's office to perform their supervisory responsibilities more diligently.

Fifth, through the various mechanisms identified above, increased judicial attention to low-level misconduct may strengthen trial and supervisory prosecutors' commitment to compliance with the norms of courtroom behavior, leading to enhancing the office's internal culture and controls.⁸⁹ Ideally, a stronger culture of compliance will result in greater compliance with all norms of prosecutorial conduct, thereby reducing serious as well as minor misconduct.

All of this speaks to prosecutors' compliance with the law, not to their

87. 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 (2005).

88. See MODEL RULES OF PROF'L CONDUCT r. 5.1(a)–(b) (AM. BAR ASS'N 2016).

89. On the importance of internal controls in prosecutors' offices, see generally Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089 (2010).

exercise of discretion. But, finally, there may even be an incidental benefit in that area as well. Many on the defense side perceive that prosecutors lack empathy for their clients.⁹⁰ This may be in part because prosecutors, regarding themselves as rule-abiding, lack sympathy or understanding toward those who break society's rules. Prosecutors who are confronted with the reality that they and their colleagues are also occasional rule breakers may develop a better understanding that people are imperfect, that basically law-abiding people are susceptible to various kinds of pressures to break the rules, and that those who break the law do not invariably deserve punishment. Prosecutors who acknowledge that they and their colleagues are imperfect and have benefitted from the disciplinary process's leniency may be influenced to extend greater leniency to those who transgress minor criminal laws.

The ultimate objective is to identify a measured, proportionate response to prosecutors' low-level, on-the-record misconduct that, standing alone, does not merit public discipline or an equivalent stigma. Entirely ignoring the disciplinary implications of prosecutors' misconduct places too much weight on prosecutors' interest in proportionality at the expense of the public interests served by the disciplinary process. Maintaining records of individual prosecutors' problematic courtroom conduct strikes a better balance.

Of course, one can debate the details. For example, there is room for disagreement regarding whether the repositories should be open to the public, thereby augmenting the possibility of unfair stigma, or should be available only to courts and disciplinary authorities, notwithstanding that the transcripts are public records.⁹¹ There may also be disagreement concerning whether, before a transcript is included, some prior determination must be made that a judicial rebuke was deserved or that the prosecutor's conduct was otherwise improper. Particularly if transcripts are publicly available, some predetermination may be justified so that prosecutors are not stigmatized when innocent behavior is included in the repository. On the other hand, if "probable cause" or the like must be found before a transcript is included, the stigma is likely to be even greater. Perhaps the ideal is a disclaimer that the repository is just a virtual storage facility and that no prejudgments are made about

90. See, e.g., Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL ETHICS 943, 955-57 (2012).

91. In *Bartko v. United States DOJ*, 898 F.3d 51 (D.C. Cir. 2018), the court of appeals considered the conflicting public and privacy interests in the context of a Freedom of Information Act request for documents of the Department of Justice Office of Professional Responsibility. In this particular case, the court determined that the public interest in documents relating to investigations of prosecutorial misconduct outweighed the individual prosecutor's interest in privacy.

whether transcripts necessarily reflect misbehavior.

One might also consider whether, after a period of time, transcripts should be removed or expunged, or whether, particularly given the infrequency of trials, records of misconduct should be preserved throughout lawyers' careers in criminal prosecution. And prosecutors would doubtless propose that if transcripts of their misconduct are maintained in a rebuke bank, transcripts of defense lawyers' misconduct should be deposited there as well.

Resolving these questions to strike a fair balance is essential, because judges who think it is unduly harsh to keep records of rebukes may refrain from issuing rebukes to prosecutors who deserve them. This would be an example of what others identify as "remedial deterrence," that is, where the costs of remedies deter courts from invoking them.⁹² While courts might be reluctant to deposit transcripts in the rebuke banks and may even be deterred from issuing rebukes, however, judges cannot avoid ruling on objections to prosecutors' misconduct. The interest in ruling correctly, to avoid appellate reversals, should far outweigh whatever judicial sympathies or interests might lead trial judges to minimize or overlook prosecutors' misbehavior. And, regardless of whether rebukes follow, records of sustained objections to prosecutors' questions and arguments should themselves be preserved. Therefore, even if one acknowledges the risk that rebuke banks will deter some judges, and not just prosecutors, preserving searchable records of arguable prosecutorial misbehavior would better serve the public interest than consigning the records to oblivion.

CONCLUSION

Trial prosecutors' visible misbehavior, such as improper questioning of witnesses and improper jury arguments, may not seem momentous. Sometimes, the improprieties are simply the product of poor training or overenthusiasm. In many cases, they pass unremarked. As the Chicago Eight trial illustrated, trial prosecutors' improprieties may also be overshadowed by the excesses of other trial participants—the witnesses, the defendants, the defense lawyers, or even the trial judge. And when noticed, prosecutors' trial misbehavior can ordinarily be remedied, and then restrained, by a capable trial judge. It is little wonder that disciplinary authorities, having bigger fish to fry, are virtually indifferent to the problem. And yet, in the obvious absence of disciplinary regulation, prosecutors and their offices have less motivation to "play by the rules."

92. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999); Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 695–96 (2008).

The challenge for disciplinary regulation is to find a proportional response to trial misconduct—one that does not punish prosecutors undeservedly, unnecessarily, or too harshly but that nevertheless serves regulatory ends. Building on the Supreme Court's observation in *Berger* that the prosecutor's repeated improprieties should have been met with "stern rebukes," this Article proposes that prosecutorial improprieties that are deserving of judicial rebuke should not be forgotten. Rather, repositories—or rebuke banks—should be maintained to preserve transcripts of prosecutors' on-the-record misconduct, even when it is committed unintentionally. Maintaining these records, which would be relatively easy in the computer age, would serve salutary regulatory ends while maintaining the necessary sense of proportionality.