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Uneven Scales: How the Symbiotic Relationship Between Prosecutors and Judges Results in Unfair Criminal Proceedings

Edward Adams[†]

Introduction

Eighteen years in the Louisiana State Penitentiary, fourteen of which were spent on death row: that is how long John Thompson spent in the Louisiana criminal justice system.¹ Thompson had “[h]is death warrant . . . signed eight times.”² However, Thompson spent all those years in prison—having his “death warrant” signed countless times—for not one, but two wrongful convictions.³ It was not until a few weeks before Thompson’s execution date that his attorneys found evidence proving his innocence.⁴ The most troubling aspect of this case is that the prosecutors knew of this evidence, but hid it from Thompson’s attorneys for years.⁵ Yet only one prosecutor faced any discipline for this matter, despite a prosecutorial culture focused on “both willfully ignoring evidence that could have led to . . . exoneration, [and] blatantly withholding it.”⁶

Another tragic tale is that of Florida resident, Herbert Smith.⁷ Smith was just twenty-three years old when he was sentenced to sixty years in prison after he was pulled over while his license was

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1. See Radley Balko, *The Untouchables: America’s Misbehaving Prosecutors, and the System that Protects Them*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/prosecutorial-misconduct-new-orleans-louisiana_n_3529891 [<https://perma.cc/XNY2-CNUK>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Josie Duffy Rice, *A Florida Judge Sentenced a Man to 60 Years in Prison for This?*, DAILY KOS (Feb. 2, 2016), <https://www.dailykos.com/stories/2016/02/02/1478743/-A-judge-in-Florida-sentenced-a-man-to-60-years-in-prison-for-this> [<https://perma.cc/JZE8-QTKF>].

suspended.⁸ Upon discovering Herbert was on probation, police conducted a search of his vehicle and found a magazine of bullets—a violation of his probation.⁹ His sentencing was heard before Florida Circuit Court Judge, and former prosecutor, Matthew Destry.¹⁰ The same judge had sentenced Herbert four years earlier.¹¹ The prosecutor asked the judge to sentence Herbert to thirteen years as a result of the violation.¹² Alternatively, Judge Destry could have simply required Herbert to complete the remaining four years of probation in prison given his “youth offender status.”¹³ Instead, the “unpredictable” and “harsh” judge ignored the prosecutor’s recommendation and sentenced him to sixty years in prison.¹⁴ Unfortunately, Herbert was not the only victim of Judge Destry. Destry sentenced Kate Peacock to ten years in prison for possession of Oxycodone and cocaine after she missed a sentencing hearing.¹⁵ At the scheduled hearing, she was supposed to sign a plea agreement for one year in jail.¹⁶ Ms. Peacock missed her sentencing hearing because she was in the hospital resulting from an attempted suicide.¹⁷ Nevertheless, Judge Destry handed down a decade-long sentence.¹⁸

Another involves a defendant, Omar Loureiro, who was sentenced to death on first degree capital murder charges by Judge Ana Gardiner.¹⁹ Just five days before Judge Gardiner handed down the sentence, Gardiner and the prosecutor against Loureiro, Howard Scheinberg, shared drinks and discussed the case at length.²⁰ The discussions included derogatory comments towards those involved in the case as well as criticizing a juror who had fainted during the presentation of evidence at trial.²¹ These *ex parte* communications were heard by a law student who was so appalled

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Bob Norman, *Judging Ana*, BROWARD PALM BEACH NEW TIMES (Apr. 24, 2008), <https://www.browardpalmbeach.com/news/judging-ana-6311564> [https://perma.cc/W4MU-DCGX].

20. *Id.*

21. *Id.*

that they left the table where the discussion was happening.²² Shortly after the interaction, Omar was sentenced to death, in part due to gruesome photographic evidence the defense unsuccessfully attempted to exclude as “unfairly prejudic[ial].”²³ Instead, Judge Gardiner sided with prosecutor Scheinberg, denying the motion to exclude the evidence and ultimately sending Omar Loureiro to death row.²⁴ Gardiner was confronted about hundreds of phone calls and text messages she sent to Scheinberg, initially lying under oath about the extent of their relationship.²⁵ It was determined that she was actively engaged in a sexual relationship with Scheinberg *during* the time of Omar’s trial.²⁶ Besides her sexual relationship with Howard Scheinberg, Gardiner was allegedly romantically involved with another prosecutor that practiced before her as well.²⁷ As a result of these infractions, Gardiner was ultimately disbarred by the Florida Supreme Court—and Omar’s death sentence was overturned on appeal.²⁸

In 2023, the Oklahoma Court of Appeals determined Robert Leon Hashagen III was entitled to a new trial after it was discovered that Judge Timothy Henderson was sleeping with one of the prosecutors involved when he sentenced Robert to life in prison for first-degree murder.²⁹ Even though the relationship was no longer ongoing at the time of the trial, the Oklahoma Court of Criminal Appeals was not persuaded that “the trial judge’s potential bias” was eliminated.³⁰ The Court of Criminal Appeals ultimately decided that the undisclosed relationship “violated Hashagen’s due process rights” and overturned Judge Henderson’s 2021 decision.³¹ Judge Henderson resigned from the bench in 2021

22. *Id.*

23. *Id.*

24. *Id.*

25. Chris Joseph, *Broward Judge Ana Gardiner Disbarred by Florida Supreme Court*, BROWARD PALM BEACH NEW TIMES (June 5, 2014), <https://www.browardpalmbeach.com/news/broward-judge-ana-gardiner-disbarred-by-florida-supreme-court-6458985> [<https://perma.cc/2ERZ-QQDG>].

26. *Id.*

27. Norman, *supra* note 19.

28. Joseph, *supra* note 25.

29. *Oklahoma Murder Conviction Reversed Due to Sexual Relationship Between Judge, Prosecutor*, ASSOCIATED PRESS (July 13, 2023), <https://apnews.com/article/judge-prosecutor-sexual-relationship-murder-conviction-overturned-6cbfb0ff1f5e0af802b8ea04c0b61f0a> [<https://perma.cc/ZC95-TAH3>].

30. Praveena Somasundaram, *Murder Conviction Reversed Over Relationship Between Judge and Prosecutor*, WASH. POST (July 17, 2023), <https://www.washingtonpost.com/nation/2023/07/17/judge-relationship-prosecutor-conviction-overturned/> (last visited Feb. 12, 2025).

31. *Id.*

after being accused of sexual misconduct committed against three female prosecutors who had tried cases before him.³²

Sadly, the stories of John Thompson, Herbert Smith, Omar Loureiro, and Robert Leon Hashagen III are far from unique when it comes to prosecutorial and judicial misconduct. In April 2023, the Oklahoma Court of Criminal Appeals ruled against a criminal defendant's appeal from death row.³³ In doing so, the Oklahoma Court of Criminal Appeals rejected the Oklahoma Attorney General's recommendation to vacate the conviction and death sentence because the accused had an "unfair and unreliable" trial.³⁴ Even the Oklahoma Legislature questioned the alleged defendant's guilt.³⁵ Notably, of the two justices that wrote opinions,³⁶ both were former prosecutors in Oklahoma.³⁷ In a different case in 1990, Charles Dean Hood was sentenced to death-row for the murder of two people.³⁸ After Hood's conviction, it came to light in 2008 that the prosecutor and judge in Hood's case had engaged in "a years-long extramarital affair" that both the prosecutor and judge denied ever existed.³⁹ Hood brought a legal challenge to the Texas Court of Criminal Appeals, which was ultimately rejected.⁴⁰ The United States Supreme Court then denied hearing Hood's appeal.⁴¹

The rise of both judicial and prosecutorial misconduct is nothing new. Judicial misconduct has become increasingly present

32. *Id.*

33. Mark J. Stern, *Oklahoma's Top Prosecutor Doesn't Want to Execute a Likely Innocent Man*, SLATE (Apr. 21, 2023), <https://slate.com/news-and-politics/2023/04/richard-glossip-attorney-general-innocent-execution.html> [<https://perma.cc/UUC6-RPMN>].

34. *Id.*

35. *Id.*

36. *Id.* (mentioning that Justice David B. Lewis wrote the majority opinion and Justice Gary L. Lumpkin wrote a concurrence).

37. See OKLA. CT. OF CRIM. APPEALS, *David B. Lewis*, <http://okcca.net/judges/david-b-lewis/> [<https://perma.cc/ET4T-WW2L>]; OKLA. CT. OF CRIM. APPEALS, *Gary L. Lumpkin*, <http://okcca.net/judges/gary-l-lumpkin/> [<https://perma.cc/KH39-9REQ>].

38. Dahlia Lithwick, *The Most Outrageous Thing About the Texas Judge Who Slept with the Prosecutor in a Death-Penalty Case*, SLATE (Apr. 24, 2010), <https://slate.com/news-and-politics/2010/04/the-most-outrageous-thing-about-the-texas-judge-who-slept-with-the-prosecutor-in-a-death-penalty-case.html> [<https://perma.cc/9J2V-RVYJ>].

39. *Id.*

40. *Id.*

41. *Id.* Hood was eventually granted a new sentencing hearing due to improper jury instructions, but the prosecutors in the case still sought the death penalty against Hood.

in the public eye at all levels of the judiciary.⁴² Prosecutorial misconduct has continued to be a focus of the criminal justice system.⁴³ Nevertheless, it is a pernicious issue within our criminal justice system and raises many concerns about whether criminal defendants receive a fair trial.

However, judicial and prosecutorial misconduct are only a piece of the issues surrounding the criminal justice system. There are continued concerns of overcriminalizing individuals,⁴⁴ especially those accused of drug offenses.⁴⁵ Many prosecutors rely on plea bargaining to resolve criminal charges; so much so that plea bargaining accounts for “95 percent of all criminal convictions today” instead of a jury trial.⁴⁶ This is all regardless of how coercive plea bargains may be.⁴⁷ What is most concerning is that the legal

42. See, e.g., Lydia Wheeler & Kimberly Strawbridge Robinson, ‘New Era’ of Scrutiny Brings Calls for Supreme Court Ethics Code, BLOOMBERG L. (Mar. 20, 2023), <https://news.bloomberglaw.com/us-law-week/new-era-of-scrutiny-brings-calls-for-supreme-court-ethics-code-22> [https://perma.cc/9P86-D34S] (discussing the need for Supreme Court justices to have a code of ethics to abide by); Joshua Kaplan, Justin Elliot & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> [https://perma.cc/2KUR-C8DZ] (highlighting how Justice Clarence Thomas has taken multiple lavish trips from a notable GOP donor); Michael Siconolfi, Coulter Jones, Joe Palazzolo & James V. Grimaldi, *Dozens of Federal Judges had Financial Conflicts: What You Need to Know*, WALL ST. J. (Apr. 27, 2022), <https://www.wsj.com/articles/dozens-of-federal-judges-broke-the-law-on-conflicts-what-you-need-to-know-11632922140> (last visited Feb. 12, 2025) (finding over 130 federal judges presiding over cases in which they or their family members personally had a financial interest).

43. See Joaquin Sapien, *He Went to Prison After a Prosecutor Hid Evidence. Seven Years After Our Story, He Walked Free*, PROPUBLICA (Feb. 20, 2020), <https://www.propublica.org/article/he-went-to-prison-after-a-prosecutor-hid-evidence-seven-years-after-our-story-he-walked-free> [https://perma.cc/HTR9-HJH5]; Maura Dolan, *U.S. Judges See ‘Epidemic’ of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015), <https://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html> [https://perma.cc/9P3P-EHQAJ]; Dana Gentry, ‘Rummaging’ Through Cells Prompts Allegations of Systemic Prosecutorial Misconduct, NEV. CURRENT (Mar. 8, 2023), <https://www.nevadacurrent.com/2023/03/08/rummaging-through-cells-prompts-allegations-of-systemic-prosecutorial-misconduct/> [https://perma.cc/Y45N-HZTS].

44. See Clark Neily, *America’s Criminal Justice System is Rotten to the Core*, CATO INST. (June 7, 2020), <https://www.cato.org/blog/americas-criminal-justice-system-rotten-core> [https://perma.cc/3RAJ-JTAL] (discussing how 726 individuals in Louisiana were arrested for violating a law against wearing saggy pants).

45. *Id.* (highlighting the almost 29,000 arrests in Virginia for marijuana offenses in 2019).

46. Clark Neily, *Overcriminalization and Plea Bargaining Make Criminal Justice Like Shooting Fish in a Barrel*, CATO INST. (July 20, 2020), <https://www.cato-unbound.org/2020/07/20/clark-neily/overcriminalization-plea-bargaining-make-criminal-justice-shooting-fish/> [https://perma.cc/8PCJ-T4TG].

47. Neily, *supra* note 44 (“The judiciary’s collective indifference to the use of

system protects this abuse—from police misconduct to prosecutorial misconduct.⁴⁸

These broader and more specific criticisms against the criminal justice system are warranted. But in understanding these criticisms, it is important to look at the judicial and prosecutorial functions, how they operate together, and how that may contribute to the broader issues within the criminal justice system. More specifically, it is crucial to recognize how the judiciary can encourage prosecutorial misconduct and how prosecutors can encourage and welcome judicial misconduct. As of 2021, almost 50% of the federal judiciary is comprised of former prosecutors or a former government attorney.⁴⁹ Given their past experiences as former prosecutors, judges may have biases that favor prosecutors during criminal proceedings.⁵⁰ As there are vacancies on the federal judicial bench,⁵¹ it is important to recognize how changing the makeup of the judiciary can change the favoritism prosecutors receive.

It is not too outlandish to consider how judges being former prosecutors may favor the prosecution during a criminal proceeding. Assume there is a basketball game between University A and University B. The referees adjudicating the game are all graduates of University B, played basketball at University B, and are in regular and close contact with the basketball coaching staff and players at University B. As referees, they know they should be impartial during the basketball match. However, it is likely that during close calls these referees may either subconsciously or intentionally make a call that favors University B over University A. In fact, University B players may even know that the referees will give them grace and allow the players to foul some University A players without calling the foul or allow the University B players to lightly travel. This is in essence how the symbiotic relationship between prosecutors and judges operates.

coercion in plea bargaining has resulted in the practical elimination of jury trials and enables the government to obtain convictions without the expense and inconvenience of that constitutionally prescribed procedure.”).

48. *Id.*

49. Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> [<https://perma.cc/TX73-5USD>].

50. *Id.*

51. Myj Saintyl, *Upcoming Article III Judicial Vacancies*, BALLOTPEDIA (Apr. 6, 2023), <https://news.ballotpedia.org/2023/04/06/upcoming-article-iii-judicial-vacancies-4> [<https://perma.cc/2G6X-VKXW>].

This Article maintains that the symbiotic relationship between judges and prosecutors results in unfair and unjust criminal proceedings against defendants. Because most judges in the judiciary are former prosecutors, these judges have subconscious and apparent biases that favor the prosecution. This Article reviews data of judicial decisions, especially judges who were former prosecutors, to prove the pervasive influence of this symbiotic relationship. To overcome and diminish the power of the symbiotic relationship, this Article argues that the composition of the judiciary must change along with how prosecutors and judges function both together and separately.

Part I will provide a general overview of the prosecutorial function, discussing how lawyers become prosecutors at the state and federal level, the general role of the prosecutor in the criminal setting, and the standards prosecutors are held to and special protections they receive. Part II will explain the judicial function and how one becomes a judge at the state and federal level, the role of the judge in a criminal trial, and the standards and protections for the judiciary. From understanding the basic functions of each role, Part III will then break down each stage and the mechanics of a criminal trial. Part IV will then argue, first, that there is a symbiotic relationship between prosecutors and judges in criminal trials. The Part will then turn to how this symbiotic relationship leads to prosecutors receiving more favors in a trial, allows prosecutors to avoid complying with laws and ethical rules, and ultimately results in more unjust prosecutions of defendants. The Part will conclude by assessing how the special protections and lack of enforcement against prosecutors and judges perpetuates and encourages judges and prosecutors to engage in their symbiotic relationship. Finally, Part V will offer different solutions to dissolve the symbiotic relationship between prosecutors and judges by, first, changing the composition of the judiciary and, second, implementing and enforcing greater accountability standards for the prosecutorial and judicial functions. Through such actions, the judiciary can focus more on conducting fair criminal proceedings rather than bolstering the symbiotic relationship between prosecutors and judges.

I. Prosecutorial Function

The prosecutorial function is one of the most powerful functions within the executive branch. This Part starts by briefly describing how one becomes a prosecutor and obtains this power. From there, this Part delves into the role of the prosecutor and what

powers the prosecutor has. Through understanding the vast powers a prosecutor has, this Part concludes with explaining the ethical and legal obligations prosecutors are supposed to abide by along with the special legal and practical protections prosecutors have.

A. *How One Becomes a Prosecutor*

Becoming a prosecutor does not have as many complexities as becoming a judge. For many prosecutorial jobs, one can just apply to the office.⁵² However, certain prosecutorial positions are elected or appointed positions.⁵³ How someone becomes a prosecutor is important and it influences how a prosecutor may act. In general, the public has little knowledge over how prosecutors operate and little say in who can and cannot be a prosecutor.⁵⁴ For non-elected prosecutors, they can manipulate their workload to their own advantage.⁵⁵ For example, a non-elected prosecutor can choose to try strong cases, while attempting to plea bargain others, in hopes to gain more public exposure for an elected prosecutorial position.⁵⁶

The public gets the most say over who gets to be District Attorney for their state, as this is an elected position.⁵⁷ Importantly to these elected prosecutorial positions, “campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal.”⁵⁸ Similar to non-elected prosecutors, elected prosecutors have control of their docket and what cases they select in hopes they can remain elected.⁵⁹ Prosecutors who are up for election may intentionally manipulate their case load to ensure they have high-profile cases and a strong win-loss record.⁶⁰ Prosecutors can do this “at the expense of victims and the public.”⁶¹ Thus, how one acts as a prosecutor and fulfills the role is crucial to continuing to be a prosecutor.

52. See generally *Learn About Being a Prosecutor*, INDEED (Aug. 18, 2024), <https://www.indeed.com/career-advice/careers/what-does-a-prosecutor-do> [<https://perma.cc/ABS8-6K7G>] (explaining the process of becoming a prosecutor after graduating law school).

53. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PENN. L. REV. 959, 983 (2009).

54. *Id.* at 961 (“[P]rosecution is a low-visibility process about which the public has poor information and little right to participate.”).

55. *Id.* at 961–62.

56. *Id.* at 962.

57. *Id.* at 961.

58. *Id.*

59. *Id.* at 961–62.

60. *Id.* at 962.

61. *Id.*

*B. Role of the Prosecutor*⁶²

After understanding how one becomes a prosecutor, it is important to know what the role of a prosecutor entails. A prosecutor represents the State in criminal prosecutions against criminal defendants.⁶³ Within the criminal justice system and while representing the State, prosecutors play a variety of functions. Prosecutors decide whether to even accept a case and which charges to bring forward, choose whether to engage in plea bargaining or not, set pretrial and trial strategy, and recommend what sentence a convicted individual should receive.⁶⁴ Because of these various decisions prosecutors get to make, many find that “[p]rosecutors are the most powerful officials in the criminal justice system.”⁶⁵ A prosecutor essentially “makes the law, enforces it against particular individuals, and adjudicates their guilt and resulting sentences.”⁶⁶ Importantly though, this is power that goes unchecked.⁶⁷

First, prosecutors hold the power to accept or deny a case. After a police officer makes an arrest, a prosecutor will typically receive the police report and determine whether to file charges or not.⁶⁸ In reviewing the report, prosecutors have to determine if there is probable cause or not to bring forward the charge.⁶⁹ This is a relatively low bar for prosecutors to clear and is not where their power truly lies—determining which charges to bring forward.

62. This Subpart will only cover the main functions of what a prosecutor does throughout a criminal proceeding as these are the areas ripest for abuse with the symbiotic relationship between judges and prosecutors.

63. Durham District Attorney’s Office, *Explained: The Role of the District Attorney*, MEDIUM (Feb. 12, 2021), <https://medium.com/durham-district-attorneys-office/explained-the-role-of-the-district-attorney-7dbabd69b132> [<https://perma.cc/QAM5-ZSKZ>]; *Learn About Being a Prosecutor*, *supra* note 52.

64. Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1415 (2010).

65. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007). Former U.S. Attorney General Robert H. Jackson may have stated the power of the prosecutor best:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 1, 3 (1940).

66. Luna & Wade, *supra* note 64, at 1415.

67. *See id.*

68. Paul Bergman updated by Rebecca Pirius, *How Do Prosecutors Decide Which Cases to Charge?*, NOLO (Feb. 2, 2023), <https://www.nolo.com/legal-encyclopedia/how-prosecutors-decide-which-cases-charge.html> [<https://perma.cc/KFS2-8UEE>].

69. *Id.*; U.S. Dep’t of Just., *Just. Manual* § 9-27.200 (2018).

Second, prosecutors get wide discretion in deciding which charges to bring against a defendant. This power “is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.”⁷⁰ The charging function carries so much power with it because a prosecutor can decide to only charge what the police arrested the individual for, charge a lesser sentence, or opt to charge for more severe crimes.⁷¹ The charging function plays a crucial role in the later functions, especially plea bargaining and the pretrial strategy. For plea bargaining, the charging function can heavily influence one’s desire to accept a plea bargain because the more and varied charges a prosecutor brings, the more likely an individual will want to accept a plea bargain.⁷² For pretrial strategy, prosecutors may choose to overcharge an individual to convince “a grand jury to indict a defendant for more and greater charges than they can establish.”⁷³

Third, a prosecutor has great discretion when deciding whether to offer a plea bargain⁷⁴ or not. This function grants a prosecutor broad leeway in deciding when they will reduce a charge, how much of a reduction there will be, and for what charges a defendant would plead to.⁷⁵ Similar to the charging function, the plea bargain function also holds immense power as “98% of criminal cases in the federal courts end with a plea bargain.”⁷⁶ The plea bargaining process is under significant scrutiny because of how

70. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001).

71. *Id.* at 409 (“[Prosecutors] may decline to bring charges, bring only charges that they believe they can prove, or ‘inflate’ the charges”); see also Bergman, *supra* note 68 (describing a prosecutor’s discretion in making charging decisions).

72. See Davis, *supra* note 70, at 409 (discussing how defendants often do not want “to run the risk of additional and more serious convictions and more prison time” by going to prison rather than accepting a plea deal); LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, U.S. DEPT OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 2 (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> [<https://perma.cc/RNS9-UNB8>].

73. Davis, *supra* note 70, at 409.

74. A plea bargain “is an agreement between the prosecution and the defendant where the defendant agrees to plead guilty to the charges against them In exchange for the self-conviction, the defendant is usually offered lesser criminal charges” *Plea Bargain*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/plea_bargain [<https://perma.cc/538Y-X45B>].

75. See DEVERS, *supra* note 72, at 2.

76. Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023), <https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice> [<https://perma.cc/LF2N-PDDA>].

frequently it is used and potential constitutional⁷⁷ and fairness concerns.⁷⁸

Fourth, prosecutors set the pretrial strategy from the preliminary hearing to determining what evidence to gather to filing different pretrial motions. At the preliminary hearing,⁷⁹ a prosecutor is tasked with presenting evidence to charge a defendant.⁸⁰ The prosecutor will have to determine which witnesses to call and what evidence to use.⁸¹ Additionally, prosecutors file motions crucial to a case that “can affect the trial, courtroom, defendants, evidence, or testimony.”⁸² The pretrial strategy coincides with charging and plea bargaining as all of these functions interact with one another to enhance the prosecutor’s power over the defendant.

Fifth, prosecutors get significant discretion in how they want to present and handle their case. Prosecutors work with defense counsel on selecting jurors, but both sides get a limited number of “peremptory challenges” to dismiss jurors without reason.⁸³ Once a jury is selected, prosecutors then present the State’s case by making an opening statement, examining different witnesses, and objecting to questions the defense may have on cross-examination.⁸⁴ After the prosecution and defense both rest their cases, then the prosecution presents a closing argument and awaits a verdict after both sides close.⁸⁵

77. See DEVERS, *supra* note 72, at 2 (“These findings are problematic because they demonstrate that if a defendant opts to invoke the Sixth Amendment right to a trial by jury, [they] will likely have a more unfavorable outcome.”).

78. *Id.* at 3 (“[O]ne study found that [Black people] are also less likely to receive the benefits of shorter or reduced sentences as a result of the exercise of prosecutorial discretion during plea bargaining.”); Davis, *supra* note 70, at 413 (“Indigent defendants with overworked counsel and limited resources often lack the ability to investigate the strength of the government’s charges and may plead guilty out of fear of the unknown.”); see also Johnson, *supra* note 76 (highlighting how innocent defendants may accept plea deals to plead guilty at the advice of their own lawyers).

79. See *infra* Part III.B. for a discussion on how the preliminary hearing works in general and how it proves important for trial.

80. See Offices of the U.S. Atty’s, *Preliminary Hearing*, DEP’T OF JUST., <https://www.justice.gov/usao/justice-101/preliminary-hearing> [<https://perma.cc/4ZA7-X8DH>].

81. *Id.*

82. See Offices of the U.S. Atty’s, *Pre-Trial Motions*, DEP’T OF JUST., <https://www.justice.gov/usao/justice-101/pretrial-motions> [<https://perma.cc/TT3E-5DZ3>].

83. See Offices of the U.S. Atty’s, *Trial*, DEP’T OF JUST., <https://www.justice.gov/usao/justice-101/trial> [<https://perma.cc/7RUW-T269>].

84. *Id.*

85. *Id.*

Sixth, and lastly, the prosecutor assists with sentencing. The first involvement a prosecutor may have with sentencing is within the charging function. Many jurisdictions use sentencing guidelines, so whatever charges a prosecutor chooses to bring against a defendant can then essentially set what sentence a defendant receives.⁸⁶ Outside of that process, a prosecutor may help the judge determine what sentence to give.⁸⁷ While the prosecutor does not determine the actual sentence the defendant receives,⁸⁸ they can influence a probation officer's sentencing recommendation.⁸⁹ The prosecutorial function enjoys significant power throughout a criminal proceeding, yet the function has ethical rules it must follow. The prosecutorial function also receives protections from these rules.

C. Prosecutorial Ethics and Special Protections

Through these different roles, prosecutors have general and specific ethical guidelines they must follow. As the American Bar Association states, these ethical guidelines are needed because lawyers have a "special responsibility for the quality of justice."⁹⁰ However, prosecutors are also afforded a multitude of legal protections and lack of oversight when prosecutors perform their function. Thus, it is important to understand how the ethical rules and specific rules for prosecutors coincide and conflict with the special protections given to the prosecutorial function. This Subpart will first discuss the ethical standards for lawyers generally, the unique rules for prosecutors, and the rationale for having such

86. See Davis, *supra* note 70, at 408 ("In federal and state jurisdictions governed by sentencing guidelines, these decisions often predetermine the outcome of a case since the sentencing judge has little, if any, discretion in determining the length, nature, or severity of the sentence.").

87. See Offices of the U.S. Atty's, *Sentencing*, DEP'T OF JUST., <https://www.justice.gov/usao/justice-101/sentencing> [<https://perma.cc/WY7F-EPDE>] (explaining how judges "receive guidance and assistance from several sources" in sentencing, including a presentence report, victim-impact statements, and statements from the defendant and attorneys).

88. *How Courts Work: Steps in a Trial: Sentencing*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/sentencing [<https://perma.cc/5RAC-E9MC>].

89. Probation officers conduct presentence investigations to prepare their sentencing recommendations. *Presentence Investigations*, U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/presentence-investigations> [<https://perma.cc/G3XK-2VQC>]. While prosecutors do not directly assist in this investigation, they do give recommendations after the report is complete, which the probation officer can implement prior to sentencing. *Id.*

90. MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 2018).

standards in place.⁹¹ From there, this Subpart will turn to the unique legal and practical protections prosecutors receive as prosecutors act within their function.⁹²

i. Prosecutorial Ethics

Attorneys in the United States must abide by their respective state ethics laws known generally as the Model Rules of Professional Conduct (“the Rules”).⁹³ Of particular note are Rules 3.1 and 3.4 and how they interact with the prosecutorial function and how a prosecutor should act as an attorney. Rule 3.1 states that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that *is not frivolous*, which includes *a good faith argument . . .*”⁹⁴ Included within this rule is the prosecutorial function of accepting cases and deciding on the charges to bring.

Rule 3.4 relates to the pretrial strategy prosecutorial function. The Rule states that “[a] lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”⁹⁵ This Rule helps to ensure the adversarial system maintains a level of fair competition.⁹⁶ Specific to the criminal justice system, Rule 3.4 exists to ensure defendants can adequately establish a defense.⁹⁷ This Rule, in conjunction with *Brady* as will be discussed below, corresponds with the prosecutorial functions to bring forward charges and pretrial strategy work. With respect to bringing forward charges, prosecutors should ensure they have evidence to support each claim.⁹⁸ This Rule relates to the pretrial strategy of the prosecutorial function, as prosecutors will have to know what evidence they have to turn over to the defense and how that may impact the State’s case.

91. *See infra* Part I.C.i.

92. *See infra* Part I.C.ii.

93. *See generally*, MODEL RULES OF PRO. CONDUCT (establishing rules for States to adopt for ethical standards). This Article will rely on the Model Rules of Professional Conduct given they are more generally applicable to the legal profession as compared to state-specific rules.

94. MODEL RULES OF PRO. CONDUCT r. 3.1 (emphasis added).

95. MODEL RULES OF PRO. CONDUCT r. 3.4(a).

96. MODEL RULES OF PRO. CONDUCT r. 3.4 cmt.

97. *Id.*

98. MODEL RULES OF PRO. CONDUCT r. 3.4(a); *see also* MODEL CODE OF PRO. CONDUCT r. 3.1 (requiring attorneys to bring forward good faith arguments).

Prosecutors have additional ethical rules⁹⁹ and standards¹⁰⁰ that they are supposed to abide by. The Rule unique to the prosecutorial function is Rule 3.8, and different components of the Rule apply to different aspects of the prosecutorial function.¹⁰¹ First, in relation to bringing forward charges, prosecutors shall “refrain from prosecuting a charge that the prosecutor *knows* is not supported by *probable cause*.”¹⁰² Similar to Rule 3.1, Rule 3.8(a) is supposed to restrain a prosecutor in what charges the prosecutor wants to bring forward and ensure that defendants are not overcharged.¹⁰³ The American Bar Association’s standards for prosecutors also endorses this notion of bringing forward charges supported with evidence.¹⁰⁴

Second, prosecutors have specific rules as it pertains to disclosing evidence to the defense. Rule 3.8(d) requires prosecutors to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”¹⁰⁵ Under *Brady v. Maryland*, the Supreme Court requires prosecutors to disclose evidence to the defense as a matter of due process.¹⁰⁶ These requirements directly impact the charging, pretrial, and trial prosecutorial functions, as the evidence will shape what charges a prosecutor reasonably believes they can bring and planning how that evidence will influence the overall pretrial and trial strategy.

Third, Rules 3.8(g) and 3.8(h) pertain to the prosecutorial function as a whole. Rule 3.8(g) requires prosecutors to disclose credible, material evidence that a “defendant did not commit an

99. MODEL RULES OF PRO. CONDUCT r. 3.8.

100. AM. BAR ASS’N, *Prosecution Function*, CRIM. JUSTICE STANDARDS: PROSECUTION FUNCTION (4th ed. 2017).

101. MODEL RULE OF PRO. CONDUCT r. 3.8.

102. MODEL RULE OF PRO. CONDUCT r. 3.8(a) (emphasis added).

103. *Id.*; MODEL RULES OF PRO. CONDUCT r. 3.1.

104. AM. BAR ASS’N, *Prosecution Function*, *supra* note 100, at Standard 3-1.2(b) (“The prosecutor . . . should act with integrity and balanced judgment . . . by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances.”); *Id.* at Standard 3-4.4(d) (“The prosecutor should not file or maintain charges greater in number or degree than can *reasonably be supported with evidence* at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct.”) (emphasis added); *Id.* at Standard 3-4.4(a) (providing various considerations for prosecutors when deciding which criminal charges to file or maintain).

105. MODEL RULE OF PRO. CONDUCT r. 3.8(d).

106. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold 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, irrespective of the good faith or bad faith of the prosecution.”).

offense of which the defendant was convicted”¹⁰⁷ Rule 3.8(h) goes further and requires a prosecutor to remedy a conviction when the prosecutor “knows of clear and convincing evidence establishing that a defendant” did not commit an offense.¹⁰⁸ Therefore, under the ethical guidelines for prosecutors, the prosecutorial function plays a crucial role in ensuring a defendant receives due process and safeguarding a defendant’s innocence.

ii. Special Protections for Prosecutors

Along with these immense ethical requirements for the prosecutorial function, prosecutors also receive a variety of legal and practical protections. The Supreme Court has carved out and reinforced many of the legal protections granted to prosecutors. Most importantly is prosecutorial immunity from *Imbler v. Pachtman*.¹⁰⁹ Prosecutorial immunity prevents a defendant from suing a prosecutor for prosecutorial misconduct.¹¹⁰ The Court’s rationale for this protection was to prevent prosecutors from second-guessing themselves for different decisions they make during a criminal trial.¹¹¹ Even if there is blatant wrongdoing, the Court found that prosecutors are still protected.¹¹² Therefore, prosecutors can falsify evidence¹¹³ and suppress evidence¹¹⁴ without facing any significant, personal consequences.

Not only do prosecutors enjoy the absolute immunity protection, but an entire prosecutor’s office can enjoy the protection as well. In *Connick v. Thompson*, a district attorney’s office had its entire office uninformed about *Brady* requirements and failed to provide *Brady* training to prosecutors.¹¹⁵ The Supreme Court found

107. MODEL RULE OF PRO. CONDUCT r. 3.8(g).

108. MODEL RULE OF PRO. CONDUCT r. 3.8(h).

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

110. See Katie McCarthy & Kiah Duggins, *Absolute Immunity for Prosecutors*, NAT’L POLICE ACCOUNTABILITY PROJECT (July 16, 2020), <https://www.nlgnpap.org/absolute-immunity/> [<https://perma.cc/G3CX-A756>].

111. *Imbler*, 424 U.S. at 428 (“In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.”) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

112. *Id.* at 427 (“To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.”).

113. See *Dory v. Ryan*, 25 F.3d 81, 81–83 (2d Cir. 1994) (finding that a prosecutor working with a police officer to solicit false testimony against a defendant did not overcome *Imbler*’s absolute immunity for prosecutors).

114. See *Cousin v. Small*, 325 F.3d 627, 636 (5th Cir. 2003).

115. *Connick v. Thompson*, 536 U.S. 51, 93–94 (2011) (Ginsburg, J., dissenting). The summary facts of this case are discussed in the introduction.

that a district attorney's office cannot be "held liable under § 1983 for failure to train based on a single *Brady* violation."¹¹⁶ Thus, many prosecutors' offices have autonomy to craft internal policies that are consistent or inconsistent with the ethical and legal rules prosecutors are supposed to abide by.¹¹⁷

There are practical protections in place for prosecutors when it comes to potential misconduct. First, the prosecutorial function operates under a shield of discretion.¹¹⁸ When a prosecutor brings a charge, she should determine whether to bring the charge under a probable cause standard.¹¹⁹ Rule 3.8, however, provides no limit on *how much* evidence is needed to bring forward such a charge, just that it is sufficient enough.¹²⁰ Moreover, the ethical rules only impact the decision to prosecute or not, but do not apply to the plea bargaining function, pretrial function, or sentencing function.¹²¹

Second, prosecutors rarely see individuals enforce the ethical rules against them. Judges, other prosecutors, defense attorneys, and a defense attorney's client could report a prosecutor's misconduct.¹²² Defense attorneys may fear bringing forward a complaint as it could damage their client's case and subsequent proceedings, while also harming the relationship between defense attorneys and prosecutors who routinely work together.¹²³ Importantly, filing a bar complaint is one of the few ways to acknowledge prosecutorial misconduct given the vast legal protections prosecutors have.¹²⁴ Thus, one of the main mechanisms for holding prosecutors accountable lacks an enforcement ability.

There are different pathways to becoming a prosecutor, which influence how a prosecutor acts when in the role. The prosecutorial

116. *Id.* at 54.

117. See David Keenan, Deborah Jane Cooper, David Lebowitz, & Tamar Lerer, *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, 210 (2011).

118. See DAVIS, *supra* note 65, at 6–9; Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (2003).

119. MODEL RULE OF PRO. CONDUCT r. 3.8(a).

120. See Green, *supra* note 118, at 1590 ("But Rule 3.8(a) sets no limits except with respect to the sufficiency of the evidence.").

121. *Id.* at 1590–91.

122. See Keenan et al., *supra* note 117.

123. *Id.* at 211 ("[A] bar complaint could itself negatively impact the outcome of ongoing litigation, if the prosecutor's need to defend against disciplinary proceedings, or simple resentment at being reported to the authorities, results in less favorable treatment of the defendant.").

124. See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (granting absolute immunity to prosecutors for misconduct); *Connick v. Thompson*, 563 U.S. 51 (2011) (granting absolute immunity to prosecutors' offices for misconduct).

function itself gives a prosecutor great power within the criminal justice system as a prosecutor can shape the entire case for a defendant. Given prosecutors have this power, there are general and specific ethical rules and standards prosecutors are supposed to abide by. However, prosecutors enjoy absolute immunity and experience little enforcement of the ethical rules. Nevertheless, while the prosecutorial function has this immense power and protection, the judicial function also experiences similar protections and power.

II. Judicial Function

Similar to Part I, this Part will explain the different nuances of how one becomes a judge. In particular, this Part will discuss how a judge's record and past legal experiences are relevant to becoming a judge. From there, this Part will explain the role of the judge in a criminal proceeding and how a judge can and cannot influence a criminal proceeding. Finally, this Part will conclude by discussing the ethical rules and guidelines judges are supposed to abide by, and the special and practical protections judges receive. Through understanding both the prosecutorial and judicial functions, one can start to piece together how both functions form a symbiotic relationship that can result in unfair trials for criminal defendants.

A. *How One Becomes a Judge*

Judges are either elected or appointed to the bench. At the state level, most judges are elected.¹²⁵ Across the country, these elections account for 87% of state judgeships.¹²⁶ State judges preside over a significant number of criminal cases. For felony convictions, 94% of those cases are heard in state courts.¹²⁷ At the federal level, criminal cases make up about 19% of the federal docket.¹²⁸ The

125. *Significant Figures in Judicial Selection*, BRENNAN CTR. FOR JUST. (May 8, 2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/EQJ5-3Q7U>] (finding that 38 states use elections to select judges at some level of the court); David E. Pozen, *The Irony of Judicial Elections*, 108 COL. L. REV. 265, 266 (2008) (discussing how the United States is the only advanced democracy that elects such a sizeable amount of its judiciary).

126. KATE BERRY, BRENNAN CTR. FOR JUST., *HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 1* (2015), <https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases> [<https://perma.cc/U6FS-MFJL>].

127. *Id.*

128. UNITED STATES CTS., *FEDERAL JUDICIAL CASELOAD STATISTICS* (Mar. 31, 2022) (finding 380,213 civil cases filed in federal court and 71,111 criminal cases filed in federal court).

judicial election and appointment processes and the criminal justice system are therefore deeply intertwined, and it is important to understand how judicial elections and appointments operate and how these elections and appointments influence judicial behavior.

Judicial elections have some parallels to other elected positions. Similar to other elected positions, people can donate to campaigns,¹²⁹ interest groups can become involved,¹³⁰ political parties can play a role,¹³¹ and the different candidates can engage in media advertising.¹³² Nevertheless, judicial elections also vary from typical elections. Depending on the state, a judge's political affiliation may or may not be on the ballot.¹³³ In some states, judicial candidates are not allowed to announce their viewpoint on certain issues.¹³⁴ However, the Supreme Court has allowed judicial candidates in certain states to discuss their stance on disputed legal and political issues.¹³⁵

Given how judicial elections operate, a judicial candidate's stance on issues and previous record as a judge greatly influence

129. *Id.* at 3; *see also* Pozen, *supra* note 125, at 267–68 (mentioning the shift in how judicial elections operate).

130. *See* DOUGLAS KEITH, PATRICK BERRY, & ERIC VELASCO, BRENNAN CTR. FOR JUST., *THE POLITICS OF JUDICIAL ELECTIONS, 2017-2018: HOW DARK MONEY, INTEREST GROUPS, AND BIG DONORS SHAPE STATE HIGH COURTS 1–2* (2019), <https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2017-18> [<https://perma.cc/LR7W-MEXF>] (discussing the increase in interest group spending for state judicial elections).

131. Pozen, *supra* note 125, at 267–68; A Martinez, *How State and Local Judicial Elections Became So Politicized*, NPR (Apr. 6, 2023), <https://www.npr.org/2023/04/06/1168327289/how-state-and-local-judicial-elections-became-so-politicized> [<https://perma.cc/5TKU-CK2M>] (discussing the 2023 Wisconsin Supreme Court election and how Supreme Court elections in Wisconsin have “gotten increasingly partisan over time. The campaign finance donation networks have gotten more partisan over time. The advertising has gotten more partisan and sharper and more negative over time”).

132. *See* BERRY, *supra* note 126, at 3 (“From 2000 to 2014, a total of nearly \$129 million was spent on TV airtime in state supreme court races.”).

133. *See* *Judicial Election Methods by State*, BALLOTPEDIA, https://ballotpedia.org/Judicial_election_methods_by_state [<https://perma.cc/V7WW-SHFE>] (highlighting how judicial elections can be partisan, nonpartisan, or retention elections, with partisan elections requiring a candidate to list their political affiliation and nonpartisan elections requiring candidates to not list their party affiliation). There is greater disparity in partisan and nonpartisan elections at the trial court level. *Id.*

134. *See* Pozen, *supra* note 125, at 268.

135. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002); *see, e.g.*, KEITH ET AL., *supra* note 130, at 8 (“Three candidates ran ads touting themselves as judges who would defend individual rights against the Trump administration, while one Alabama Republican ran a primary ad tying herself to Trump and claiming, ‘Like President Trump, Judge Sarah Stewart will protect our Second Amendment gun rights.’”).

their chance at being elected to the bench. Specifically, one's record on crime significantly influences an election.¹³⁶ First, many judicial elections will focus on whether the judicial candidate was soft on crime or not.¹³⁷ For example, in a 2014 Illinois Supreme Court race, Justice Lloyd Karmeier had an ad run against him stating that "in one case Judge Lloyd Karmeier gave easy bail to a woman later found guilty of murdering her 4-year-old stepson and gave probation instead of prison to a man who sexually assaulted a child."¹³⁸ Even representing criminal defendants can be seen as being soft on crime.¹³⁹ Second, many ads and judicial campaigns focus on whether a candidate is tough on crime.¹⁴⁰ This is not unique to judicial elections in the highest state courts either. In 2000, Ferrill McRae ran for Mobile County trial judge and ran an ad mentioning how "he had presided over more than 9,000 cases, including some of the most heinous murder trials in our history."¹⁴¹

Judicial appointments to a state bench or the federal bench are also intertwined with the criminal justice system. Most judicial candidates for appointment are vetted by a judicial nominating commission.¹⁴² These commissions are comprised of governor-appointed commissioners who normally align with the governor's political views.¹⁴³ These commissions will review an applicant in great detail to see if the candidate is sound for the bench.¹⁴⁴ Thus, whoever the commission selects becomes a political decision¹⁴⁵ and

136. See BERRY, *supra* note 126, at 3 (discussing how outside interest groups fund TV ads for judicial elections with an increased focus "on candidates' criminal justice decisions").

137. *Id.* ("In the 2013-14 election cycle, 82 percent of ad spots attacking candidates discussed criminal justice issues. Of the negative criminal justice-themed ads that cycle, all but one attacked candidates for judicial decisions they had made — focusing either on particular decisions or their criminal justice records as a whole.").

138. *Id.* at 4 (internal quotations omitted).

139. *Id.* (discussing how Bridget McCormack's 2012 judicial campaign experienced attack ads against her for representing detainees at Guantanamo Bay).

140. *Id.* at 5 ("In the 2013-14 election cycle, there were 26 ads promoting candidates' rulings in criminal cases, of which 22 discussed candidates' overall records, two focused on judges' decisions in individual cases, and two considered both.").

141. *Id.* at 6 (internal quotations omitted).

142. See *Significant Figures in Judicial Selection*, *supra* note 125.

143. DOUGLAS KEITH, BRENNAN CTR. FOR JUST., JUDICIAL NOMINATING COMMISSIONS 1 (2019), <https://www.brennancenter.org/our-work/research-reports/judicial-nominating-commissions> [<https://perma.cc/447S-WBGP>].

144. *Id.* at 3 ("Typically commissioners solicit applications, review written submissions from applicants, conduct interviews, call references, and discuss candidates as a group.").

145. *Id.* at 11 ("[B]ecause governors are likely to appoint commissioners who share

an appointed judge may then reflect on that decision and want to ensure it is not damaging politically.

Magistrate judges, similarly, are elected by a majority of the district court judges to serve an eight-year term.¹⁴⁶ Most district court judges will select individuals who they have a close relationship with to become a magistrate judge.¹⁴⁷ The only limitation to selection of magistrate judges is a set of qualifications from legislation from 1979.¹⁴⁸ Appointment to the federal bench also has a keen focus on a candidate's record on crime. Many federal district court judges have to go through the blue slip process, which requires a home-senator to return a piece of paper showing approval for a federal judicial nominee.¹⁴⁹ The blue slip process makes appointing a federal judge political and has led home-state senators to scrutinize a nominee's record.¹⁵⁰ One can even look to Justice Ketanji Brown Jackson's Supreme Court confirmation hearing where there was significant focus on Justice Jackson's record sentencing criminals.¹⁵¹ Thus, what a judge did before being on the bench and while on the bench, especially in the criminal justice context, plays a crucial role in one becoming a judge.

B. *Role of the Judge in Criminal Cases*

In understanding how one becomes a judge, it is important to distinguish the different roles and powers a judge has during a criminal case. Judges are supposed to be "impartial arbitrators in criminal cases."¹⁵² As Chief Justice John Roberts said, "Judges are

their political views, it may be that a different political makeup of governors would lead to nominating commissioners that more closely resembled non-gubernatorial appointees.").

146. *FAQs: Federal Judges*, U.S. CTS., <https://www.uscourts.gov/faqs-federal-judges#faq--What-are-federal-magistrate-judges?> [https://perma.cc/996C-4QW8].

147. Edward S. Adams, Edward R. Adams & William C. Price Jr., *An Empirical Constitutional Crisis: When Magistrate Judges Exercise De Facto Article III Power*, 2023 MICH. ST. L. REV. 195, 211 (2023).

148. *Id.*

149. *Blue Slip (Federal Judicial Nominations)*, BALLOTPEDIA, [https://ballotpedia.org/Blue_slip_\(federal_judicial_nominations\)](https://ballotpedia.org/Blue_slip_(federal_judicial_nominations)) [https://perma.cc/KP84-8C6W].

150. *See To Transform Our Courts: End or Reform the Blue Slip*, ALL. FOR J., <https://afj.org/to-transform-our-courts-end-or-reform-the-blue-slip/> [https://perma.cc/78AP-NPGK]; CONG. RSCH. SERV., *ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES 29–31* (2013), <https://crsreports.congress.gov/product/pdf/RL/RL34405>.

151. *See, e.g.*, Devin Dwyer, *Fact Check: Judge Ketanji Brown Jackson Child Porn Sentences 'Pretty Mainstream'*, ABC NEWS (Mar. 21, 2022), <https://abcnews.go.com/Politics/fact-check-judge-ketanji-brown-jackson-child-porn/story?id=83565833> [https://perma.cc/RB7Y-BNE7].

152. *See BERRY, supra* note 126, at 1.

not politicians, even when they come to the bench by way of the ballot.”¹⁵³ Judges play an integral role at many stages in the trial process. Judges have minimal, if any, influence during the charging and plea-bargaining stages, but judges have considerably more power at the pretrial motion, trial, and sentencing stages.¹⁵⁴

Theoretically, judges have little to no power when it comes to the charges of a criminal defendant. The charging function is reserved for the prosecution, so the State can decide whether to prosecute a case or not.¹⁵⁵ However, judges do have the ability to dismiss charges and stay proceedings.¹⁵⁶ First, a judge can dismiss charges if there are not enough sufficient facts to bring forward the charge.¹⁵⁷ Second, a judge may dismiss charges if a prosecutor has impermissible motives for bringing forward the charge.¹⁵⁸ Third, a judge may dismiss charges against a defendant for some other form of prosecutorial misconduct.¹⁵⁹ Lastly, in some states, judges may dismiss a charge in the interest of justice.¹⁶⁰ This power to dismiss

153. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015).

154. *Compare* Davis, *supra* note 70 (explaining that prosecutors decide when and how to charge an individual, whether to offer a plea, the terms of the plea, and whether the conditions have been met), *and* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681, 1697 (1992) (describing how sentencing guidelines increase prosecutorial powers during the charging and plea-bargaining stages, while rendering the judge a “handcuffed decisionmaker”), *with Pre-Trial Motions*, DEPT OF JUST., <https://www.justice.gov/usaof/justice-101/pretrial-motions> [<https://perma.cc/3JC7-5VC4>] (“Only judges decide the outcome of [pre-trial] motions.”), Samuel Strom, *What is a Judge’s Role in Court?*, FindLaw, <https://www.findlaw.com/litigation/legal-system/what-is-a-judges-role-in-court.html> [<https://perma.cc/GW82-U3ED>] (equating a judge in a jury trial to a “referee in charge of a sporting event”), *and* Janet Portman, *Federal Sentencing Guidelines: Mandatory or Not?*, NOLO, <https://www.nolo.com/legal-encyclopedia/federal-sentencing-guidelines-mandatory-not.html> [<https://perma.cc/J62D-9VWY>] (“[F]ederal court trial judges often have considerable sentencing discretion . . .”).

155. *See* Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 *HOFSTRA L. REV.* 63, 63 (2018).

156. *Id.* at 66–67 (noting how judges, like prosecutors, can “dismiss previously filed charges” and have “powers to stay (or halt, temporarily or indefinitely) a prosecution from proceeding”).

157. *See id.* at 67–68.

158. *Id.* at 68–69 (“Judges should dismiss charges motivated by vindictiveness, retaliation for exercising First Amendment or other fundamental rights, or racial bias.”). However, it is a high standard that must be met for a judge to dismiss a charge based on impermissible motives. *Id.* at 69.

159. *Id.* at 69–70.

160. This is not the majority rule in United States’ jurisdictions. Fourteen states “permit judges to dismiss charges on their own initiative if they conclude doing so is in the interest of justice,” four states permit judges to dismiss charges if “the defendant’s conduct constituted only a de minimus violation of a criminal offense,” and several states recognize an “inherent judicial power to dismiss charges without statutory authorization.” *Id.* at 70–71.

charges in the interest of justice where it is permitted is largely not utilized by judges.¹⁶¹

Judges can play some role during the plea-bargaining process, but only once a deal has been made: importantly, judges cannot oversee what negotiation tactics prosecutors may employ during plea bargaining to ensure that the process is fair.¹⁶² Judges can ensure there is “a proper legal and factual basis” for a given plea deal.¹⁶³ Additionally, the judicial function can opt to “reject [plea bargain] proposals as unjust or inconsistent with the public interest.”¹⁶⁴ The extent of a judge’s power to reject a guilty plea as inconsistent with the public interest is, however, limited by “practical as well as customary limits.”¹⁶⁵

Arguably, judges have the most power during a criminal trial when it comes to pretrial motions and the ability to help prosecutors and police investigate crimes.¹⁶⁶ As stated above, judges can dismiss a case or charge if there is a motion to dismiss.¹⁶⁷ More importantly to a trial, judges rule on motions to suppress, which “attempt to keep certain statements or evidence from being introduced as evidence”¹⁶⁸ and motions in limine, which “can be used to affirmatively admit evidence . . . [or] exclude admission of and any reference to a certain piece of evidence.”¹⁶⁹ These pretrial motions can greatly shape how a case will turn out and weaken or strengthen one side’s case.¹⁷⁰ Additionally, judges can assist with

161. *Id.* at 71 (“Most state courts have interpreted their power under these statutes exceedingly narrowly, so that they overwhelmingly defer to prosecutorial preferences about whether cases should proceed or be dismissed.”).

162. *See id.* at 76–77 (“[J]udges have relatively little legal basis for policing the fairness of party *negotiation* tactics—in particular, prosecutors’ tactical conduct—in the plea bargaining process.”).

163. *Id.* at 77.

164. *Id.*

165. *See id.* at 80 (“As a practical matter, judges can reject plea bargains and offer reasons for doing so that provide guidance to—and thus influence—the parties on the terms of a disposition that the court would find acceptable. But they generally cannot of their own accord adjust charges to which they will accept a guilty plea. It is no surprise that judges cannot demand or file on their own a more serious charge than those that prosecutors have filed.”).

166. *See* Offices of the U.S. Atty’s, *Pre-Trial Motions*, *supra* note 82 (“Only judges decide the outcome of motions.”).

167. *See id.*

168. *Id.*

169. Jordan Dickson, *Writing for Trial: The Motion in Limine*, GEO. L.: THE WRITING CTR. (2018), <https://www.law.georgetown.edu/wp-content/uploads/2018/11/Updated-Writing-Center-Handout-Motions-in-Limine.pdf> [<https://perma.cc/P42T-PRMT>].

170. *See id.* (“A motion in limine is a powerful weapon for advocates that can alter the entire makeup of the case.”).

an investigation, as judges can issue search warrants that allow for a broad search.¹⁷¹

During the trial, judges play a more limited role, but have power that can heavily influence the outcome of the case. First, judges rule on objections to evidence a party tries to introduce.¹⁷² Rulings on these objections matter as they can determine whether key evidence is introduced and presented to the jury.¹⁷³ Similarly, judges also play a role in sustaining or overruling on objections to testimony, which influences what testimony the jury may hear.¹⁷⁴ In general, a judge ruling on any objection can influence a jury, for “if a judge consistently overrules a practitioner’s objections, the jury may conclude that the practitioner is untrustworthy and, as a result, disregard his or her arguments.”¹⁷⁵ Second, judges decide the jury instructions for the case.¹⁷⁶ Both prosecutors and defense attorneys can request the judge to give certain instructions, but the judge ultimately decides whether to go with one of the party’s instructions or to present their own instructions.¹⁷⁷

Finally, judges play a role in sentencing, but it can be regulated by the prosecutorial function.¹⁷⁸ Depending on the jurisdiction, a judge follows sentencing guidelines to determine what sentence to give a convicted defendant.¹⁷⁹ However, the judge can choose to follow the guidelines or not.¹⁸⁰ The judge ultimately makes the decision on what sentence to give. Some sources a judge

171. See Edward S. Adams & William C. Price Jr., *When Taint Teams Go Awry: Laundering Unconstitutional Violations of the Fourth Amendment*, 75 ARK. L. REV. 753, 755–58 (arguing how taint teams can access information from search warrants despite possible constitutional violations).

172. See Jonathan J. O’Konek, *To Object or Not Object, That is the Question: A Criminal Law Practitioner’s Guide to the “Five W’s” of Evidentiary Objections*, 95 N.D. L. REV. 155, 160 (2020).

173. See *id.* at 161 (explaining how an attorney may object to evidence of a murder weapon if there is insufficient foundation or relevance).

174. See *id.* at 161–62 (“The purpose behind objecting prior to the witness’ answer is to prevent the jury from ever hearing the objectionable testimony.”).

175. *Id.* at 166.

176. See *How Courts Work: Steps in a Trial: Instructions to the Jury*, AM. BAR ASS’N (Sept. 9, 2019),

https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct/ [https://perma.cc/36MR-9XP8].

177. *Id.*

178. See *supra* Part I.B.

179. See *How Courts Work: Steps in a Trial: Sentencing*, AM. BAR ASS’N (Sept. 9, 2019),

https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/steps_in_a_trial/ [https://perma.cc/Z2E3-HLFM].

180. *Id.*; Carissa B. Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1110–11 (2008).

considers in this decision are the pre-sentence investigation and impact statements from a victim and/or their family.¹⁸¹

C. *Judicial Ethics and Special Protections*

Judges, much like prosecutors, also have their own set of ethical rules and guidelines that they are supposed to abide by. The American Bar Association prescribes specific guidelines that judges should follow through the Model Code of Judicial Conduct (“the Code”). The Code “consists of four Canons” with numbered Rules that judges are supposed to follow.¹⁸² Each Canon and the rules underneath it are important when understanding how judges are supposed to act. However, similar to prosecutors, judges also have special protections through judicial immunity and often lack of enforcement of the Code.¹⁸³

i. Judicial Ethics

The first Canon and its Rules that apply to judges pertain to promoting the “independence, integrity, and impartiality of the judiciary.”¹⁸⁴ Rule 1.2 is most relevant to how a judge should act. Under Rule 1.2, “A judge shall act at all times in a manner that promotes public confidence in the *independence, integrity, and impartiality* of the judiciary, and shall avoid *impropriety and the appearance of impropriety*.”¹⁸⁵ To determine if a judge has engaged in impropriety, the Code employs a reasonable minds standard.¹⁸⁶ As the Code states, it is important for judges to remain impartial as impropriety can erode public confidence in the judiciary.¹⁸⁷

181. See *Victim Impact Statements*, DEPT OF JUST., <https://www.justice.gov/criminal/criminal-vns/victim-impact-statements> [<https://perma.cc/S3GK-LDQN>] (“The victim impact statement assists the judge when he or she decides what sentence the defendant should receive.”).

182. See MODEL CODE OF JUD. CONDUCT Scope 1 (AM. BAR ASS’N 2020).

183. See Charles Gardner Geyh, *Judicial Ethics and Discipline in the States*, STATE CT. REP. (Dec. 14, 2023), <https://statecourtreport.org/our-work/analysis-opinion/judicial-ethics-and-discipline-states> [<https://perma.cc/2KKA-HS45>] (“[J]urisdictions vary in the aggressiveness with which they police judicial misconduct and have been called to task for underenforcing ethical lapses.”).

184. MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS’N. 2020).

185. MODEL CODE OF JUD. CONDUCT Canon 1, r. 1.2 (AM. BAR ASS’N. 2020) (emphasis added).

186. MODEL CODE OF JUD. CONDUCT Canon 1, r.1.2, cmt. 5 (AM. BAR ASS’N. 2020) (“The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”).

187. See MODEL CODE OF JUD. CONDUCT Canon 1, r.1.2. (AM. BAR ASS’N. 2020). It

Therefore, it is vital for the judiciary that judges avoid giving an impression that they are biased toward one party over another.

The second Canon relates to how a judge is supposed to perform the judicial function and that it should be done “impartially, competently, and diligently.”¹⁸⁸ The relevant rules are Rules 2.2, 2.3, 2.4, 2.11, and 2.15. Rule 2.2 requires judges to perform their duties “fairly and impartially,”¹⁸⁹ and Rule 2.3 ensures that judges perform their duties “without bias or prejudice.”¹⁹⁰ Rule 2.4(B) then addresses external influences on how a judge should act by not letting a judge’s “family, social, political, financial, or other interests or relationships . . . influence the judge’s judicial conduct or judgment.”¹⁹¹ Rule 2.11 instructs a judge to disqualify or recuse themselves from a proceeding when they may be partial or when they are faced with any of the situations mentioned in Rules 2.2, 2.3, or 2.4.¹⁹² Different from the other Rules, Rule 2.15 concerns judicial and lawyer misconduct, requiring a judge to report any known misconduct of another judge or of an attorney.¹⁹³

The third Canon and subsequent Rules pertain to a “judge’s personal and extrajudicial activities” to mitigate a conflict with one’s role in the judiciary.¹⁹⁴ Most relevant to the symbiotic relationship between judges and prosecutors is Rule 3.13. Under this Rule, judges are required to disclose “gifts, loans, bequests, benefits, or other things of value”¹⁹⁵ However, judges are not required to disclose “ordinary social hospitality”¹⁹⁶ or “gifts, loans,

is important to note that Rule 1.2 applies to *both* the professional and personal conduct of a judge. *Id.*

188. MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS’N. 2020).

189. MODEL CODE OF JUD. CONDUCT Canon 1, r. 2.2 (AM. BAR ASS’N. 2020).

190. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.3(A) (AM. BAR ASS’N. 2020). The comment for this Rule highlights how easily a judge can show bias or prejudice, and arguably impropriety, as “[e]ven facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice.” MODEL CODE OF JUD. CONDUCT Canon 2, r.2.3, cmt. 2 (AM. BAR ASS’N. 2020).

191. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.4(B) (AM. BAR ASS’N. 2020).

192. *See* MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.11 (AM. BAR ASS’N. 2020). Disqualification from a proceeding does not require defense counsel to file a motion to disqualify. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.11 cmt 2 (AM. BAR ASS’N. 2020). The decision to recuse oneself presiding over a case is evaluated under a reasonableness standard. *See* MODEL CODE OF JUD. CONDUCT Canon 2, r.2.11, cmt. 1 (AM. BAR ASS’N. 2020).

193. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.15 (AM. BAR ASS’N. 2020).

194. MODEL CODE OF JUD. CONDUCT Canon 3 (AM. BAR ASS’N. 2020).

195. MODEL CODE OF JUD. CONDUCT Canon 3, r. 3.13(A) (AM. BAR ASS’N. 2020).

196. MODEL CODE OF JUD. CONDUCT Canon 3, r. 3.13(B)(3) (AM. BAR ASS’N. 2020).

bequests, benefits, or other things of value from . . . lawyers, whose appearance or interest in a proceeding pending[] or impending[] before the judge would in any event require disqualification of the judge under Rule 2.11.”¹⁹⁷

Canon Four, the final Canon, relates to judicial campaigns and ensuring that such campaigns are not “inconsistent with the independence, integrity, or impartiality of the judiciary.”¹⁹⁸ Most relevant is Rule 4.1.¹⁹⁹ Under this Rule, judicial candidates are not supposed to “make pledges, promises, or commitments that are inconsistent with the impartial[] performance of the adjudicative duties of judicial office.”²⁰⁰ Further, judges and judicial candidates are supposed to “take reasonable measures to ensure that other persons” do not engage in any other behaviors listed in Rule 4.1.²⁰¹

ii. Special Protections for Judges

While there are various ethical rules judges are supposed to follow, judges are also afforded legal protections from liability and the ethical rules are rarely enforced against them. Similar to prosecutors, judges enjoy absolute immunity from any damages that may have resulted from a judicial act.²⁰² The only limitation to this immunity is that the judicial act cannot extend beyond the judge’s jurisdiction.²⁰³ For example, a judge can find someone to be “in contempt of court and order[] them incarcerated” as long as that “judge had subject matter jurisdiction over the case.”²⁰⁴ This absolute immunity applies to both state and federal judges at all levels of the judiciary.²⁰⁵

Also parallel to prosecutors is a lack of enforcement of judicial ethical rules. Notably, many judges do not even know they are in violation of the judicial code of ethics.²⁰⁶ Often times, punishment for judicial misconduct is minor.²⁰⁷ Many judges can return to the

197. MODEL CODE OF JUD. CONDUCT Canon 2, r. 3.13(B)(2) (AM. BAR ASS’N. 2020).

198. MODEL CODE OF JUD. CONDUCT Canon 4 (AM. BAR ASS’N 2020) (capitalization omitted).

199. Importantly, the rules concerning judicial campaigns vary greatly by state and have been upheld by Supreme Court precedent. *See infra* Part II.B.

200. MODEL CODE OF JUD. CONDUCT r. 4.1(A)(13) (AM. BAR ASS’N 2020).

201. MODEL CODE OF JUD. CONDUCT Canon 2, r. 4.1(B) (AM. BAR ASS’N. 2020).

202. *Stump v. Sparkman*, 435 U.S. 349, 359 (1978).

203. Jeffrey M. Shaman, *Judicial Immunity*, 27 SAN DIEGO L. REV. 1, 7 (1990).

204. *Id.*

205. *Id.* at 5.

206. *See* Siconolfi et al., *supra* note 42.

207. Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke*

bench after receiving a misconduct sanction.²⁰⁸ These cases can range from a judge interrupting jury deliberations in order to express his own opinion on a criminal case to a judge violating nepotism rules.²⁰⁹ One of the main issues with trying to remove a judge is that the oversight commissions that review judicial misconduct are typically comprised of other judges.²¹⁰ This underenforcement of the judicial ethical rules occurs at the expense of many people who are negatively impacted by judicial misconduct.²¹¹

Moreover, the processes for filing judicial misconduct claims are challenging. It can be difficult to file a complaint against a judge for judicial misconduct. For example, in Alabama, complaints need to be notarized, in writing, and include the complainant's name on the complaint.²¹² Louisiana state law imposes a confidentiality requirement, under threat of being held in contempt of court, for anyone who files a complaint against a judge unless and until the Judiciary Commission recommends public discipline to the Louisiana Supreme Court.²¹³ Such public discipline is “a remarkably rare occurrence.”²¹⁴ Moreover, in some jurisdictions, the oversight commission “must keep a judge who is under scrutiny fully informed throughout an investigation.”²¹⁵ In South Carolina, the Commission on Judicial Conduct—the body tasked with overseeing and adjudicating ethical complaints against judges—is

Laws or Oaths Remained on the Bench, REUTERS (June 30, 2020), <https://www.reuters.com/investigates/special-report/usa-judges-misconduct/> [<https://perma.cc/DY42-EFR7>] (quoting Stephen Gillers, a law professor at New York University, stating that “the public ‘would be appalled at some of the lenient treatment judges get’ for substantial transgressions.”)

208. *Id.* (analyzing 5,122 judicial misconduct cases and finding “9 of every 10 judges were allowed to return to the bench after they were sanctioned for misconduct . . .”).

209. *Id.*

210. *Id.*

211. *Id.* (finding that “at least 5,206 people . . . were directly affected by a judge’s misconduct”).

212. Berens & Schiffman, *supra* note 207. It is important to highlight that requiring the complaint to be notarized means any misstatement about the judge opens the complainant up to being prosecuted for perjury. *Id.*

213. Andrea Gallo & John Simerman, *Jeff Hughes Case Shows how a Judge’s Misbehavior can Remain Hidden Forever in Louisiana*, ADVOCATE (Aug. 11, 2019), https://www.theadvocate.com/baton_rouge/news/courts/article_56cceb18-b3ad-11e9-9946-e7afe5a9c1a4.html [<https://perma.cc/8DBV-MTTA>].

214. *Id.* Between 2014 and 2019, the Judiciary Commission opened “in-depth investigations” for 317 complaints, but only recommended 12 to the Supreme Court for further judicial discipline. *Id.*

215. Berens & Schiffman, *supra* note 207. The judge can even receive copies of issued subpoenas. *Id.*

comprised of 54% judges.²¹⁶ Thus, judges have protection from the system itself as it imposes barriers to those who want to complain about judicial misconduct. As a result, many judges who have misconduct complaints filed against them receive no punishment at all.²¹⁷

Becoming and remaining a judge is intertwined with the criminal justice process. Judges and judicial candidates cannot be seen as weak on crime. Given the judicial function, there are different powers judges have, such as granting or denying crucial pretrial motions, sustaining or overruling certain objections during trials, and the ability to decide what sentence a convicted defendant receives. However, this power rarely goes checked and, even when this power is checked, no real punishment is given to the judge. Because judges have this safety net and great power, it is important to dissect how criminal proceedings work, how the prosecutorial and judicial functions interact with one another during a criminal proceeding, and where these issues of abuse can arise.

III. Steps and Mechanics of a Criminal Proceeding

Now that the basic functions and rules governing the prosecutorial and judicial functions have been laid out, it is important to understand how criminal proceedings work at a foundational level. This Part will walk through the steps of a criminal proceeding, covering the steps that typically involve prosecutors and judges interacting with one another the most. Through detailing out each of these steps, it will become clearer how the symbiotic relationship between prosecutors and judges allows for unfair trials against criminal defendants at every step.

A. *Step One: Bringing Charges Against the Defendant*

After a person is arrested to be tried, criminal charges must be brought against them. There are three different ways charges are

216. Joseph Cranney, *South Carolina: The State Where Judges Rule Themselves in Secret*, PROPUBLICA (Apr. 25, 2019), <https://www.propublica.org/article/what-happens-when-judges-police-themselves-in-secret-not-much> [<https://perma.cc/F3GV-WJGK>].

217. See Erik Ortiz, *Robed in Secrecy: How Judges Accused of Misconduct can Dodge Public Scrutiny*, NBC NEWS (Dec. 26, 2021), <https://www.nbcnews.com/news/us-news/robed-secrecy-judges-accused-misconduct-can-dodge-public-scrutiny-rcna7638> [<https://perma.cc/ZZC6-AWTA>] (stating that “[m]isconduct findings are rare in the judicial complaint process” and that 90% of judicial misconduct cases end with the sanctioned judge returning to the bench according to a Reuter’s analysis).

brought. First, a grand jury can vote on an indictment.²¹⁸ Second, a prosecutor can file charges or, on occasion, have another individual file a criminal complaint.²¹⁹ Third, and least relevant to the criminal trial setting, a police officer can file a citation for a minor offense or petty misdemeanor.²²⁰ Important to the second option, prosecutors choose which charges to file.²²¹ Prosecutors decide what charges to bring based on the evidence gathered from the arrest and ultimately present those charges to the court.²²²

B. Step Two: The Grand Jury or Preliminary Hearing

Grand juries and preliminary hearings both operate in similar manners but have some distinct differences. A grand jury is a group of jurors who hear evidence from a prosecutor to decide whether there is enough evidence to believe that an individual committed a crime and that the case should be formally tried.²²³ It only takes a majority of the grand jury members to bring forward an indictment against someone.²²⁴ Importantly, “there is no presentation of defense evidence or cross-examination of the prosecution’s evidence.”²²⁵ The fact that the prosecution can present such evidence uncontested gives prosecutors certain advantages during a trial.²²⁶ The grand jury process also benefits prosecutors as it gives prosecutors a chance to test evidence in front of a jury.²²⁷

218. *How Courts Work: Steps in a Trial: Bringing the Charge*, AM. BAR ASS’N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bringingcharge [https://perma.cc/H3WF-NHC4].

219. *Id.*

220. *Id.*

221. *See* Davis, *supra* note 70, at 409.

222. *Id.*

223. Catherine Garcia, *How Do Grand Juries Work?*, THE WEEK (Mar. 30, 2023), <https://theweek.com/us/1022196/how-do-grand-juries-work> [https://perma.cc/679X-ZKUC].

224. *Id.* (noting that grand juries comprise sixteen to twenty-three members). There is a common saying that one could “indict a ham sandwich,” suggesting how easy it is for prosecutors to bring a successful indictment. Josh Levin, *The Judge Who Coined “Indict a Ham Sandwich” Was Himself Indicted*, SLATE (Nov. 25, 2018, 1:20 PM), <https://slate.com/human-interest/2014/11/sol-wachtler-the-judge-who-coined-indict-a-ham-sandwich-was-himself-indicted.html> [https://perma.cc/84EY-6DKD].

225. Garcia, *supra* note 223.

226. Under FED. R. EVID. 801(d)(1)(A), a prosecutor can have a witness on the stand during the grand jury, have that person become a witness for the defense during the trial, and then use the grand jury testimony to show that the witness has made prior inconsistent statements and avoid a hearsay objection.

227. *See* Garcia, *supra* note 223 (quoting Peter Joy, a professor at Washington University School of Law).

Additionally, the grand jury process is secretive as “only the grand jurors, prosecutors, witnesses, and a court reporter are allowed in the room.”²²⁸

Other pretrial hearings depend on the types of charges being brought against the defendant. For misdemeanors, the individual appears before a magistrate or a judge of a lower court.²²⁹ The judge will read to the defendant the charges and explain any penalties while also advising the defendant of their right to counsel.²³⁰ Additionally, at this step, the defendant chooses to enter a plea for guilty or not guilty.²³¹ If the defendant pleads not guilty, then the judge sets bail.²³²

For felonies, the process is similar to the misdemeanor process but with some additional protections. First, the defendant will appear in front of a magistrate or lower court judge to have the charges read and be advised of the right to counsel.²³³ Defendants charged with a felony do not enter a plea of guilty or not guilty, but rather have bail set by the judge and then wait for a preliminary hearing.²³⁴ The preliminary hearing requires the government to prove to a magistrate or judge that the State has probable cause that the defendant committed the crimes with which he or she is charged.²³⁵ Similar to the grand jury process, the defendant is present but the defense does not offer evidence.²³⁶ If the court finds there is probable cause, then the matter goes to trial; if there is not probable cause, then the defendant is released.²³⁷

C. Step Three: The Option to Engage in Plea Bargaining

Once someone has a formal charge brought against them, the defendant can start engaging in the plea bargaining process. In general, plea bargaining is a negotiation between both parties to

²²⁸. *Id.*

²²⁹. *How Courts Work: Steps in a Trial: Pre-Trial Court Appearances in Criminal Cases*, AM. BAR ASS'N (Sept. 9, 2021),

https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pretrial_appearances [https://perma.cc/VB6K-HRFP].

²³⁰. *Id.*

²³¹. *Id.* If a defendant requests counsel or is appointed counsel, then the court will enter a plea of not guilty. *Id.*

²³². *Id.*

²³³. *Id.*

²³⁴. *Id.*

²³⁵. *How Courts Work: Steps in a Trial: Pre-Trial Court Appearances in Criminal Cases*, *supra* note 229.

²³⁶. *Id.*

²³⁷. *Id.*

reach an agreement as to which charges a defendant will plead guilty to and what the respective punishment will be.²³⁸ The prosecutor will provide a recommended sentence to the court.²³⁹ However, the court must approve the plea bargain and can choose to give a different sentence than the prosecution recommends.²⁴⁰

Plea bargaining helps resolve many criminal cases.²⁴¹ There are various reasons one chooses to engage in the process and accept a plea bargain. First, a plea bargain can allow a defendant to receive a lesser punishment while not having the risk and expense of going to trial.²⁴² Similar for the prosecution, the prosecutor does not have to prepare for trial nor run the risk of losing at trial.²⁴³ Lastly, a plea bargain frees up the court and allows a judge to hear other cases.²⁴⁴

D. Step Four: Pretrial Motions

If a defendant decides to not accept a plea bargain and wants to proceed to trial, then the defendant and prosecution will file various pretrial motions. Pretrial motions are important as they can help shape the trial to one party's benefit.²⁴⁵ A common pretrial motion is a motion to dismiss. A defense attorney will file this motion if she believes there was a violation of the law, the prosecution did not follow the rules, or the facts of the case do not support the alleged crime.²⁴⁶ A motion to suppress is another frequently filed pretrial motion. Simply, a motion to suppress serves as a means to exclude certain evidence from trial.²⁴⁷ These motions are commonly filed if the defense believes certain evidence was obtained in violation of the defendant's Fourth Amendment rights.²⁴⁸ However, these motions can also be filed if the defense

²³⁸. *How Courts Work: Steps in a Trial: Plea Bargaining*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining [<https://perma.cc/P6N6-M2UP>].

²³⁹. *Id.*

²⁴⁰. *Id.*

²⁴¹. *Id.*

²⁴². *Id.*

²⁴³. *Id.*

²⁴⁴. *Id.*

²⁴⁵. *Pre-Trial Motions in Criminal Cases*, GILLES LAW: BLOG (Oct. 5, 2018), <https://gilleslaw.com/pre-trial-motions-in-criminal-cases> [<https://perma.cc/84PS-CDRE>].

²⁴⁶. *Id.*

²⁴⁷. *Id.*

²⁴⁸. Micah Schwartzbach, *What Is a Motion to Suppress?*, NOLO (May 5, 2024),

believes the police investigation was improper.²⁴⁹ Whether a judge grants or dismisses a motion to suppress is consequential to a trial, as a granted motion to suppress evidence could uproot the prosecution's entire case.²⁵⁰

The most common and, arguably, most important pretrial motion is the motion *in limine*. A motion *in limine* allows a party to exclude certain testimony of witnesses and prevent attorneys from making particular statements during the trial.²⁵¹ Additionally, a motion in limine can prevent an expert from testifying under *Daubert*.²⁵² Importantly, though, motions in limine serve as a means to communicate with the court.²⁵³ This communication can allow a party to more successfully object to certain evidence and testimony.²⁵⁴ Further, it tells the court and opposing counsel a party's theory of the case.²⁵⁵ Therefore, the court has a better understanding of what the case will be about and what arguments and evidence the court expects to hear.

*E. Step Five: The Criminal Trial*²⁵⁶

After most pretrial motions are resolved, the criminal trial can begin. The start of the trial begins with jury selection.²⁵⁷ This process involves the prosecution and defense counsel asking questions to the jurors.²⁵⁸ Moreover, the judge presiding over the case can ask the jurors questions.²⁵⁹ Important to jury selection is

<https://www.nolo.com/legal-encyclopedia/what-motion-suppress.html>
[<https://perma.cc/9HAK-8NJ9>].

249. *Id.* (“A defendant might argue that the identification procedure was so unfair that the judge should bar the prosecution from mentioning its results at trial.”).

250. *Id.*

251. *Pre-Trial Motions in Criminal Cases*, *supra* note 245.

252. *Motion in Limine*, LEGAL INFO. INST.,

https://www.law.cornell.edu/wex/motion_in_limine [<https://perma.cc/FQ3S-VH4U>].

253. Jeffrey M. Pollock, *Use in Limine Motions to Frame the Field of the Courtroom Battle*, N.J.L.J., Aug. 7, 2017 (“One benefit of in limine motions is that, by discussing them with the court in advance, you educate the court of your concerns regarding the admissibility of certain evidence.”).

254. *Id.* (“If the court understands your perspective, you may have more success in barring that evidence at trial because the court is sensitized to the issue.”).

255. *Id.*

256. Criminal trials have various different components to them. This subpart will only cover a few of the components that are most relevant to how prosecutors and judges interact.

257. *How Courts Work: Steps in a Trial: Selecting the Jury*, AM. BAR ASS'N (Sept. 9, 2019),

https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect [<https://perma.cc/TZ5Q-6QA6>].

258. *Id.*

259. *Id.*

the ability to strike a juror. Either lawyer can ask to dismiss a juror for cause, meaning that the juror likely has some prejudice about the case.²⁶⁰ Each attorney can dismiss any number of jurors for cause, but each request must be approved by the judge.²⁶¹ However, each lawyer also receives a set number of peremptory challenges.²⁶² These preemptory challenges allow a lawyer to dismiss a juror without providing a reason why.²⁶³ Once enough jurors are selected, the trial begins.

In a criminal trial, the prosecution and defense will give their respective opening statements and present their respective cases.²⁶⁴ During the presentation of either case, the prosecution and defense will attempt to admit evidence,²⁶⁵ question witnesses and object to questions,²⁶⁶ and, after the prosecution rests its case, the defense may ask to dismiss the case.²⁶⁷ Once both sides rest their case, both parties may recommend jury instructions to the judge to be read to the jury.²⁶⁸ The judge may accept or deny either party's jury

260. *Id.*; see, e.g., *Schitt's Creek: The Rollout* (Pop TV television broadcast Apr. 3, 2018) (demonstrating juror prejudice when character Moira Rose is struck as a juror for a criminal case involving alleged tax fraud given her previous experience with alleged tax evasion).

261. *How Courts Work: Steps in a Trial: Selecting the Jury*, *supra* note 257.

262. *Id.*

263. *Id.* However, attorneys cannot dismiss a juror for a discriminatory purpose. *Id.*

264. *How Courts Work: Steps in a Trial: Opening Statements*, AM. BAR ASS'N (Nov. 28, 2021),

https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/openingstatements [<https://perma.cc/A6BJ-UDDF>]. Depending on the jurisdiction, some courts allow the defendant to save their opening statement until the prosecution rests its case. *Id.*

265. *How Courts Work: Steps in a Trial: Evidence*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/evidence [<https://perma.cc/7PYF-QHHC>].

266. *How Courts Work: Steps in a Trial: Direct Examination*, AM. BAR ASS'N (Sept. 9, 2019),

https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/directexam/ [<https://perma.cc/RH5C-LWQ2>]; *How Courts Work: Steps in a Trial: Cross-Examination*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/crossexam [<https://perma.cc/HN3M-6W3Q>].

267. *How Courts Work: Steps in a Trial: Motion for Directed Verdict/Dismissal*, AM. BAR ASS'N (Sept. 9, 2019),

https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/motiondismiss [<https://perma.cc/828T-LTTM>]. A defense attorney would, with the jury out of the courtroom, make a motion to dismiss the case if the attorney believes the prosecution failed to prove its case. *Id.* The judge decides whether to dismiss the case. *Id.*

268. *How Courts Work: Steps in a Trial: Instructions to the Jury*, AM. BAR ASS'N

instructions and will then instruct the jury on what laws it must follow to reach a verdict.²⁶⁹ After the jury deliberates, the jury then reaches a verdict to find the defendant guilty or not guilty on all, some, or none of the charges brought against them.²⁷⁰

F. Step Six: Sentencing

If a defendant is found guilty, then the criminal proceeding transitions to sentencing. Prior to the sentencing hearing, a pre-sentence investigation takes place.²⁷¹ The pre-sentence investigation is typically conducted by a probation officer who will look at “the defendant’s prior criminal record, family situation, health, work record, and any other relevant factor.”²⁷² This information helps the judge determine what sentence to give the convicted defendant.²⁷³

Besides a pre-sentence investigation, sentencing guidelines also influence a judge’s sentence. Sentencing guidelines typically work as a grid that considers the severity of the convicted offense and the convicted defendant’s criminal history.²⁷⁴ The judge would find the convicted offense and the correlated criminal history score to then find the sentence range.²⁷⁵ The judge would proceed to do this for each charge.²⁷⁶ In determining what sentence to give within the range, a judge will often consider the defendant’s prior bad acts and charges, if any.²⁷⁷ Once the judge has made that determination, the judge then issues their sentence on the defendant.

IV. Uneven Scales: How the Prosecutor-Judge Symbiotic Relationship Results in Unequal and Unfair Criminal

(Sept. 9, 2019),

https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct [<https://perma.cc/BZ2H-3E3Z>].

269. *Id.*

270. *How Courts Work: Steps in a Trial: Verdict*, AM. BAR ASS’N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/verdict [<https://perma.cc/J4LW-GPFF>].

271. *How Courts Work: Steps in a Trial: Sentencing*, *supra* note 179.

272. *Id.*

273. *Id.*

274. *See, e.g.*, MINN. SENT’G GUIDELINES GRID § 4.A (MINN. SENT’G COMMENT. 2022).

275. *Id.* For example, under Minnesota’s sentencing guidelines, if an individual was convicted of First-Degree Burglary and had a criminal history score of two, the judge could issue a sentence between fifty-eight to eighty-one months with a presumptive length of sixty-eight months. *Id.*

276. *Id.*

277. *See Hessick, supra* note 180, at 1114–15.

Proceedings for Defendants

Through detailing how both the prosecutorial and judicial functions work and the steps and mechanics of a criminal proceeding, this Part will argue that a symbiotic relationship exists between prosecutors and judges. Specifically, this Part maintains that prosecutors and judges routinely work hand-in-hand to best serve their respective functions such that defendants can rarely receive a fair trial. This Part first starts by describing the symbiotic relationship between prosecutors and judges, discussing how many judges are former prosecutors, how the judicial and prosecutorial election system benefits prosecutors, and how it is difficult for judges to truly be impartial when presiding over cases with former colleagues. From there, this Part will assert that prosecutors receive a variety of judicial favors during a criminal proceeding because of this symbiotic relationship. Finally, this Part will conclude by discussing how prosecutors and judges can circumvent the ethical and legal rules surrounding their functions to avoid facing any real consequences.

A. *The Symbiotic Relationship between Prosecutors and Judges*

The symbiotic relationship between judges and prosecutors starts with the fact that many judges are former prosecutors. As of 2021, 263 federal judges used to be prosecutors.²⁷⁸ However, only 66 federal judges were criminal defense attorneys.²⁷⁹ Thus, the current federal judiciary has an almost four to one ratio of former prosecutors to former defense attorneys.²⁸⁰ When factoring in whether a judge previously worked as an advocate for the government,²⁸¹ the number increases to 389, a ratio of approximately six to one.²⁸² More generally, judges who previously served as advocates for the government outnumber judges who

278. Clark Neily, *Are A Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), <https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates> [<https://perma.cc/TX73-5USD>].

279. *Id.* There are fifty-five judges who were both prosecutors *and* criminal defense attorneys. *Id.*

280. *Id.*

281. For purposes of the study, an individual is considered to have worked as an advocate for the government if they were a “prosecutor, noncriminal courtroom advocate on behalf of government, [or] nonlitigating government lawyer (e.g., agency general counsel)” *Id.*

282. *Id.* There is some overlap in the data, as some judges used to be both prosecutors and advocates for the government. *Id.*

previously advocated against the government by almost seven to one.²⁸³ At the state supreme court level, there is little difference, as 39% of state supreme court justices were former prosecutors as of 2022.²⁸⁴ Only 7% of sitting state court justices were public defenders.²⁸⁵

Historically, there has been a trend of having more prosecutors on the bench than criminal defense attorneys. During President Obama's administration in 2015, 41% of his nominees had some work experience as a prosecutor.²⁸⁶ Only 14% of President Obama's nominees at that time were former public defenders.²⁸⁷ State courts also follow this trend. In 2011, 33% of sitting state justices had experience as a prosecutor while 15% had experience in public defense.²⁸⁸

This imbalance between the number of former prosecutors and former criminal defense attorneys who serve as judges plays a significant role in the outcome of cases. To start, someone challenging the government has an almost 45% chance of being assigned a judge who previously worked for the government.²⁸⁹ Judges' former experiences color their ability to be impartial.²⁹⁰ This bias can come in two different forms. First, a former judge who is a prosecutor can have confirmation bias.²⁹¹ Under confirmation bias, judges will make decisions "that confirm[] or support[] prior beliefs, attitudes, or values."²⁹² Thus, what a judge learned as a

283. *Id.* It is important to note that this data does not cover magistrate judges and their former careers, although magistrate judges also play a key role in criminal proceedings. *Id.* However, as of 2019, there were 549 full-time magistrate judges. See Adams et al., *supra* note 147, at 205.

284. Amanda Powers & Alicia Bannon, *State Supreme Court Diversity – May 2022 Update*, BRENNAN CTR. FOR JUST. (May 25, 2022), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update> [https://perma.cc/Q779-VVXU].

285. *Id.*

286. Casey Tolan, *Why Public Defenders are Less Likely to Become Judges—And Why That Matters*, SPLINTER (Mar. 18, 2016), <https://splinternews.com/why-public-defenders-are-less-likely-to-become-judges-a-1793855687> [https://perma.cc/5FT8-RYR2].

287. *Id.*

288. *Id.*

289. Neily, *supra* note 278.

290. *Id.*; see also Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L. J. 521, 530 (2007) ("Absolute impartiality is an unattainable goal, then, because all judges bring their own perspective and biases with them into the courtroom.")

291. Colleen M. Berryessa, Itiel E. Dror & Bridget McCormack, *Prosecuting from the Bench? Examining Sources of Pro-Prosecution Bias in Judges*, 28 LEGAL & CRIM. PSYCH. 1, 7 (2022).

292. *Id.*

prosecutor can influence how a judge views a case. Second, judges who were former prosecutors experience role-induced bias.²⁹³ Under role-induced bias, a judge who was a prosecutor will likely subconsciously view their role as prosecutorial, depending on how long they worked as a prosecutor.²⁹⁴ These biases are felt by criminal defense attorneys. In a study of 101 criminal defense attorneys, 87% somewhat or strongly agreed that judges are pro-prosecution, and 79% somewhat or strongly agreed that judges protect police witnesses.²⁹⁵

Judges who were former prosecutors are likely to hear cases in front of former colleagues and friends as well. Judges hearing cases from their colleagues or former division may trust the attorney or office over the defense.²⁹⁶ Therefore, defendants face a significant hurdle to prove their innocence. This also raises ethical concerns. Judges are supposed to be impartial and not even show the appearance of impropriety.²⁹⁷ However, judges who routinely hear cases from former colleagues will likely have some bias and favoritism toward those colleagues.

How one acts as a prosecutor, and how one becomes a judge, reinforces and bolsters the symbiotic relationship between prosecutors and judges. Judicial elections have a strong focus on being “tough on crime.”²⁹⁸ Any previous criminal defense work can negatively harm one’s chances of being elected or appointed to the bench.²⁹⁹ It is why there is a team mentality between prosecutors and judges, as “[b]oth the judge and prosecutor benefit from a cooperative relationship.”³⁰⁰ There is an incentive for prosecutors to bring forward more charges and for judges to not question the charges brought. Indeed, the electoral and appointment systems require prosecutors and judges to be careful of how they handle criminal cases from rulings on evidence to sentencing. For example,

293. *Id.* at 8.

294. *Id.*

295. Esther Nir & Siyu Liu, *Defending Constitutional Rights in Imbalanced Courtrooms*, 111 J. CRIM. L. & CRIMINOLOGY 501, 525 (2021).

296. See Berryessa et al., *supra* note 291, at 8 (finding that those assigned prosecutorial training and then acting as a third-party neutral tend to favor the prosecution’s evidence and arguments over the defense).

297. See *supra* Part II.C.i and accompanying notes 182–98.

298. See BERRY, *supra* note 126, at 3.

299. *Id.*; Tolan, *supra* note 286 (discussing how Jane Kelly’s potential appointment to the United States Supreme Court became untenable because Kelly previously represented a defendant who was “charged with murder and possession of child pornography . . .”).

300. Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and Prosecutor*, 79 NEB. L. REV. 251, 269 (2000).

if a judge tries to curb the prosecutor's power, the judge could be labeled an "activist" judge and harm their chances for re-election.³⁰¹ Thus, defendants in criminal proceedings are participating in a system that is designed to disadvantage them and encourages unfair treatment towards defendants.

But the symbiotic relationship is not reserved solely to what happens in the courtroom. For example, in one case, a judge secretly met with prosecutors and government witnesses to discuss potential witness intimidation.³⁰² The judge said that he would grant a mistrial, but would convince the defense to file a motion for a mistrial to then bring forward a new trial.³⁰³ The judge successfully convinced defense counsel to bring a motion for a mistrial and the judge granted it, allowing for the prosecution to try the case again.³⁰⁴ These relationships can be more personal as well. Judges and prosecutors frequently attend the same parties.³⁰⁵ Prosecutors and judges are also known to text one another.³⁰⁶ Thus, defendants do not only have to overcome the professional connection the symbiotic relationship creates, but the deeply personal connection as well.

B. Prosecutors Receive Judicial Favors

In understanding the symbiotic relationship between prosecutors and judges, it is important to observe the real effects the relationship has on criminal defendants and their ability to have a fair trial. First, the symbiotic relationship encourages prosecutors to bring forward multiple, unwarranted charges and for the judge to not dismiss any of the charges. Prosecutors hold the power to bring whatever charges they want.³⁰⁷ Judges have little incentive to dismiss the charges as it can be seen as them being weak on crime³⁰⁸ and judges likely trust that prosecutors have enough evidence for each charge.³⁰⁹ This is despite the fact that

301. Luna & Wade, *supra* note 64, at 1528.

302. *See* Flowers, *supra* note 300, at 267.

303. *Id.*

304. *Id.*

305. *See* Balko, *supra* note 1.

306. John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALBANY L. REV. 881, 884–85 (2014) (discussing a Florida criminal case for first-degree murder where the prosecutor and judge "exchanged 471 text messages and 949 cellphone calls, averaging nearly 10 ex parte communications *per day*") (emphasis in original).

307. *See supra* Part I.B.

308. *See* BERRY, *supra* note 126, at 3.

309. *See* Berryessa et al., *supra* note 291, at 8.

prosecutors are supposed to be restrained in what charges they bring³¹⁰ and judges should be ensuring a trial is fair and not partial to one party.³¹¹ Thus, charged individuals have a greater burden placed on them to prove their innocence and run the risk of receiving a harsher punishment if convicted on all charges.

Because prosecutors can bring forward so many charges, there is a greater incentive for defendants to accept unfair plea deals with little judicial interference. Defendants often choose to take plea deals because the risk of trial can be great and the punishment can be more severe.³¹² However, the symbiotic relationship distorts any check to ensure the plea deal is actually fair. Judges will typically defer to the prosecutor for plea bargaining and setting bail requirements.³¹³ Prosecutors could thus bring severe charges against a defendant with little evidence to support the charge, but have the ultimate goal to have the defendant plead to a lower charge they may have never been convicted of in the first place. Thus, the symbiotic relationship hinders criminal defendants from exercising their right to trial and proving they are not guilty of a crime.

Additionally, the symbiotic relationship gives prosecutors a significant advantage in trial strategy when it comes to obtaining evidence and receiving favorable rulings on pretrial motions. First, the symbiotic relationship makes it easier for prosecutors to obtain evidence. Because judges who were prosecutors have more trust in the prosecution, these judges will often sign search warrants for prosecutors with little review.³¹⁴ These search warrants can be vast and intrude into evidence that is potentially irrelevant to the trial.³¹⁵ The prosecution can accumulate more evidence against a

310. MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 1983).

311. MODEL CODE OF JUD. CONDUCT Canon 1, r. 1.2 (AM. BAR ASS'N 2020).

312. See *supra* Part II.C and accompanying notes 234–40.

313. Michael W. Smith, *Making the Innocent Guilty: Plea Bargaining and the False Plea Convictions of the Innocent*, 46 CRIM. L. BULLETIN No. 5, Art. 4 (2010) (“This is also a symbiotic relationship, whereby judges customary [sic] agree with prosecutions’ recommendations for bail/pre-detention and allow prosecutors to control the court dockets, thereby increasing the likelihood of false guilty pleas or wrongful convictions by trial.”).

314. See FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 53 n.18 (Frank J. Remington ed., 1969) (“One judge responsible for the signing of warrants stated that he, being a former prosecutor himself, placed much faith in the ability of the present prosecutor to screen cases. Consequently, he did little more than scan the information contained in the warrant before signing it.”); David S. D’Amato, *Judges and Prosecutors are Complicit in Injustice*, THE HILL (July 2, 2020), <https://thehill.com/opinion/judiciary/505582-judges-and-prosecutors-are-complicit-in-injustice> [https://perma.cc/X4MZ-9UYF] (finding that judges regularly uphold illegal searches and arrests).

315. See Adams & Price, *supra* note 171.

criminal defendant and require the defendant to file a motion to suppress unlawfully obtained evidence. However, such motions would then require the judge to question the authority of the prosecutor. The relationship between prosecutor and judge likely results in the judge denying the motion.

Data on judicial decisions supports this notion that judges who were former prosecutors rule in favor of the prosecution more often. In a review of 727 cases, 50 cases resulted in judges allowing “prosecutors to introduce questionable . . . and often improper . . . evidence.”³¹⁶ Conversely, in almost “50 other cases, defense attorneys were restricted from introducing their own evidence.”³¹⁷

Below, the author will analyze Alabama’s and Georgia’s district court judges who were former prosecutors and their records on different motions.³¹⁸ In conducting this review, the author found that most judges who were former prosecutors ruled on motions in favor of the prosecution.

To start, Judge Terry F. Moorer was an Assistant U.S. Attorney for seventeen years before being appointed to the bench in 2018. Over the course of five years, Judge Moorer has denied 22 out of 29 motions to suppress. Similarly, Chief Judge Kristi DuBose, who was a prosecutor for six years before being appointed to the bench, has denied 12 out of 18 motions to suppress evidence. Judge Liles C. Burke, a former municipal prosecutor for seven years, has denied 9 motions to exclude evidence out of 13. Judge L. Scott Coogler, who was a prosecutor for one year, has denied 27 out of 33 motions to suppress evidence.

316. Fredric N. Tulsky, *How Judges Favor the Prosecution*, MERCURY NEWS (Jan. 31, 2007), <https://www.mercurynews.com/2007/01/31/part-four-how-judges-favor-the-prosecution> [<https://perma.cc/NGN7-VN4Z>].

317. *Id.* (“For example, in one manslaughter trial, the judge permitted the jury to hear the portion of a defendant’s statement to police in which he confessed to striking the victim with a board, but not the portion in which he explained that it happened in a frenzy, after he was stabbed, and that he had not intended to kill the man.”).

318. The author utilized data provided from the CATO Institute on federal judges’ background experience and searched their motion history in Lexis to generate the following analysis on Alabama and Georgia judges’ history and records. <https://advance.lexis.com/contextprofile/index?crd=88020f19-dd22-4f79-8680-e3f812cb0e2d&pdtabname=overview&pdprofileid=urn%3Aentity%3Ajud-100066258&pdprofiletype=judge&pdmfid=1518492&pdisurlapi=true> (search “Judge [judge’s first and last name]” to locate the judge’s “Lexis Context Profile.” Within a particular judge’s profile, the “Analytics” tab provides a breakdown of the judge’s previous motion decisions). It is important to note that Lexis does not have access to every motion filed in one judge’s chambers nor does this account for the numerous amounts of criminal cases that are resolved through a plea deal.

In Georgia, the data is similar. Chief Judge Thomas W. Thrash, Jr., who was an Assistant District Attorney for three years, has denied 96 out of 136 motions to suppress evidence. Judge William S. Duffey, Jr., who was a prosecutor for four years and a government advocate for six years, has denied 69 out of 99 motions to suppress evidence and has denied all motions for acquittal before him. Judge Steve C. Jones, a former six-year prosecutor and a judge appointed by President Obama, has denied 39 out of 61 motions to suppress evidence and denied 26 out of 73 motions to dismiss a criminal case. Lastly, Judge Eleanor L. Ross, who served in various prosecutorial functions from 1994 to 2011, has denied 28 out of 43 motions to suppress evidence. Thus, the data shows the symbiotic relationship between prosecutors and judges in action and how it can unfairly treat criminal defendants.

However, this does not account for magistrate judges who see significantly more motions to suppress evidence or dismiss a case. From October 2018 to September 2019, “magistrate judges handled 244,367 felony pretrial matters and conducted 34,964 felony guilty plea proceedings.”³¹⁹ What is concerning is that most district court judges sign off on whatever recommendation a magistrate judge makes.³²⁰ Indeed, magistrate judges may choose to rule on motions that would favor the prosecution or align with the district court judge in order to keep the appointment.³²¹

The symbiotic relationship also encourages judicial activism while on the bench. Judges may help the prosecution by examining a witness themselves in front of the jury.³²² Even worse, some judges may interrupt defense counsel and take over the defense counsel’s examination.³²³ In Tulskey’s review, he found ten cases where “judges made explicit remarks or took actions in the presence of the jury that suggested their bias against the defendant.”³²⁴ Such advocacy by the judge can benefit the prosecution significantly.³²⁵

319. See Adams et al., *supra* note 147, at 205–06; *U.S. Magistrate Judges — Judicial Business 2019*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/us-magistrate-judges-judicial-business-2019> [https://perma.cc/W2HC-JPGD]. Unfortunately, the CATO Institute data does not include data on magistrate judges.

320. Adams et al., *supra* note 147, at 224.

321. *Id.* at 244 (“[Magistrate judges] may alter their work in order to increase their reputation with the judge, tailoring each R&R to the overseeing judge’s preferences to enhance their reputation and thus their chances for reappointment.”).

322. Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 260–63 (2000).

323. *Id.*

324. See Tulskey, *supra* note 316.

325. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.3 cmt. 2 (AM. BAR ASS’N 2020) (discussing how a judge’s facial expressions could show impropriety).

However, this advocacy does not have to be confined solely to judicial comments. The symbiotic relationship also incentivizes judges to follow whatever orders prosecutors may file. Judges may opt to copy exactly what a prosecutor writes in an order rather than write their own.³²⁶ With respect to jury instructions, judges can choose to use the prosecution's jury instructions, despite them being inappropriate for the jury.³²⁷

Lastly, the symbiotic relationship encourages judges to give harsher punishments. From the outset of a criminal proceeding, defendants can be subjected to harsher punishments because prosecutors have great discretion in what charges to bring and judges are rarely willing to challenge these charges.³²⁸ For states that use the sentencing guidelines, the increase in severity of charges allows a judge to give a higher sentence than what a criminal defendant might justly deserve.³²⁹ Moreover, the symbiotic relationship incentivizes prosecutors to recommend higher sentences and for judges to issue higher sentences. Given both prosecutors and judges do not want to be seen as weak on crime,³³⁰ prosecutors will want to recommend higher sentences for defendants and judges are likely to comply with that to avoid any negative reaction for giving too lenient a sentence. Overall, though, this results in an unjust and unwarranted punishment for the defendant.

C. *How Special Protections Perpetuate the Symbiotic Relationship*

The ways that judges act have real impacts on defendants and the judiciary as a whole. In Tulskey's study, he found "more than 100 instances when the appellate courts found that trial judges erred in ways that helped prosecutors, and more than 40 additional instances of troubling conduct that the appellate courts declined to assess."³³¹ Therefore, the symbiotic relationship results in many defendants receiving unfair trials and unjustly serving time for

326. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOS. U. L. REV. 759, 803 (1995).

327. See Tulskey, *supra* note 316 ("In 48 cases, judges failed to give the jury appropriate guidance on the law – in ways that either bolstered the prosecution's view of the case or undermined the defense's contentions.")

328. See *supra* Part I.B.

329. See MINN. SENT'G GUIDELINES & COMMENT., SENT'G GUIDELINES GRID § 4.A (2022).

330. See *supra* Part II.A.

331. See Tulskey, *supra* note 316.

crimes they potentially did not commit. This diminishes trust within the judiciary as, when the symbiotic relationship is brought to light, it shows the inherent impartiality that the judiciary is supposed to avoid.³³² However, this only happens if misconduct charges are brought and enforced.

Problematically, there is a general lack of enforcement of the ethical rules against prosecutors. Prosecutors have little incentive to bring misconduct charges against one another.³³³ Additionally, when misconduct is found, there is no real deterrence mechanism. An ethical complaint filed against a prosecutor does not carry a significant punishment with it, and because prosecutors have absolute immunity, prosecutors can continue to act in violation of the ethical rules and the law.³³⁴ Through the underenforcement of ethical rules and the absolute immunity of prosecutors, the symbiotic relationship between judges and prosecutors is able to continue.

The same applies to prosecutorial offices as well. Because of the Court's ruling in *Connick*, prosecutorial offices are allowed to have policies in place that directly harm defendants: these offices can refuse to turn over necessary *Brady* evidence, seek potentially illegal evidence, overcharge defendants, and not update policies to remain current with the law.³³⁵ In particular, these protections incentivize departments to have policies that unconstitutionally harm defendants, especially if these policies result in more arrests and longer sentences for individuals, as it can make the department seem tough on crime.³³⁶

Lastly, the special protections judges receive further perpetuate the symbiotic relationship and the abuses the relationship permits against defendants. Given judges are supposed to be tough on crime,³³⁷ judges have an incentive to assist prosecutors more, even if doing so may violate a judge's ethical obligations.³³⁸ Further, when one does file an ethical complaint against a judge, the consequences are minimal and the judge can

332. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.3 (AM. BAR ASS'N 2020).

333. *See supra* Part I.C.ii.

334. *Id.*

335. *Id.*

336. *See supra* Parts I.A, II.A.

337. *See supra* Part II.A.

338. *See* BERRY, *supra* note 126, at 7–8 (“Ten prominent empirical studies examining the relationship between judicial elections and criminal case outcomes all found that retention and re-election pressures impact judges’ rulings — to the detriment of defendants.”).

usually return to the bench.³³⁹ Even if misconduct is found, judicial immunity prevents any real accountability by the judge.³⁴⁰ The lack of ethical and legal enforcement against both judges and prosecutors allows for prosecutorial and judicial misconduct to continue. Even the system's design, which focuses on punishing criminals, encourages and incentivizes prosecutors and judges to engage in the symbiotic relationship. Thus, changes to the judiciary and its accountability mechanisms are necessary to give defendants fairer and more just trials.

V. Balancing the Scales: The Need to Change the Judiciary, Prosecutorial Function, and Judicial Function

Because the symbiotic relationship between prosecutors and judges provides unfair criminal proceedings for criminal defendants, this Part will advocate for rebalancing the scales of justice. First, changing the makeup of the judiciary by incorporating different legal backgrounds can shift how people view the judicial function. Second, there needs to be a change in how prosecutors function and are held accountable. Lastly, the judicial function itself must change and have greater accountability. Through these reforms, the symbiotic relationship between prosecutors and judges can start to diminish and defendants can experience fairer trials.

A. *Changing the Judiciary: The Need for More Public Defenders as Judges*

First, having more public defenders or criminal defense attorneys in the judiciary can start to change how individuals view the judiciary and allow for fairer trials for defendants. Only fifty-seven federal judges as of 2021 were advocates for individuals against the government.³⁴¹ This only accounts for 10% of the judiciary.³⁴² While President Biden nominated more public defenders to the federal bench,³⁴³ there were numerous issues regarding whether those public defenders would get appointed or

339. See Berens & Shiffman, *supra* note 207.

340. See *supra* Part II.C.ii.

341. See Neily, *supra* note 278.

342. *Id.*

343. Kenichi Serino, *How Having a Former Public Defender on the Supreme Court Could be 'Revolutionary'*, PBS NEWS (Mar. 21, 2022), <https://www.pbs.org/newshour/politics/few-public-defenders-become-federal-judges-ke-tanji-brown-jackson-would-be-the-supreme-courts-first> [https://perma.cc/F6Q9-D243] (finding that 30% of President Biden's nominations were former public defenders).

not.³⁴⁴ Nevertheless, there are still many vacancies on the federal bench³⁴⁵ and continuous state judge elections. There should be greater attention given to public defenders or criminal defense attorneys to fill those positions.

Increasing the number of public defenders serving as judges can change how people perceive the judiciary. With so many prosecutors as judges, the public does not view the judiciary as being fair.³⁴⁶ Having different legal backgrounds for the judiciary can change this negative perception.³⁴⁷ Having more public defenders serve as judges can also shift the focus of the judge's role from fighting crime to ensuring a fair trial. This in turn can encourage former prosecutors who are judges to conduct criminal proceedings in a fairer manner.³⁴⁸ Thus, the judiciary as a whole can become less biased and be viewed more favorably if there is diversity in background on the bench.³⁴⁹

Additionally, public defenders can change how the judiciary operates during criminal proceedings. A judge who was a public defender will likely recognize that prosecutors bring excessive charges because of their experience as a public defender.³⁵⁰ This judge can then be more critical and willing to dismiss certain charges or find certain plea deals to be unfair.³⁵¹ Public defenders or criminal defense attorneys who serve as judges can make

344. See Jennifer Haberkorn, *White House Pulls Its Punches over GOP Judicial Nomination Blockade*, POLITICO (Apr. 6, 2023), <https://www.politico.com/news/2023/04/06/white-house-pulls-punches-over-gop-judicial-nomination-blockade-00090824> (last visited Feb. 11, 2025).

345. *Judicial Vacancies*, U.S. CTS. (Apr. 25, 2023), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> [<https://perma.cc/A8B2-9Q4V>] (stating that there are 78 federal judgeship vacancies with 36 nominees pending).

346. See Berryessa et al., *supra* note 291, at 8.

347. *Id.*

348. *Id.* at 9 (“Thus, expanding professional diversity on the bench may lead to more balanced, socio-cultural perspectives on the law, precedent, and legal philosophy. By doing so, pro-prosecution bias may become less pervasive, and defence [sic] backgrounds may be less of a liability for potential judges.”) (citation omitted).

349. See Neily, *supra* note 278.

350. See Berryessa et al., *supra* note 291, at 8.

351. See *supra* Part II.B; see also Amber Saddler, *From the Defense Table to the Bench: The Importance of Public Defenders as Judges*, ALL FOR JUST. (Apr. 26, 2021), <https://www.afj.org/article/from-the-defense-table-to-the-bench-the-importance-of-public-defenders-as-judges> [<https://perma.cc/ZCB5-CCEK>] (“When a judge decides whether a claim is ‘plausible,’ or whether a witness is ‘credible,’ or whether police officers, when they stopped and searched a pedestrian, acted ‘reasonably,’ her determination is necessarily influenced by the nature of her work as a lawyer up to that point.”).

criminal proceedings as a whole more empathic towards criminal defendants.³⁵² Therefore, public defenders serving as judges can weaken the symbiotic relationship between prosecutors and judges and draw more focus on having an equitable criminal proceeding.

*B. Changing the Prosecutorial Function: The Need for
Greater Prosecutorial Accountability*

Second, there are several changes necessary to the prosecutorial function as presently constructed. This includes restraining the powers prosecutors have, ensuring greater enforcement of ethical rules, and limiting the special protections prosecutors receive. The prosecutorial function has a significant amount of power, especially at the charging stages of a criminal proceeding. Limiting a prosecutor's ability to bring an abundance of charges can allow for fairer criminal proceedings. This could be done by increasing the necessary burden prosecutors need to meet to bring a charge or allowing for more public involvement in charging decisions.³⁵³ By limiting the number and types of charges prosecutors can bring, criminal defendants can better pursue their defenses and not feel compelled to accept a plea bargain. Moreover, changing the charging function could result in fairer sentences for defendants, as judges would not have to follow the more extreme sentences set through statutory sentences and the sentencing guidelines.³⁵⁴

However, changing the prosecutorial function and the charging power is unlikely. First, it is difficult to know what standard to use, and courts are generally reluctant to review the decision to prosecute or not.³⁵⁵ Second, involving the public in the charging function can slow judicial efficiency.³⁵⁶ Thus, it is important to explore other means to rein in the power of prosecutors and their ability to engage in the symbiotic relationship with judges.

One of the better methods to change the prosecutorial function is by increasing the accountability of prosecutors. Enforcing ethical rules against prosecutors can help shed more light on whether a prosecutor is properly advocating for the state. Public pressure

352. See Berryessa et al., *supra* note 291, at 8–9.

353. See, e.g., Bibas, *supra* note 53, at 990 (advocating for citizen advocates within a prosecutor's office to consult with prosecutors on what charges to bring).

354. MINN. SENT'G GUIDELINES & COMMENT., SENT'G GUIDELINES GRID § 4.A (2022).

355. See Bibas, *supra* note 53, at 970.

356. *Id.* at 990.

against prosecutors who constantly violate ethical rules can either result in a prosecutor being ousted at the next election or the prosecutor changing their behavior.³⁵⁷ This would also change *how* individuals view prosecutorial elections. While convictions may be important, having more information about what prosecutors are doing and how they are doing it can shift the public's perception of what a prosecutor is supposed to do in criminal proceedings.³⁵⁸ Thus, the prosecutorial function itself can be pressured to focusing more on ensuring criminal proceedings are fair and that prosecutors are not abusing their power.

Lastly, limiting prosecutorial immunity will require prosecutors to more aptly follow ethical rules and the law. By stripping away individual prosecutorial immunity, wrongly-accused or wrongly-tried defendants can raise § 1983 claims against prosecutors and have some form of monetary recourse.³⁵⁹ If a defendant can successfully bring a § 1983 claim against a prosecutor, then the defendant can get monetary damages and the public can have more information about the prosecutor's misconduct to assess if the person is fit to be a prosecutor.³⁶⁰ Notably, a lack of individual prosecutorial immunity could greatly hamper the prosecutorial function and impair prosecutors who do not violate the law or ethical rules.³⁶¹ However, this outcome is not likely to arise. First, a defendant would have to successfully plead and have enough facts to show a prosecutor engaged in such misconduct.³⁶² Second, this would require a prosecutor to engage in more egregious misconduct that was readily discernable.

In addition to individual prosecutorial immunity, removing immunity from prosecutorial offices will also better ensure prosecutors follow the law and ethical rules. Similar to removing individual immunity, holding entire departments accountable would allow the public to know more about how prosecutorial offices are managed.³⁶³ This public pressure would encourage prosecution

357. *Id.* at 989–90.

358. *Id.* at 990 (“[T]he public is not always as punitive as one might think. In recent years, drug courts and similar criminal justice alternatives have flourished, reflecting the public’s willingness to soften enforcement.”).

359. See McCarthy & Duggins, *supra* note 110.

360. See Bibas, *supra* note 53 at 989–90.

361. *Imber v. Pachtman*, 424 U.S. 409, 427–28 (1976).

362. There are also questions as to whether the *Twigg* standard would apply to such a claim. Martain Flumenbaum & Brad S. Karp, *Pleading Standards for § 1983 Claims Against Govt. Supervisors*, 265 N.Y. L. J., Jan. 27, 2021.

363. See Bibas, *supra* note 53, at 989–90.

offices to be more compliant with the law.³⁶⁴ Moreover, by being able to challenge entire departments in court, wrongly-convicted or wrongly-tried defendants can hold a prosecutor's office accountable to provide proper training, ensure prosecutors know the law, and make offices comply with the law.³⁶⁵ Ultimately, removing such broad immunity for entire prosecutorial departments can better criminal proceedings by making them more fair and compliant with the law.

*C. Changing the Judicial Function: The Need for Greater
Judicial Accountability*

Similar to the prosecutorial function, the judicial function needs greater accountability. This can be done first by changing how judicial elections operate, second by changing the ethical rules for judges, and finally by holding judges accountable for ethics violations. First, and most importantly, changing how judicial elections work can better ensure that judges focus on how they conduct criminal proceedings instead of the outcomes. Rather than elections focusing on criminal punishments,³⁶⁶ elections should pay more attention to broader policy ideas and how a judge acts within the courtroom.³⁶⁷ Moreover, there must be greater regulation on special interest group involvement in judicial elections, as these are the groups that typically air attack ads against judges and their records on crime or previous work.³⁶⁸ This focus on judicial conduct and broader ideas can restore trust and impartiality in the judiciary.³⁶⁹ Importantly, judges will spend more time ensuring a criminal proceeding is fair and less time worrying about how the public may perceive them based on how they handle a particular criminal proceeding.

364. *Id.*

365. See *Connick v. Thompson*, 563 U.S. 51, 93 (2011) (Ginsburg, J., dissenting).

366. See BERRY, *supra* note 126, at 7–8 (discussing how judicial elections shape how judges sentence convicted defendants in order to appear tougher on crime).

367. For example, by removing the lack of transparency in judicial proceedings found in some states. Compare Gallo & Simerman, *supra* note 213 (discussing Supreme Court Justice Jefferson Hughes III who was the subject of an FBI probe and issued multiple apology letters without any public disclosure of wrongdoing) with Ortiz, *supra* note 217 (observing that states such as New Jersey, Pennsylvania, and Vermont have an automatic public notification requirement immediately upon the filing of ethics charges against a judge).

368. See BERRY, *supra* note 126, at 3 (reporting that 82% of ad spots in the 2013–14 judicial election cycle discussed criminal justice issues and “all but one attacked candidates for judicial decisions they had made . . .”).

369. See Berryessa et al., *supra* note 291, at 8–9.

Second, the ethical rules for judges need to change. Currently, the rules are vague for judges in determining whether a judge has a personal conflict with a matter.³⁷⁰ The ethical rules should be more explicit about what counts as a personal relationship or friendship with someone involved in a case. Additionally, the ethical rules should have judges recuse themselves from cases where an attorney assigned to a case before them is someone they previously directly supervised.³⁷¹ More clarity from the American Bar Association can better prevent judges feeling uncertain as to whether to recuse themselves from a case. By having judges acknowledge when they have a conflict with hearing a case, defendants can have more assurance that their case is fair.

Third, there needs to be greater enforcement of the ethical rules against judges and increased penalties for judges who violate the rules. It is easy for judges to circumvent the ethical rules, or to remain unaware of them.³⁷² Even when found to be in violation of judicial misconduct, penalties are minor.³⁷³ Penalties for judicial misconduct should increase and be made public. Parallel to knowing about prosecutorial misconduct,³⁷⁴ this would allow the public to better understand how a judge acts and whether the judge is fit for the role. This can serve as a means to hold judges accountable. Additionally, judges need to more dutifully follow Rule 2.15 on reporting misconduct from other judges or attorneys.³⁷⁵ By doing so, judges can serve as an additional check on prosecutorial and judicial misconduct in criminal cases. Overall, this can create a more just system for criminal defendants by ensuring their cases are brought in front of judges who will fairly adjudicate their criminal proceedings.

Conclusion

The symbiotic relationship between judges and prosecutors allows for a vicious cycle of unjust and unfair criminal proceedings. Judges who were former prosecutors have ties to their former roles

370. *See, e.g.*, MODEL CODE OF JUD. CONDUCT Canon 1, r. 1.2 cmt. (AM. BAR ASS'N 2020) (stating a reasonableness standard for determining whether there is impropriety).

371. This would be fair to both former prosecutors and public defenders who become judges to better ensure that the judge does not have any personal biases towards a former colleague.

372. Berens & Shiffman, *supra* note 207.

373. *Id.* (finding judges could return to the bench after gross judicial misconduct, receive a censure, or private reprimand).

374. *See* Bibas, *supra* note 53, at 989–90.

375. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.15 (AM. BAR ASS'N 2020).

as prosecutors and are deeply influenced by their experiences as prosecutors. Moreover, these judges have close personal ties with the prosecutors in their district. Because of this influence, prosecutors know they can overcharge defendants, obtain illegal evidence, and have trials conducted in their favor.

Prosecutors have almost unlimited discretion when it comes to how they want to conduct a case. Under this discretion, prosecutors are allowed to overcharge defendants, recommend excessive bail, and offer unfair plea deals to criminal defendants. Importantly, prosecutors can be selective in their cases and will want to try cases where they are more likely to receive favorable rulings. With this great power, prosecutors are supposed to abide by ethical rules and laws that make criminal proceedings fair. However, prosecutors have little incentive to follow these rules and guidelines, and there are few consequences when prosecutors do violate these rules and laws.

Judges have more limited discretion, but judges can heavily influence a criminal case. Additionally, because many judges are elected or want to be appointed, judges are cognizant of how their decisions in criminal proceedings can impact their continued service on the bench. If judges are lenient on sentencing or are seen as soft on crime, they may face significant challenges in being re-elected or elected in the first place. This aspect of being a judge further supports judges following what prosecutors want. Despite there being ethical rules for judges to follow to avoid such impartiality, there is little enforcement of these rules.

Moreover, judges who were previously prosecutors have biases that align with the prosecution. Because of these biases, these judges will typically follow what prosecutors recommend. These judges often sign warrants that allow prosecutors to gather illegal evidence, rule on motions in ways that benefit the prosecution, and do not challenge the charges prosecutors bring. Because there are few enforced checks on either the prosecutor or the judge, this symbiotic relationship can continuously grow.

To make criminal proceedings fair, it is important to recognize this symbiotic relationship and how it influences criminal proceedings. Appointing and electing more public defenders or criminal defense attorneys to the judiciary can serve as a first step to disrupting the symbiotic relationship between judges and prosecutors. Further, enforcing ethical rules and holding prosecutors and judges accountable for misconduct can make prosecutors and judges more cognizant of their own interests and biases. These solutions can result in more fair and equal trials,

finally balancing the scales that have been tilted to one side for so many years.

