

**PROSECUTORIAL MISCONDUCT: COMPARING AMERICAN AND
FOREIGN APPROACHES TO A PERVASIVE PROBLEM AND
DEVISING POSSIBLE SOLUTIONS**

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I. INTRODUCTION

In recent years, grand juries have been organized, congressional meetings held, and considerable moneys expended to mete out punishment for professional athletes who cheat in sports by taking performance enhancing substances. The consequences of such athletic moral shortcomings are hardly severe. So it must be thought of as considerably incongruous that no similarly substantial investigations have been undertaken to address prosecutorial cheating in criminal trials, the consequences of which can be enormously severe. While many Americans may view the U.S. criminal justice system as among the fairest systems in the world, such a view is more myth than reality. Notwithstanding common law and ethical rules that purport to govern attorney conduct and thereby prevent malfeasance, U.S. courts typically take a highly tolerant stance when confronted with misconduct perpetrated by prosecutors in the criminal justice system. American tolerance of prosecutorial misconduct is brought into specific relief through an examination of approaches to misconduct taken by other nations. Such an examination of selected foreign case law (for common law nations) or statutes (for civil law nations) reveals that meaningful diligence is observed outside the borders of the United States, both to prevent prosecutorial misconduct from occurring as well as to impose consistent relief to those harmed by it when it does occur. In contrast, American tolerance of prosecutorial misconduct and the consequent ability of prosecutors to engage in it with virtual impunity, as well as a lack of fairness in the availability of remedies to those defendants aggrieved by such misconduct, renders the American criminal justice system only as fair as the minimally supervised ethics of individual prosecutors allow it to be, resulting in widespread abuse, lack of accountability, and even wrongful convictions of the innocent.¹

¹ See, e.g., *United States v. Olsen*, 737 F.3d 625 (9th Cir. 2013) (“*Brady* violations have reached epidemic proportions in recent years.”) (Kozinski, C.J., dissenting). Basic Westlaw citation searches of the most significant cases addressing prosecutorial misconduct, such as *Brady v. Maryland*, *Kyles v. Whitley*, *Napue v. Illinois*, and *United States v. Bagley* reveal that in 2013 alone, including only the Federal Circuit courts and state supreme courts, each case is cited hundreds or even thousands of times. Even if only

The high import of the issue of prosecutorial misconduct has been repeatedly and eloquently recognized by the U.S. Supreme Court.² Many of the seminal cases addressing the issue have engaged sweeping philosophical pronouncements intended as profound statements implicating notions of fairness and justice. Perhaps the most renowned and oft cited epithet was penned by Justice Sutherland in *Berger v. United States*: “[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones.”³ While condemning misconduct committed by a U.S. Attorney,⁴ Sutherland describes the ideal function of a prosecutor as having an interest not to win, but to do justice, and as a “servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.”⁵ More recently Justice Ginsburg, recognizing the importance of full prosecutorial disclosure of evidence, the absence of which may result in wrongful conviction, opined that “it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light.”⁶

Flowery aphorisms emanating from respected legal minds on the bench are not the only evidence of the critical consequences of prosecutorial misconduct. A landmark study of more than 4500 capital appeals, released in 2000, found that 19% of the cases containing serious error warranting reversal were due to prosecutorial misconduct, making it the second most common factor contributing to reversible error in capital cases.⁷ Another estimate puts the frequency of official misconduct contributing to wrongful convictions as high as 43%.⁸

The critical point is not that the prosecutor is somehow evil-minded, or bent on locking away the innocent. Many instances of prosecutorial misconduct may very well be motivated by well-intentioned prosecutors seeking to punish those guilty of horrendous crimes, perpetrators that might have gone free absent the prosecutor bending the rules. But serious is the role of a prosecutor in ensuring the fundamental fairness of trial,⁹ and severe consequences can accrue

a small percentage of these cases involve legitimate claims, the sheer volume of cases shows the extreme commonality of prosecutorial misconduct.

² See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1385 (2011) (Ginsburg, J., dissenting); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Berger v. United States*, 295 U.S. 78, 88 (1935).

³ *Berger*, 295 U.S. at 88.

⁴ *Id.* at 84. The misconduct of the prosecutor in the case was quite extensive, including, among other transgressions, misstating the facts, bullying witnesses and putting words in their mouths, and misleading the jury.

⁵ *Id.* at 88.

⁶ *Connick v. Thompson*, 131 S. Ct. 1350, 1385 (2011) (Ginsburg, J., dissenting).

⁷ JEFFREY FAGAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* 5 (2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

⁸ CTR. FOR PROSECUTOR INTEGRITY, *AN EPIDEMIC OF PROSECUTOR MISCONDUCT* 4 (2013), available at <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf>.

⁹ See generally *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

when a prosecutor fails to live up to that obligation.¹⁰ In addressing this balancing of the societal interest in punishing crime against the importance of guaranteeing the accused a fair trial, Justice Douglas wrote that overturning a verdict because the rights of the accused were deprived “is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”¹¹ But defendants have little or no recourse when prosecutors cross the line and behave impermissibly; reversal of a conviction is extremely difficult to obtain, and individual prosecutors have absolute immunity from civil liability.¹² Prosecutors have little to fear in terms of other forms of accountability; though they may be held criminally liable, prosecutors are hardly racing to the courtroom for the chance to criminally charge other prosecutors. Realistically, the only consequence a misbehaving prosecutor faces is disciplinary action from bar associations; but such actions against prosecutors appear to seldom occur.¹³ In fact, over a fifty-year period from 1963-2013, in cases in which misconduct was identified, public sanctions were imposed less than 2% of the time, and these sanctions were rarely serious.¹⁴ As a result, the balance between protecting society and ensuring fair trials has tipped considerably in favor of prosecutors and against the ability of defendants to obtain any sort of relief.

This Note will be a comprehensive examination of prosecutorial misconduct. Section II will examine the law regarding prosecutorial misconduct as it currently exists in the United States, including common law rules governing failure to disclose evidence, the knowing¹⁵ use of false testimony, and improper comments, as well as the law related to prosecutorial immunity from civil liability. Section III will examine how various other nations, including Canada, England, China, and France, handle such issues. This section is not meant to be an in depth evaluation of the intricate nuances of foreign approaches; rather, it is meant to provide insight into comparative alternative approaches that might provide illumination as to how American courts might rein in prosecutorial misbehavior. Finally, Section IV will consider how the U.S. approach to prosecutorial misconduct can be improved by borrowing from approaches taken by these other nations. It should be noted that the primary focus of this note is on the remedies

¹⁰ Such consequences can include death in a capital case, incarceration, probation, heavy fines, and loss of civil rights, among others.

¹¹ *Brady*, 373 U.S. at 87.

¹² See *Imbler v. Pachtman*, 424 U.S. 409 (1976). Immunity is discussed in greater detail below.

¹³ Obtaining specific prosecutorial disciplinary statistics on a national level is difficult since there is no entity tracking such statistics on a national level. Most such statistics are kept, if at all, by individual state bar associations.

¹⁴ CTR. FOR PROSECUTOR INTEGRITY, *supra* note 8, at 8.

¹⁵ This includes where a prosecutor should have known of the falsity of offered testimony.

available to a defendant victimized by prosecutorial misconduct. As such, no consideration is given to the frequency of bar association disciplinary responses to prosecutorial misconduct, which have no effect on victims of such misconduct.

II. THE LAW ON PROSECUTORIAL MISCONDUCT IN THE UNITED STATES

Instances of prosecutorial misconduct can be grouped into three general categories: failure to disclose evidence, use of testimony a prosecutor knew or should have known was false, and improper comments by a prosecutor. When any of these types of misconduct is shown to have occurred during the course of a criminal trial, the question of whether a conviction will be reversed will turn on the standard of review employed by the reviewing court. As discussed below, Supreme Court jurisprudence has erected different common law standards of review for each type of misconduct,¹⁶ as well as for multiple instances of misconduct, and an entirely different set of rules to deal with possible prosecutorial liability (to the individual prosecutor and the prosecuting body) arising out of that misconduct. Each of these types of misconduct and the approaches used by the courts in addressing them is examined in turn below.

A. Failure to Disclose Evidence and *Brady v. Maryland*

Perhaps the most heavily litigated type of prosecutorial misconduct in the United States is the failure of a prosecutor to disclose evidence to a criminal defendant. Such misconduct falls under the auspices of *Brady v. Maryland* and its progeny.¹⁷ *Brady* is well-known to criminal attorneys; failure of a prosecutor to comply with the rules governing evidentiary disclosure, in fact, is known as a *Brady* violation in legal vernacular. The case remains extremely important, as noted by Justice Ginsburg: “*Brady*, this Court has long recognized, is among the most basic safeguards brigading a criminal defendant’s fair trial right.”¹⁸ The basic holding that “suppression by the prosecution of evidence favorable to an accused . . . 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,” remains intact.¹⁹

¹⁶ The court uses specific legal terms of art in articulating these standards of review, such as whether the misconduct was “material” or whether the misconduct was “prejudicial” (to the defendant). In practice, these standards amount to harmless-error review with standards specific to each type of misconduct.

¹⁷ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁸ *Connick v. Thompson*, 131 S. Ct. 1350, 1385 (2011) (Ginsburg, J., dissenting).

¹⁹ *Brady*, 373 U.S. at 87.

In the fifty years since the Court decided *Brady*, there have been a number of cases that have refined its holding. Among these, the most important are *United States v. Bagley*²⁰ and *Kyles v. Whitley*.²¹ As explained in *Banks v. Dretke*, a *Brady* prosecutorial misconduct claim has three elements: (1) evidence favorable to the accused as exculpatory or impeaching must be disclosed; (2) such evidence was suppressed, i.e. not disclosed to the defense; and (3) prejudice resulted.²² The second element is self-explanatory. Under the first element, it is important to note that not all evidence must be disclosed to a defendant. As explained in *Bagley*, “the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.”²³ This, of course, means that a prosecutor must exercise discretion to determine whether evidence is of such a character that it requires disclosure. Not surprisingly, in an adversarial system in which considerable pressure is exerted on prosecutors to obtain convictions, the temptation to push the envelope is substantial.

Though the question of whether evidence requires disclosure unquestionably has had its share of litigation, by far the most litigated element of prosecutorial misconduct is the prejudice element, commonly called “materiality.” The *Bagley* Court specifically noted that suppression of evidence only works a constitutional violation if the suppression defeats the fairness of the trial.²⁴ The trial is considered unfair, and the defendant to have been prejudiced, where the undisclosed evidence is material.²⁵ To establish a standard of materiality, the *Bagley* Court drew from *Strickland v. Washington*,²⁶ the seminal case involving ineffective assistance of defense counsel, decided just a year earlier. Specifically, the Court held that undisclosed evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”²⁷

²⁰ 473 U.S. 667 (1985). Note that there is another case significantly refining *Brady*, *United States v. Agurs*, 427 U.S. 97 (1976). However, that case was overruled in large part by *Bagley*, and what survives of it was incorporated into the *Bagley* decision. Specifically, *Bagley* overruled distinctions drawn in *Agurs* regarding how non-disclosure is treated where the evidence in question did not fall under defense disclosure requests, where the defense disclosure request was only general, and where the evidence was specifically requested.

²¹ 514 U.S. 419 (1995).

²² 540 U.S. 668, 691 (2004) (discussing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

²³ *Bagley*, 473 U.S. at 675.

²⁴ *Id.* at 678.

²⁵ *Id.*

²⁶ 466 U.S. 668 (1984).

²⁷ *Bagley*, 473 U.S. at 682.

Kyles is considered the touchstone for materiality with respect to failure of the prosecution to disclose evidence.²⁸ Decided ten years after *Bagley*, the Court reiterated its earlier materiality standard of a “reasonable probability” of a different outcome, explaining that it is met where “the favorable [suppressed] evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”²⁹ Of course, it must be noted that the converse is also true. The Court has specifically held that evidence may not be material if other evidence adduced at trial is strong enough to sustain confidence in the verdict.³⁰ More importantly, *Kyles* specified that suppressed evidence is to be “considered collectively, not item by item.”³¹ This collective approach is generally known as cumulativeness.

From the various cases cited above, the principle that has emerged is that evidence favorable to the accused must be disclosed. Where the prosecutor fails to meet this requirement, reversal is warranted if the undisclosed evidence is material, meaning there is a reasonable probability that all undisclosed evidence, if it had been disclosed and considered, would have resulted in a different verdict. Thus, where disclosure error exists, it has what is effectively its own harmless-error review standard. In formulation, this “reasonable probability of undermining confidence in the verdict” standard sounds somewhat similar to a preponderance standard. However, in practice it tends to be applied more strictly, similar to harmless-error review under *Brecht v. Abrahamson*,³² which requires a showing that the error had a “substantial and injurious effect or influence in determining the jury’s verdict.”

B. Use of Testimony the Prosecutor Knew or Should Have Known to Be False, and *Napue v. People of the State of Illinois*

The use of testimony by the prosecution that a prosecutor knows, or should know, to be false, or the failure to correct false testimony when its falsity becomes known to a prosecutor, falls under *Napue v. Illinois* and its progeny.³³ The principles that formed the foundation of *Napue* were eloquently laid out more than two decades earlier in a strongly worded per curiam pronouncement, in which the court discussed the fundamental requirements of due process:

It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of

²⁸ *Banks v. Dretke*, 540 U.S. 668, 698 (2004).

²⁹ *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995).

³⁰ *Smith v. Cain*, 132 S. Ct. 627, 630 (2012).

³¹ *Kyles*, 514 U.S. at 436.

³² 507 U.S. 619 (1993).

³³ *Napue v. Illinois*, 360 U.S. 264 (1959).

depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.³⁴

Napue's critical contribution was threefold; first, it extended the principles described above, principles found to be "implicit in any concept of ordered liberty," to apply not just to deliberate deceptions, but also to circumstances under which a prosecutor, "although not soliciting false evidence, allows it to go uncorrected when it appears."³⁵ Second, the Court extended the Fourteenth Amendment Due Process prohibition on the knowing use of false evidence to cover impeaching evidence as well as direct evidence.³⁶ Third, and most importantly, the Court established a standard of materiality as to when false testimony warranted reversal of a conviction.³⁷ As subsequently explained by the Court in *Giglio v. United States*, *Napue* requires a new trial if the false testimony could "in any reasonable likelihood have affected the judgment of the jury."³⁸ This is a strict standard indeed; the Court in *Bagley* described it as basically requiring that the false testimony be considered material unless harmless beyond a reasonable doubt,³⁹ similar to harmless-error review under *Chapman v. California*.⁴⁰ Because of this stringent review, cumulative consideration is generally unnecessary where a *Napue* violation is demonstrated.

C. Inappropriate, Inflammatory, or Improper Comments (or Eliciting Such Comments), and *Darden v. Wainwright*⁴¹

As a general rule, it is considered unprofessional conduct for a prosecutor to express his or her own opinion about the veracity of testimony, evidence, or the

³⁴ *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

³⁵ *Napue*, 360 U.S. at 269.

³⁶ *Id.* This principle would become an important factor in the *Brady* holding just four years later.

³⁷ *Id.* at 271.

³⁸ *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 271).

³⁹ *United States v. Bagley*, 473 U.S. 667, 679-80 (1985).

⁴⁰ 386 U.S. 18, 23-24 (1967). The *Chapman* standard has been largely supplanted by the *Brecht* standard. However, it is still applied in direct, of-right appeals. See *Fry v. Pliler*, 551 U.S. 112, 116 (2007).

⁴¹ It should be noted here that improper vouching, which occurs where a prosecutor improperly vouches for the credibility of a witness or evidence, or states that a witness will testify to something that the witness never testifies to, may fall in this category or under the *Napue* standard, if severe enough.

guilt of a defendant.⁴² But the line between proper and improper comments is not always easily drawn, and zealous representation often leads to a breach of the duty to refrain from improper comments.⁴³ Improper comments can vary substantially, from more ambiguous comments that slightly overstep the bounds of propriety to more severe characterizations of a defendant as “an animal” or as similar to an infamous serial killer. It is also important to note that improper comments, unlike a failure to disclose or the use of false testimony, can often be addressed at the time of trial, since the court is obviously aware of the impropriety at the time it occurs. Thus, it is often possible to avoid appellate review, absent an abuse of the trial court’s discretion in the way such comments are addressed at trial.

Examination of whether such comments require reversal falls under the standard announced in *Donnelly v. DeChristoforo*⁴⁴ and reaffirmed in *Darden v. Wainwright*.⁴⁵ Under that materiality standard, improper prosecutorial comments “will be held to violate the Constitution only if they ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’”⁴⁶ This is a highly deferential standard; it requires that the comment(s) “be examined within the context of the trial to determine whether the prosecutor’s behavior amounted to prejudicial error,” and consideration of “the probable effect the prosecutor’s response [will] have on the jury’s ability to judge the evidence fairly.”⁴⁷ Implicit in the standard is a cumulative consideration element; unless one particular comment is substantially prejudicial, improper comments will have to litter the trial to warrant reversal. In many cases, a simple curative instruction given by the court will suffice to mitigate any possible effect of the comments.⁴⁸ While a prosecutor who makes improper comments may face professional disciplinary action, the tough standard erected by the Court in addressing improper comments reflects a view that protects verdicts from isolated misstatements and leaves defendants with very little opportunity for a retrial. This *Darden* standard, as it is sometimes called, tends to be somewhat analogous to an abuse of discretion standard of review.

D. Prosecutorial Immunity and *Imbler v. Pachtman*

Prosecutorial immunity enjoys a long and vibrant history under the common law.⁴⁹ Historically, it has been justified with appeal to the same notions

⁴² United States v. Young, 470 U.S. 1, 8 (1985).

⁴³ *Id.* at 7.

⁴⁴ 416 U.S. 637, 647 (1974).

⁴⁵ 477 U.S. 168, 181 (1986).

⁴⁶ Parker v. Matthews, 132 S. Ct. 2148, 2153, (2012) (quoting *Darden*, 477 U.S. at 181) (internal citation omitted).

⁴⁷ *Young*, 470 U.S. at 12.

⁴⁸ *Id.* at 11.

⁴⁹ *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976).

underlying immunity for judges, witnesses, and jurors, to wit, serving the broader public interest through independent, unfettered decision-making, and avoiding negative impact on the criminal justice system as a whole through the distraction of unfounded litigation.⁵⁰ *Imbler v. Pachtman* is the seminal case on this issue, holding that prosecutors have absolute immunity from liability not just under the common law, but also from civil rights actions filed under 42 U.S.C. § 1983.⁵¹ The decision expressly rejects qualified immunity despite recognizing that absolute immunity does “leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.”⁵² *Imbler* also expressly rejects notions of prosecutorial liability for malfeasances such as a “prosecutor’s possible knowledge of a witness’[s] falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and ultimately in every case the likelihood that prosecutorial misconduct so infected a trial as to deny due process,” on the grounds that to do otherwise “often would require a virtual retrial of the criminal offense in a new forum.”⁵³ This functional approach to absolute immunity covers the performance of all the ordinary judicial and advocacy duties of a prosecutor, such as initiating prosecution, calling witnesses, and presenting evidence: duties “intimately associated with the judicial phase of the criminal process.”⁵⁴ It should be noted that Justice White, in his concurring opinion, argued there should be an exception to absolute immunity carved out in circumstances in which a prosecutor unconstitutionally suppresses evidence.⁵⁵ While this position has not been embraced by U.S. courts, it has been in other nations, with specific citation to Justice White’s opinion, a point addressed later in this note.⁵⁶

Subsequent to *Imbler*, absolute prosecutorial immunity from civil liability was slightly abridged in *Burns v. Reed*, which held that advising police during the investigatory phase of a criminal case did not fall under duties “intimately associated with the judicial phase of the criminal process.”⁵⁷ Even in that role, however, a prosecutor still enjoys qualified immunity, limiting liability to only those who are “plainly incompetent or those who knowingly violate the

⁵⁰ *Id.* Of course, the same justifications could be used to immunize defense attorneys against malpractice, but that is an issue outside the scope of this note.

⁵¹ *Id.* at 427.

⁵² *Id.*

⁵³ *Id.* at 425. Note that this covers *Napue*, *Brady*, and *Darden* violations discussed above.

⁵⁴ *Burns v. Reed*, 500 U.S. 478, 493 (1991).

⁵⁵ *Imbler*, 424 U.S. at 433 (White, J., concurring).

⁵⁶ *See, e.g., Nelles v. Ontario*, [1989] 2 S.C.R. 170 (Can.). The Nelles court additionally notes that England has similarly approved of Justice White’s view in *Riches v. Dir. of Pub. Prosecutors*, [1973] 1 W.L.R. 1019 (H.L.) [941] (appeal taken from Eng.).

⁵⁷ *Burns*, 500 U.S. at 493; *see also Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (qualified, not absolute, immunity applies where a prosecutor is acting in an investigatory rather than advocacy capacity).

law.”⁵⁸ Since *Burns*, qualified, rather than absolute, immunity has also been applied where a prosecutor speaks to the press or acts as a complaining witness in support of a warrant application.⁵⁹

More recently, the Court’s decision in *Connick v. Thompson* illustrates just how difficult it is to overcome prosecutorial immunity.⁶⁰ There, the individual prosecutor was not facing § 1983 liability for the wrongful conviction and death sentence of an innocent man; rather, it was the prosecuting agency.⁶¹ However, the Court pointed out that governments are “not vicariously liable under § 1983 for their employees’ actions,” but only for their own illegal acts.⁶² This requires a showing that “action pursuant to official municipal policy” caused the injury in question, where official municipal policy is limited to “the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.”⁶³ Since a prosecuting agency does not have responsibilities under the first two, it becomes necessary to show that the misbehavior is “persistent and widespread” to overcome immunity. Though the Court has never specified what would be sufficient to meet this standard in the prosecutorial context, in *Connick*, it concluded that four reversals of criminal convictions due to *Brady* violations were not sufficient to put the office on notice that it needed to take corrective action (in the form of trainings).⁶⁴

E. An Open Cumulativity Question

As discussed above, each of the types of prosecutorial misconduct is required to be addressed cumulatively under *Kyles*. However, the Court has left open the question of the proper standard of materiality to be applied to the cumulative effect of multiple instances of prosecutorial misconduct when a defendant alleges more than one instance of prosecutorial misconduct, and those instances include more than one type of misconduct. The circuit courts have expressed uncertainty as to how to properly proceed in such a case.

In *Hein v. Sullivan*, the Ninth Circuit expressed uncertainty as to this very issue: “It is unclear whether we should employ *Brady*’s prejudice standard to evaluate the cumulative effect of the prosecutorial misconduct [with regard to improper comments] and the non-disclosure.”⁶⁵ Ultimately, the court in that case

⁵⁸ *Burns*, 500 U.S. at 494-95 (quoting *Malley v. Briggs*, 474 U.S. 335, 341 (1986)).

⁵⁹ *Van de Kamp v. Goldstein*, 555 U.S. 335, 343 (2009) (citing *Buckley*, 509 U.S. at 277 and *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997)).

⁶⁰ 131 S. Ct. 1350, 1365 (2011).

⁶¹ *Id.* at 1355-56.

⁶² *Id.* at 1359.

⁶³ *Id.*

⁶⁴ *Id.* at 1360.

⁶⁵ 601 F.3d 897, 914 (9th Cir. 2010).

opted to apply the *Brady* “reasonable probability” standard as explained in *Kyles* to the improper comments rather than the *Darden* standard of “so infect[ing] the trial with unfairness.”⁶⁶

The Sixth Circuit also discussed the importance of the question of which standard to apply in *Rosencrantz v. Lafler*, a case involving potential claims of both failure to disclose and false testimony.⁶⁷ In that case, the court pointed out a distinction between the two standards of review involving the application of harmless-error review.⁶⁸ Though the opinion deals more specifically with the harmless-error review issue, the noteworthy aspect for present purposes is the recognition of an open question of how to approach multiple instances of prosecutorial misconduct of differing types.⁶⁹ It seems surprising that the Supreme Court has never addressed this issue directly, given the likelihood that where one type of misconduct is present, often so is another. A proper approach to this question may be a critical step in providing recourse for aggrieved defendants, a notion addressed in subsequent sections of this note.

III. THE LAW ON PROSECUTORIAL MISCONDUCT IN OTHER NATIONS

The previous section described the various approaches the Court has taken in dealing with prosecutorial misconduct in the American criminal justice system. With the exception of a somewhat stringent standard for instances of the knowing use of false testimony, these approaches tend to be highly forgiving of prosecutorial malfeasance. Internationally, the standards in some instances are remarkably similar to those used in the United States; however, the similarity in the standard does not mean that standard is applied with the same vigor. In fact, the nations examined tend to approach the issue from a perspective far more vigilant for the rights of defendants, and far more condemning of misbehaving prosecutors, in some cases using approaches completely foreign to American jurisprudence. The nations examined below include Canada, England, China, and France. The former two were selected because of the similarity of their legal systems to that of the United States; it should be noted that other nations grounded in English common law, Australia and India, for example, are also highly similar in their approaches to Canada and/or England. China and France were selected as civil law nations to compare with the approaches of the aforementioned common law nations, France because it is somewhat similarly situated to the United States as well as the other examined common law nations as a Western democracy, and China because it is similarly situated to the United States economically, though starkly different in governance. Through an examination of the approaches taken

⁶⁶ *Id.* at 914-15.

⁶⁷ 568 F.3d 577 (6th Cir. 2009).

⁶⁸ *Id.* at 584.

⁶⁹ *Id.*

in these nations as compared with those in the United States, some possible solutions to the American problem of prosecutorial misconduct emerge. It should be noted that, except in nations with highly similar approaches to prosecutorial misconduct both in standards and application (i.e. India), cumulativeness is not a consideration. This is in large part because these other nations treat cases in which prosecutors have engaged in misconduct with such a high degree of suspicion, generally obviating the need for cumulative consideration. As such, issues of cumulativeness are not addressed in this section, though cumulativeness remains a highly important consideration in American courts.

A. Failure to Disclose Evidence, and Disclosure Rules in General

As noted above, U.S. common law approaches disclosure by requiring three elements to overturn a conviction under a *Brady* prosecutorial misconduct claim: (1) evidence favorable to the accused as exculpatory or impeaching must be disclosed; (2) such evidence was suppressed, i.e. not disclosed to the defense; and (3) prejudice resulted.⁷⁰ Thus, apart from the self-evident element of suppression, litigated U.S. criminal cases involving disclosure issues focus on what evidence the prosecution must disclose (or when or how it must be disclosed) and, when the prosecution is required to disclose evidence, whether failing to do so prejudiced the defendant. Internationally, the rules governing what evidence prosecutors must disclose and how they must disclose it vary considerably; though this note is primarily concerned with what happens when the rules are violated, a brief overview of different disclosure rules is warranted.

1. Overview of Rules Governing Disclosure

The Supreme Court of Canada set out its common law principles governing what evidence must be disclosed to a defendant in *R. v. Stinchcombe*.⁷¹ There, the Court specified that the prosecution (referred to as the Crown) “has a legal duty to disclose all relevant information to the defence.”⁷² While some evidence may be deemed, under the discretion of Crown counsel, to fall under a privilege and thus not be subject to disclosure, an exercise of such discretion by Crown counsel is subject to review by the trial judge, who “should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence.”⁷³ The Court has called the right of a defendant to the disclosure of all relevant evidence a constitutional right, one which applies even if the Crown does not

⁷⁰ *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

⁷¹ [1991] 3 S.C.R. 326 (Can.).

⁷² *Id.*

⁷³ *Id.*

intend to introduce the evidence at trial, and one which applies to “all statements obtained from persons who have provided relevant information to the authorities . . . notwithstanding that these persons are not proposed as Crown witnesses.”⁷⁴ Moreover, the Court has explained that the “right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial.”⁷⁵ The treatment of disclosure as a constitutional right and the use of relevance, even marginal relevance, as the threshold inquiry into whether the Crown must disclose evidence represents a significantly more stringent approach to disclosure than that taken in the United States, where disclosure is only constitutionally required if evidence is favorable to the accused, and, if suppressed, would deprive a defendant of a fair trial.⁷⁶

The requirements of disclosure in the United Kingdom are highly similar to those in Canada; in fact, at least one case considering disclosure questions cited approvingly to *Stinchcombe* as persuasive authority.⁷⁷ While disclosure rules related to specific situations may be found in the Criminal Procedure and Investigations Act of 1996 (CPIA), in general, those provisions and the common law combine to form a disclosure requirement sufficiently similar to that existing in Canada so that no additional exploration is required here.⁷⁸

While one may consider the differences between common law disclosure rules in countries such as Canada and the United Kingdom and those in the United States to be subtle, the differences are far more substantial when examining the requirements in civil law countries. China, in particular, has some stringent and unusual provisions related to disclosure, some that appear to prioritize the rights of the accused and others that appear to weaken the fairness of trials. On the side of protecting defendants’ rights, it is statutorily forbidden for a public procurator (the Chinese equivalent of a prosecutor) to conceal evidence.⁷⁹ Judges, procurators, and investigators are mandated not only with the collection of evidence that might prove guilt, but also evidence that might prove innocence.⁸⁰

⁷⁴ R. v. Taillefer; R. v. Duguay, 2003 SCC 307, [2003] 3 S.C.R. 307 (Can.).

⁷⁵ R. v. Dixon, [1998] 1 S.C.R. 244, para. 23 (Can.).

⁷⁶ United States v. Bagley, 473 U.S. 667 (1985).

⁷⁷ R. v. Mills, [1998] A.C. 382 (H.L.) [385] (appeal taken from Eng.).

⁷⁸ See, e.g., R. v. Olu, [2011] 1 Cr. App. R. 33 (appeal taken from Eng.); R. v. Flook, [2010] 1 Cr. App. R. 30 (appeal taken from Eng.); R. v. Mills, [1998] A.C. at 385; R. v. Ward, [1993], 96 Cr. App. R. 1 (appeal taken from Eng.); R. v. Maguire, [1992] 94 Cr. App. R. 133 (appeal taken from Eng.).

⁷⁹ Public Procurators Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 28, 1995, effective July 1, 1995), arts. 35-37, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383688.htm [hereinafter Public Procurators Law of the People’s Republic of China].

⁸⁰ Criminal Procedure Law of the People’s Republic of China (promulgated by the Nat’l People’s Cong., July 1, 1979, effective Jan. 1, 1980), art. 43, available at <http://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the>

On the other hand, both procurators and defense attorneys must show all material evidence to the court.⁸¹ Witness and expert testimony may be read into the record; there is no presence requirement.⁸² Defense attorneys may collect evidence, but must do so through the People's Procuratorate or the court, and must get consent from witnesses and the victim to collect information from them.⁸³ In short, the Chinese system of disclosure only goes as far as the procurator's permission allows.⁸⁴

French disclosure rules and procedures are also different from those of the common law countries discussed above, in that the case file is submitted to the court, and a defendant has a right to examine it in its entirety.⁸⁵ To protect against lack of attachment to the case file of important information, numerous sections of French Code of Criminal Procedure require items to be attached to the case file,⁸⁶ which also must include "the official records establishing the existence of the offence, of the written statements of witnesses and of any experts' reports."⁸⁷ These records are provided at no charge to the accused (rather than the lawyer), and the defender may examine those records at the time he or she communicates with the defendant.⁸⁸ The court itself may conduct its own investigation, and records of such investigations are kept in the court office and attached to the case file, where they are available for review by the defendant and counsel.⁸⁹

Of course, the above discussion of disclosure rules as they exist in other countries is not meant to be comprehensive. Such an exploration would require detailed examination of the rules of evidence and procedure of each nation. Rather, the point is simply to show some of the differences between the disclosure requirements of these nations and those of the United States. More permissive or restrictive disclosure rules have bearing on the more salient issue of this note, that being what happens when those rules are violated. For example, one would hardly consider a nation that imposes harsh consequences for failing to disclose evidence to be effectively deterring misconduct if that nation does not require prosecutors to disclose very much evidence. Thus, at least some consideration

peoples-republic-of-china [hereinafter Criminal Procedure Law of the People's Republic of China].

⁸¹ *Id.* art. 157. In the United States, the defense is not required to show all evidence.

⁸² *Id.* In the United States, the Confrontation Clause requires witness presence with narrow exceptions, and the defendant has the right to be present during all phases of trial. These are both constitutional guarantees under the Sixth Amendment.

⁸³ *Id.* art. 37.

⁸⁴ Though, as will be discussed below, the consequences for violating the rules are harsh.

⁸⁵ CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 278 (Fr.), *available at* <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> [hereinafter Code of Criminal Procedure].

⁸⁶ *See id.* arts. 80-81, 171, 181, 215, 393, 494-14, 520.

⁸⁷ *Id.* art. 279.

⁸⁸ *Id.* arts. 278-79.

⁸⁹ *Id.* art. 284.

should be given to the system of disclosure rules in place in a particular nation when evaluating the efficacy of that nation's approach to dealing with violations of those rules.

2. Failure to Disclose

In the United States, as discussed above, failure to disclose is subject to a materiality test to determine whether a particular defendant is owed a new trial due to prejudice from the violation, to wit, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.⁹⁰ "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."⁹¹ As discussed below, the evaluative tests used by other nations to consider failures of prosecutors to adhere to disclosure rules are often quite similar to the U.S. test that has emerged from *Brady/Bagley* and their progeny. However, the use of similar tests, as it turns out, does not mean that the tests are applied in the same way and would produce the same results.

The test applied by Canadian courts to determine whether a failure to disclose evidence is sufficiently material to require a new trial was set forth in *R. v. Dixon*.⁹² There, the Court held that the materiality of undisclosed evidence depends on an assessment of the reliability of the verdict, determined by examining the undisclosed information and the impact it may have had on the decision to convict.⁹³ A new trial is required if "there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction."⁹⁴ This examination described by the Supreme Court of Canada is nearly identical to the test of materiality used in the United States. However, *Dixon* adds a second layer to the analysis by requiring a second consideration even if the reviewing court determines that there is no reasonable possibility that the undisclosed information affected the reliability of the verdict.⁹⁵ Canadian courts must also consider whether the failure to disclose had an effect on the overall fairness of the trial.⁹⁶ This involves an assessment of, "on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed."⁹⁷ This second layer adds teeth to the

⁹⁰ *United States v. Bagley*, 473 U.S. 667, 682 (1985).

⁹¹ *Id.*

⁹² *R. v. Dixon*, [1998] 1 S.C.R. 244 (Can.).

⁹³ *Id.* para. 36.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Dixon*, 1 S.C.R. 244 para. 36. It should be noted that part of this inquiry considers whether defense counsel knew or should have known, based on other disclosures, of a failure to disclose, and rejects a finding of unfairness if answered in the affirmative.

evaluation of prejudice as compared to the American *Brady/Bagley* test. In both tests, highly material evidence that would reasonably impact the verdict is sufficient in itself to require a new trial. However, the fairness element added in Canada obviates the need to consider the impact of undisclosed evidence; even if the impact is low, if opportunities may have been lost to the defense, a new trial may be required.⁹⁸

An example of the impact of this fairness inquiry can be found in *R. v. Skinner*.⁹⁹ There, the Court acknowledged that a particular undisclosed statement, “on its face, could have had very little, if any, impact on the reliability of the result reached at trial.”¹⁰⁰ Notwithstanding that materiality was lacking, however, the Court found that the fairness of the trial “could have been affected by the Crown’s failure to disclose that statement because the defence could have garnered additional evidence flowing from this statement that could have affected its strategy.”¹⁰¹ Thus, there existed a reasonable possibility “that disclosure would have had an impact on the conduct of the defence,” and the Court ordered a new trial.¹⁰²

As with the disclosure rules, the English test of materiality is also highly similar to that used in Canada. In England, the general common law as well as the Criminal Procedure and Investigations Act of 1996 combine to provide that a “material irregularity” exists where the prosecutor fails to disclose material information to the defendant, and that failure to disclose renders the conviction unsafe.¹⁰³ A material irregularity is akin to trial error in the United States; prior to the adoption of the CPIA, a material irregularity constituted its own separate grounds for appeal.¹⁰⁴ Since CPIA adoption, the English courts consider simply whether a material irregularity renders a conviction unsafe, though it should be noted that the courts have specified that there is “no real distinction between a material irregularity which causes a miscarriage of justice and a feature of the trial which causes a conviction to be unsafe.”¹⁰⁵ As in Canada, the inquiry into whether a conviction is unsafe does not only involve questioning the reliability of the verdict, but also involves an inquiry into the fairness of the trial.¹⁰⁶ However, the English courts are somewhat more reticent to overturn verdicts on this basis than their Canadian counterparts.¹⁰⁷ In this sense, England’s test of materiality, in

⁹⁸ *Id.* para. 39.

⁹⁹ [1998] 1 S.C.R. 298 (Can.).

¹⁰⁰ *Id.* para. 8.

¹⁰¹ *Id.* para. 10.

¹⁰² *Id.*

¹⁰³ *R. v. Brown*, [1998] A.C. 367 (H.L.) (appeal taken from Eng.).

¹⁰⁴ *Id.*

¹⁰⁵ *R. v. Mills*, [1998] A.C. 382 (H.L.) [397] (appeal taken from Eng.).

¹⁰⁶ *Brown*, [1998] A.C. 367.

¹⁰⁷ *See, e.g., id.* (dismissing appeal where undisclosed material went to the credibility of a defense witness); *R. v. Mills*, [1998] A.C. 382 (H.L.) (appeal taken from Eng.) (dismissing appeal where failure to disclose the statement of a witness was a material

application, tends to fall somewhere in between the Canadian and American tests with regard to how strictly prosecutorial disclosure failures are addressed.

It is difficult, at best, to ascertain the way Chinese courts address prosecutorial failure to disclose, since there is little available information on individual Chinese criminal cases. Certainly, one must consider the general reputation of China for engaging in human rights violations as providing at least some indication that fairness to criminal defendants may not be paramount in Chinese criminal justice.¹⁰⁸ However, notwithstanding this general reputation, there are provisions in Chinese law that indicate that a prosecutorial failure to disclose may impart significant rights upon a defendant. As seen above, Chinese procedure strictly forbids prosecutorial concealment of evidence¹⁰⁹ and requires that prosecutors collect evidence, which may be indicative not only of guilt, but also of innocence.¹¹⁰ In the event of a procedural failure impacting a citizen's procedural rights or subjecting citizens to "indignities," participants in the proceedings have the right to file charges against procurators, judges, and investigators.¹¹¹ No such right exists in the United States. In appellate proceedings, if the reviewing court determines that legally required litigation procedures have been violated, "it shall rule to rescind the original judgment and remand the case to the People's Court which originally tried it for retrial."¹¹² Retrial is also required where an appellate petition shows that the evidence giving rise to conviction is unreliable or insufficient.¹¹³ Though it may very well be that, in practice, retrials are rarely granted, it is at least noteworthy that the Chinese system recognizes the importance of procedure, including disclosure, and the negative impact that violations may have on the reliability of a verdict.

The French disclosure requirements, as discussed above, specify that the case file, which must include certain items, be deposited with the court and available for inspection and copying by the accused and his or her attorney.¹¹⁴ Unlike the common law systems, French law eschews any consideration of materiality, instead declaring by statute that a "nullity" exists when "the breach of an essential formality provided for by a provision of the present Code or by any other rule of criminal procedure has harmed the interests of the party it

irregularity, but the disclosure of other statements by the same witness meant that the defense was aware of the risks of calling that witness); *cf.* *R. v. Maguire*, [1992] 94 Cr. App. R. 133 (appeal taken from Eng.) (determining convictions were unsafe, despite no miscarriage of justice in failure to disclose).

¹⁰⁸ *See, e.g.*, Criminal Procedure Law of the People's Republic of China, *supra* note 80, art. 157 (requiring the court to heed the opinions of prosecutors, parties, and the defendants). Heeding the opinion of a prosecutor could imply that the court must respect a prosecutorial determination that a failure to disclose had no impact on a verdict.

¹⁰⁹ Public Procurators Law of the People's Republic of China, *supra* note 79.

¹¹⁰ Criminal Procedure Law of the People's Republic of China, *supra* note 80.

¹¹¹ *Id.* art. 14.

¹¹² *Id.* art. 191.

¹¹³ *Id.* art. 204.

¹¹⁴ Code of Criminal Procedure, *supra* note 85.

concerns.”¹¹⁵ A “nullity” is simply the word used in the French system to describe reversible error; in general, the French criminal code simply designates violations of certain procedural requirements as being “under pain of nullity,” or automatic grounds for reversal.¹¹⁶ Procedural violations that constitute a nullity include failure to allow the defendant (or his or her advocate) to examine the case file¹¹⁷ and failure to attach required items to the case file.¹¹⁸ Thus, the French system has a virtual *per se* rule of reversal of a conviction where a defendant can demonstrate a violation of the rules of disclosure.

The various disclosure rules and requirements of the nations discussed above, and the consequences, to the conviction of a defendant, of prosecutorial violations of those rules and requirements, are revealing when compared to the same rules and requirements in the United States. The addition of the extra “fairness” examination, applied with force in Canada, and the same examination, albeit applied less forcefully in England, provide greater opportunity for defendants in those nations to overturn verdicts rendered in proceedings lacking full and fair disclosure than similarly situated defendants in the United States. Though there may be a question as to how the rules in China are applied, that nation also provides defendants relatively robust remedial measures as compared to the United States. And the French law’s virtual *per se* nullification of convictions obtained without full disclosure certainly is more vigilant in assuring a defendant’s rights are respected than the American system. Thus, in the United States, prosecutors have considerably more unencumbered opportunity to engage in misconduct with respect to disclosure malfeasance.

B. Use of Testimony a Prosecutor Knew or Should Have Known to Be False

In comparing the American approach to dealing with the knowing or reckless use of false testimony with the approaches taken in other nations, generally, the differences are not enormous. Not surprisingly, there are differences among nations as to the penalties imposed for perjury, and differences regarding when a prosecutor is regarded to have knowingly or recklessly elicited false testimony. However, punishing perjury and excluding it from the criminal justice system is a relatively uniform interest of all nations and their judicial systems, so there is no real need to address such subtleties here. Rather, the focus of this section is on the remedy available to a defendant where false testimony is used against him or her. As discussed above, in the United States, the use of false testimony requires reversal of a conviction if the false testimony could “in any reasonable likelihood have affected the judgment of the jury.”¹¹⁹ Yet, even in

¹¹⁵ *Id.* art. 171.

¹¹⁶ *See, e.g., id.* arts. 80-81, 171, 181, 215, 393, 494-14, 520.

¹¹⁷ *Id.* art. 278.

¹¹⁸ *See, e.g., id.* arts. 80-81, 171, 181, 215, 393, 494-14, 520.

¹¹⁹ *Giglio v. United States*, 405 U.S. 150, 154 (1972).

considering this seemingly easy-to-meet standard, there are still meaningful differences as to how other nations address the problem of prosecutorial misconduct in the form of the knowing use of false testimony, differences that may be of value in considering the efficacy of the U.S. approach.

In Canada (as well as other nations discussed below), rules regarding the use of false testimony tend to be bound up with rules regulating failure to disclose.¹²⁰ Of course, this makes sense if one considers a failure to disclose to be a deception imposed on the court. As such, there is similarity in the Canadian approach to false testimony offered by prosecutors with their approach to disclosure failures. In fact, in *R. v. McNeil*, the Canadian Supreme Court specifies that, when the Crown discovers that one of its witnesses has committed perjury, it is obligated to “take all reasonable steps to find out what had happened and to share the results of those inquiries with the defence.”¹²¹ The duty to inquire imposed by the Court in *McNeil* begs the inference that, where perjured testimony is discovered to have been used by the Crown, the burden is on the *Crown* to provide an explanation. Thus, though the strict standard used by American courts in evaluating the knowing prosecutorial use of false testimony is highly similar to the Canadian standard in its determination of whether such misconduct is material, the Canadian system takes the further step of placing the onus on the Crown to show immateriality, rather than on a defendant to show knowingly-used false testimony was material and prejudicial. In this sense, the Canadian system must be said to be less tolerant of perjured testimony offered by a prosecutor than the American system.¹²²

Like the Canadian system, English cases as well tend to address the use of false testimony in a similar fashion to disclosure failures. The use of false testimony is a material irregularity as is a failure to disclose; as such, the use of false testimony falls under the same post-CPIA standard discussed above, to wit, whether the irregularity renders a conviction unsafe.¹²³ The English judicial examination of whether a conviction is unsafe, as it relates to the use of false testimony, does not, in practice, substantially differ from the *Napue/Giglio* standard used in the United States.

China, on the other hand, offers some particularly interesting and starkly different approaches to the issue of knowing prosecutorial use of false testimony. While its approach must be subject to the same caveat mentioned above, namely, the nation’s spotty track record with respect to human rights, the statutory requirements are somewhat unique in global jurisprudence. Most interesting among these is a requirement that before any evidence, including witness

¹²⁰ *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, para. 49 (Can.).

¹²¹ *Id.* para. 50.

¹²² It should also be mentioned that in Canada, the penalty for either committing perjury or inciting one to commit perjury is particularly harsh, punishable by up to fourteen years in prison. Criminal Code, R.S.C. 1985, c. C-46, § 132.

¹²³ *R. v. Mills*, [1998] 3 A.C. 382 (H.L.) (appeal taken from Eng.).

testimony,¹²⁴ may be used as a basis for deciding a case, it must be verified.¹²⁵ Of course, any cynic would be justified in pointing out the inherent ambiguity in the phrase “as a basis for deciding a case,” and it must be acknowledged that the statute is silent on who is responsible for the verification. However, the falsification of evidence by a public procurator is a criminal offense,¹²⁶ and anyone who intentionally conceals facts *must* be investigated, “regardless of which side of a case he belongs to.”¹²⁷ Moreover, where different items of evidence contradict one another, or the evidence upon which a conviction is based is deemed unreliable, retrial is mandated.¹²⁸ It is true that significant portions of the American Federal Rules of Evidence are designed with the reliability of evidence in mind;¹²⁹ as such, it might be argued that those rules operate to ensure evidentiary veracity to the greatest extent possible without adjudications for every item of evidence. Still, it cannot be denied that false, unreliable, and even fabricated evidence does find its way into the courtroom somewhat frequently. Thus, though it may not so reliably exclude false evidence when applied in practice, the Chinese system offers a tantalizing glimpse of a system completely unforgiving of a prosecutor’s knowing use of false testimony.

The French system similarly has a virtual zero tolerance policy with respect to the use of false testimony. As described above, the French system finds a nullity where any breach of an essential formality of the criminal code exists.¹³⁰ On the other hand, a Code permissive requirement allowing revision of a criminal decision in the event a witness against an accused is prosecuted and sentenced for perjury suggests that such a revision might not be allowed if the authorities opt not to prosecute for perjury.¹³¹ Nonetheless, the consistent position throughout the Code, finding a nullity where procedure is breached, shows that the French treat false testimony with the same intolerance, at minimum, as the other systems discussed herein.¹³²

Of all the types of prosecutorial misconduct and the various ways in which the U.S. criminal justice system deals with them, the knowing use of false testimony and the American *Napue/Giglio* standard used to evaluate its materiality is most closely in line with the lack of tolerance for similar malfeasance shown by other nations. Even given the comparatively (to other forms of prosecutorial misconduct) low bar for a finding of materiality in U.S. courts, however, other

¹²⁴ Criminal Procedure Law of the People’s Republic of China, *supra* note 80, art. 42.

¹²⁵ *Id.* art. 42.

¹²⁶ Public Procurators Law of the People’s Republic of China, *supra* note 79, art. 35.

¹²⁷ Criminal Procedure Law of the People’s Republic of China, *supra* note 80, art. 44.

¹²⁸ *Id.* art. 204.

¹²⁹ *See, e.g.*, FED. R. EVID. 803(6), (8), 901, 902 (Business records, public records, and self-authentication respectively).

¹³⁰ Code of Criminal Procedure, *supra* note 85.

¹³¹ *Id.* art. 622.

¹³² Code of Criminal Procedure, *supra* note 85.

nations and their respective approaches to the use of false testimony still offer a glimpse of how U.S. courts might take an approach even more vigilant of the rights of an accused.

C. Inappropriate, Inflammatory or Improper Comments (or Eliciting Such Comments)

As described above, a defendant in the U.S. criminal justice system has a very steep hill to climb in order to secure a new trial based on prosecutorial misconduct in the form of improper comments. To do so, he or she must show the improper comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”¹³³ If the comments are not found to be prejudicial, or if the trial court (as trial courts do in many cases) simply issues a curative instruction to the jury, retrial will not be granted.¹³⁴ The reality of such a difficult standard is that improper comments generally will result in the overturning of a conviction only if grossly improper and if they persist throughout the trial.

Overall trial fairness and the issuance, or lack thereof, of curative instructions by the trial court are the primary considerations dictating whether improper prosecutorial comments will warrant granting a new trial in the Canadian criminal justice system.¹³⁵ The Canadian fairness inquiry is an examination into whether there was a miscarriage of justice resulting from the improper comments,¹³⁶ a determination highly analogous to the American *Darden* standard of whether improper prosecutorial comments violate due process because they “so infected the trial with unfairness.”¹³⁷ However, in practice, Canadian courts apply this standard more critically than their American counterparts, and, furthermore, place substantial importance on the issuance of a curative instruction by the trial court.¹³⁸ For example, the Canadian Supreme Court refused to find a miscarriage of justice and overturn a conviction where Crown counsel gave personal opinions as to the veracity of witnesses, despite the fact that the trial court did not advise the jury of the impropriety of the remarks, because the trial court “did instruct the jury that it was their exclusive province to make findings of fact and in the course of that function to assess the credibility of witnesses.”¹³⁹ The court determined that this instruction “was sufficient to overcome the unfortunate

¹³³ *Parker v. Matthews*, 132 S. Ct. 2148, 2153 (2012) (quoting *Darden*, 477 U.S. 168, 181) (internal citation omitted).

¹³⁴ *United States v. Young*, 470 U.S. 1, 11-12 (1985).

¹³⁵ *R. v. Romeo*, [1991] 1 S.C.R. 86 (Can.).

¹³⁶ *Id.*

¹³⁷ *Darden v. Wainwright*, 477 U.S. 168, 181.

¹³⁸ *See, e.g., R. v. Rose*, [1998] 3 S.C.R. 262 (Can.); *R. v. Romeo*, [1991] 1 S.C.R. 86 (Can.); *Provencher v. The Queen*, [1956] S.C.R. 95 (Can.).

¹³⁹ *R. v. Chambers*, [1990] 2 S.C.R. 1293 (Can.).

statements of Crown counsel.”¹⁴⁰ Similarly, the court has given broad discretion to the trial court in determining whether an improper comment in a Crown counsel closing argument warrants allowing a response by the defense, pointing out that in most cases, a curative instruction will suffice, except in relatively rare situations.¹⁴¹

On the other hand, the Court ordered a conviction overturned where Crown counsel stated, during questioning, that he was going to have the defendant arrested for perjury, finding that the making of such a statement “could scarcely fail to prejudice the fair trial of the accused.”¹⁴² The court similarly reversed a conviction and ordered a new trial where Crown counsel made prejudicial remarks about a defense witness’s expert testimony, finding that the comments “were prejudicial to a degree sufficient to impose a legal duty on the trial judge to comment [by giving a curative instruction] and thus ensure that the position of the defence was fairly put to the jury.”¹⁴³ The court held that the failure to give the instruction “constituted an incorrect decision on a question of law.”¹⁴⁴ On the facts of both *Provencher* and *Romeo*, it is unlikely that a U.S. court would find the comments sufficiently “infected” the overall trial to warrant reversal. As such, though in theory the Canadian and American standards of reviewing improper prosecutorial comments are almost identical, with only a stronger Canadian emphasis on the giving of curative instructions, in practice, the Canadian courts conduct review more critically than American courts.

The Canadian approach to improper prosecutorial comments mirrors that of the English common law upon which Canadian jurisprudence is largely based. England’s application, however, is less liberal than Canada’s, and more closely resembles the American approach, finding a trial unfair and reversing conviction where “the departure from good practice is so gross, or so persistent or so prejudicial as to be irremediable.”¹⁴⁵ In application as well, the English treatment of improper prosecutorial comments tends to parallel the U.S. approach. For example, an English appellate court refused to reverse a conviction where a prosecutor improperly commented, in violation of the Criminal Evidence Act of 1898, on a defendant’s failure to give evidence, deciding that the comments did not harm the defendant’s case, and, in any event, a curative instruction was given by the trial court in summing up its charges to the jury.¹⁴⁶ Similarly, an appellate court rejected reversal where a prosecutor improperly commented on the

¹⁴⁰ *Id.*

¹⁴¹ *Rose*, [1998] 3 S.C.R. 262. Such situations would exist where the defendant’s right to a fair trial have been prejudiced, for example due to a change in the Crown theory of criminal liability.

¹⁴² *Provencher*, [1956] S.C.R. at 100.

¹⁴³ *Romeo*, [1991] 1 S.C.R. 86. It should be noted that the case involved an insanity defense regarding the killing of a law enforcement officer.

¹⁴⁴ *Id.*

¹⁴⁵ *Benedetto v. The Queen*, [2003] UKPC 27 (appeal taken from Virgin Is.).

¹⁴⁶ *R. v. Riley*, [1990] 91 Cr. App. R. 208 (appeal taken from Eng.).

defendant's exercise of his right to remain silent.¹⁴⁷ Though the court pointed out that the trial court had erred in failing to correct the prosecutor, the appeal was rejected because the trial court, in summing up, had pointed out that an accused has the right to remain silent, and the exercise of that right cannot be used against him.¹⁴⁸ On the other hand, an appeals court did overturn a conviction where a prosecutor gave a speech which was "xenophobic, inflammatory and [sought] to make use of inadmissible and irrelevant material."¹⁴⁹ The result in each case likely would have been similar had the cases been reviewed in American courts under the *Darden* standard.

Though, at least in statute, China offers interesting glimpses of alternative and intolerant approaches to dealing with prosecutorial misconduct with respect to failing to disclose evidence or using false testimony, the same cannot be said regarding improper comments. In China, all parties, including both the prosecution and defense attorneys, are allowed, with permission of the presiding judge, to "state their views on the evidence and the case, and they may debate with each other."¹⁵⁰ This fact alone obviates any need for comparison of the Chinese approach to that of the United States; opinion remarks by a prosecutor that would constitute impropriety in the United States are not improper in China. While it may be that there are boundaries to the permissive opinion comments by Chinese prosecutors, the fact that in general this sort of advocacy does not amount to misconduct in China is sufficient to negate any comparative value.

The French approach, though not as sweeping in allowing the unfettered offering of prosecutorial opinion as China, also allows prosecutors to give opinions in various instances.¹⁵¹ As such, the French statutory scheme is largely silent on the issue of improper prosecutorial comments. However, as in the case of failures to disclose and the use of false testimony, the fact remains that the French courts will find a nullity "when the breach of an essential formality provided for by a provision of the present Code or by any other rule of criminal procedure has harmed the interests of the party it concerns."¹⁵² Thus, in the event a prosecutor's behavior or comments transgress any rule of procedure and harm an accused, there is a real possibility of conviction reversal.

Because both China and France permit opinions by advocates in criminal trials, there is no real comparative value in examining the approaches of those nations to improper prosecutorial commentary. Furthermore, England's approach to improper comments is virtually identical both in the standard applied and in practical application. Canada, however, does offer some insight into a more

¹⁴⁷ *Berry v. The Queen*, (1993) 96 Cr. App. R. 77, 81 (appeal taken from Jam.).

¹⁴⁸ *Id.*

¹⁴⁹ *Benedetto*, [2003] UKPC 27.

¹⁵⁰ Criminal Procedure Law of the People's Republic of China, *supra* note 80, art. 160.

¹⁵¹ *See generally* Code of Criminal Procedure, *supra* note 85 (frequently referring to opinions given by prosecutors).

¹⁵² *Id.*, art. 171.

intolerant system. Canada's insistence on the issuance of a curative instruction and its strict review of whether improper comments affected trial fairness mean that system is more likely to deter such misconduct than the U.S. system.

D. Prosecutorial Immunity

As described above, in the United States, the Court has rejected prosecutorial qualified immunity from liability for individual prosecutors, in favor of absolute immunity, despite the fact that absolute immunity strips from a defendant any opportunity for redress even where a prosecutor acts maliciously in pursuing a prosecution.¹⁵³ Even in actions not intimately associated with the judicial process, such as actions related to the investigatory phase of a criminal proceeding, a prosecutor still enjoys qualified immunity, facing liability only when plainly incompetent or knowingly violating the law.¹⁵⁴ A prosecuting agency has only qualified immunity, and thus may incur liability unlike an individual prosecutor; however, a finding of liability requires a showing that misbehavior is "persistent and widespread," a standard, though as of yet undefined, that appears to establish a high bar to liability.¹⁵⁵ As seen below, both Canada and the United Kingdom depart significantly from these standards.

Canada turns the U.S. approach upside-down by applying virtually absolute qualified immunity for the Crown itself, while eschewing immunity for the prosecuting agency and its individual prosecuting attorneys.¹⁵⁶ In *Nelles v. Ontario*, the Canadian Supreme Court declared that "the Crown enjoys absolute immunity from a suit for malicious prosecution."¹⁵⁷ The Court determined that the decision to prosecute is a judicial one, executed on behalf of the Crown by Crown attorneys, thus immunizing the Crown from liability.¹⁵⁸ However, the Court specified that individual prosecuting attorneys acting on behalf of the Crown do not enjoy immunity from liability for malicious prosecution, deciding that, in the interests of public policy, there is no justification for negating a private right of action by the barring of a remedy under the Canadian Charter of Rights and Freedoms.¹⁵⁹ The Court in *Nelles* recognized that "the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted," so policy considerations in favor of absolute immunity "must give way to the right of a private citizen to seek a remedy when

¹⁵³ *Imbler v. Pachtman*, 424 U.S. 409 (1976).

¹⁵⁴ *Burns v. Reed*, 500 U.S. 478 (1991).

¹⁵⁵ *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

¹⁵⁶ *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (Can.).

¹⁵⁷ *Id.* para. 5.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim.”¹⁶⁰

The *Nelles* Court set out four requirements to demonstrate the tort of malicious prosecution: “(1) the respondent initiated the prosecution; (2) the prosecution resulted in the appellant’s acquittal; (3) the Crown prosecutor did not have reasonable and probable cause upon which to found the charges brought against the appellant; and (4) the prosecution was motivated by an improper purpose.”¹⁶¹ Addressing the issues of meritless claims clogging the court system or of interference with the ability of prosecutors to properly execute their important public duties (both commonly cited by U.S. courts as justifying absolute prosecutorial immunity), the Court pointed out the “inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims,” are sufficient to negate such concerns.¹⁶² Even the immunity granted to the Crown, however, is not absolute; there are exceptional cases in which the Court will remove Crown immunity for prosecutorial misconduct.¹⁶³ The court cited with approval to Justice White’s concurring opinion in *Imbler*, which exempted from immunity instances of prosecutorial suppression of evidence.¹⁶⁴

As the Canadian Supreme Court pointed out in *Nelles*, England occupies a different position with respect to prosecutorial immunity due to the existence in that nation of private prosecutions.¹⁶⁵ While private prosecutors have never had immunity from civil liability, as a general rule, public prosecutors and other participants in a trial, including witnesses and judges, historically have enjoyed absolute immunity from liability.¹⁶⁶ But the English courts operate from a basic principle that “any wrong should not be without a remedy; and that any exception to that basic principle of any system of justice must be necessary, strict and cogent.”¹⁶⁷ This principle explains why the English courts do not extend immunity to instances of malicious prosecution; liability for this tort is exempt from prosecutorial immunity that applies to other torts, such as defamation.¹⁶⁸ In this sense, the English version of prosecutorial immunity is more analogous to the Canadian version than the American version, in which § 1983 actions have largely

¹⁶⁰ *Id.* paras. 55-56.

¹⁶¹ *Proulx v. Quebec (Att’y General)*, 2001 SCC 66, [2001] 3 S.C.R. 9 (Can.).

¹⁶² *Nelles*, [1989] 2 S.C.R. 170.

¹⁶³ *Proulx*, 2001 SCC 66 (finding liability should be applied against the Crown in a case meeting all four of the *Nelles* requirements).

¹⁶⁴ *Nelles*, [1989] 2 S.C.R. 170 (discussing *Imbler v. Pachtman*, 424 U.S. 409, 434 (White, J., concurring)).

¹⁶⁵ *Id.*

¹⁶⁶ *See, e.g.*, *Singh v. Reading*, [2013] 1 W.L.R. 3052 (appeal taken from Eng.); *Silcott v. Comm’r of Police of the Metropolis*, QBENI 95/0709/E, 1996 W.L. 1092285 (A.C. 24 May 1996) (appeal taken from Eng.); *Riches v. Dir. of Pub. Prosecutors*, [1973] 1 W.L.R. 1019 (H.L.) (Eng.).

¹⁶⁷ *Singh*, 1 W.L.R. para. 20.

¹⁶⁸ *Id.* para. 34.

replaced the tort of malicious prosecution,¹⁶⁹ and, as recently illustrated by the *Connick* decision, are extremely difficult for a defendant to win.

The elements for the English tort of malicious prosecution are identical to those laid out by the Canadian Supreme Court in *Nelles*.¹⁷⁰ As such, the English system similarly relies on the high bar to proving malicious prosecution as a way to address the policy concerns supporting immunity, such as excessive litigation and interference with prosecutorial decisions. English courts have also departed from the American position by adopting a view similar to that expressed by Justice White in his concurrence in *Imbler*, to wit, eschewing immunity in instances of evidentiary suppression.¹⁷¹ In instances involving neither suppression of evidence nor malicious prosecution, the English courts do make the same functionality distinction as did the U.S. Supreme Court in *Imbler*, drawing a line between conduct that is and is not part of the judicial process.¹⁷² However, this does not alter the fact that English courts share the approach of their Canadian counterparts respecting prosecutorial immunity, an approach far less forgiving of the misbehavior of prosecutors than that taken by American courts. Moreover, English courts have been moving towards increased exposure to liability for courtroom misbehavior generally; recent decisions have allowed advocates (other than prosecutors) and expert witnesses to be sued for negligent acts or omissions arising out of their conduct in litigation.¹⁷³

In considering the issue of prosecutorial liability in China, it should first be noted that both the Public Procurator's Law as well as the Criminal Procedure Law require that investigations be launched where prosecutors engage in certain types of malfeasance; as this has been discussed in previous sections, there is no need to reiterate it here.¹⁷⁴ However, there have been some interesting recent amendments to the Chinese Civil Procedure Code that are worth mentioning. Notably, in 2013, the Chinese for the first time adopted provisions allowing public interest litigation, albeit in very narrow circumstances.¹⁷⁵ Additionally, that same year, the Chinese adopted an amendment related to lawsuits for malicious prosecution, allowing suit by third parties where civil rights have been infringed, again within fairly narrow

¹⁶⁹ Some states do still retain a tort of malicious prosecution.

¹⁷⁰ *Martin v. Watson*, [1996] A.C. 74 (H.L.) (appeal taken from Eng.).

¹⁷¹ *Riches*, [1973] 1 W.L.R. at 1026.

¹⁷² *Silcott v. Comm'r of Police of the Metropolis*, QBENI 95/0709/E, 1996 W.L. 1092285 (A.C. 24 May 1996) (appeal taken from Eng.).

¹⁷³ See, e.g., *Singh v. Reading*, [2013] 1 W.L.R. 3052, para. 45 (appeal taken from Eng.) (discussing *Arthur J.S. Hall & Co. v. Simons*, [2002] 1 A.C. 615 (H.L.) (appeal taken from Eng.) and *Jones v. Kaney*, [2011] UKSC 13, [2011] 2 A.C. 398 (S.C.) (appeal taken from Eng.)).

¹⁷⁴ Criminal Procedure Law of the People's Republic of China, *supra* note 80; Public Procurators Law of the People's Republic of China, *supra* note 79, art. 34.

¹⁷⁵ MAYER BROWN JSM, NEW AMENDMENTS TO PRC CIVIL PROCEDURE LAW AIMED AT INCREASING EFFICIENCY, TRANSPARENCY AND PARTIES' AUTONOMY (Jan. 17, 2013), <http://www.mayerbrown.com/files/Publication/a103da29-0076-476e-9264-92ab2f7b4b27/Presentation/PublicationAttachment/713aa6c3-d4f4-47da-99fb-96bc51990a48/130117-PRC-Litigation.pdf>.

constraints.¹⁷⁶ Because of the relatively recent nature of these amendments and their extremely limited scope, it is difficult to ascertain at present how they will be applied and if they will be expanded. However, it is at least worth noting that the Chinese system is allowing some degree of prosecutorial civil liability, adding to already existing criminal liability discussed in prior sections. This at least suggests that the Chinese system has taken or is taking a stronger stand against prosecutorial misbehavior than the U.S. system. Of course, this does not consider the issue of corruption or of general problems with violations of human rights in China, which may very well negate the moral high ground of such a stand.

France represents the opposite extreme from American absolute immunity in its approach to prosecutorial immunity. As an initial consideration, tort law in France represents a marked departure from the ordinarily statutory approach of a civil law nation. Because only five highly general articles in the entire French civil code of more than twenty-two hundred articles address torts, tort law has been developed by the courts in interpreting those few non-specific provisions.¹⁷⁷ In this sense, French tort law more closely resembles a common law system. It should also be noted that France allows private prosecutions as England does; in general, public prosecutors have complete discretion as to whether to prosecute, but when they opt not to prosecute, the victim or his or her family may initiate private prosecution.¹⁷⁸ As for public prosecutors, they occupy a significantly different position with respect to the criminal justice system than their American counterparts. In the United States, prosecutors are part of the executive branch and are separate from the judiciary; in France, they are part of the judiciary, treated in the same fashion as judges.¹⁷⁹ Notwithstanding this position, France completely rejects prosecutorial immunity; in fact, as a general rule, a verdict of not guilty in a criminal case creates a high likelihood of success in a suit in tort.¹⁸⁰ Even before the filing of a tort claim, the French criminal code specifically provides for a defendant to apply to an appeals court for damages where the appeals court finds there is no offense, the facts were not proved, or the facts are not imputable to the defendant.¹⁸¹ Thus, where a defendant cannot be proven guilty, he or she may win damages irrespective of whether there was misconduct and irrespective of whether a separate civil suit is filed.¹⁸² In stark contrast to the rigid and broadly applied American system of immunity for prosecutors, wronged defendants in France are almost certain to recover at least some damages as a remedy.

¹⁷⁶ *Id.*

¹⁷⁷ John H. Crabb, *The French Concept of Abuse of Rights*, 6 INTER-AM. L. REV. 1, 8 (1964) (discussing arts. 1382-86).

¹⁷⁸ Rita Hauser, *Comparative Law: The Criminal Law in France*, 45 A.B.A. J. 807, 808 (1959).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 809.

¹⁸¹ Code of Criminal Procedure, *supra* note 85, art. 516.

¹⁸² *Id.*

IV. IMPROVING THE AMERICAN APPROACH TO DEALING WITH PROSECUTORIAL MISCONDUCT

Having examined the way Canadian, English, Chinese, and French courts address prosecutorial misconduct in their criminal justice systems compared to the way American courts do the same, it is clear that the American criminal justice system is far too lenient on misbehaving prosecutors, and far too harsh on victimized defendants. One only need look as far as the substantial number of cases¹⁸³ filed in appellate courts each year which raise claims of misconduct as evidence that the present lenient stance has been ineffective. The obvious question is: How might the American system more effectively abrogate the sweeping commonality of prosecutorial misbehavior, a serious blight on the fairness of trials and on the due process rights of those accused of crimes, without abandoning its countervailing interests in punishing crime and ensuring that the guilty remain incarcerated? The problem is especially difficult to resolve when one considers the judicial election factor. The fact that many American state judges are answerable to the populace means few are willing to make more remedies available to defendants while lowering conviction rates by making prosecutors toe ethical lines; being tough on crime is simply too popular a campaign stance. The election of prosecutors does not help either; higher conviction rates increase the likelihood of re-election, all the more incentive for prosecutors to step over those ethical lines. Thus, it is up to the federal courts, whose judges do not face election, to craft solutions that balance the competing interest of ensuring that aggrieved defendants have remedies and prosecutors operate within the rules with the interest in punishing those guilty of committing crimes. The various approaches to balancing these interests taken in other nations that are discussed above inform the possible solutions presented below.

¹⁸³ See *infra* Table 1.

Table 1¹⁸⁴

Case	Total cites in appellate decisions through 6/30/14 (years since case was decided)	Cites since start of 2010	Percentage of total case cites	Percentage of total time since decision of years since 2010
<i>Brady v. Maryland</i> (1963)	29,936 (51 years)	7,672	25.6%	8.8%
<i>United States v. Bagley</i> (1985)	8,848 (29 years)	2,215	25.0%	15.5%
<i>Imbler v. Pachtman</i> (1974)	7,748 (40 years)	2,501	32.3%	11.3%
<i>Giglio v. United States</i> (1982)	6,769 (32 years)	1,825	27.0%	14.1%
<i>Donnelly v. DeChristoforo</i> (1974)	6,285 (40 years)	1,781	28.3%	11.3%
<i>Darden v. Wainwright</i> (1986)	6,218 (28 years)	2,462	40.0%	16.1%
<i>Kyles v. Whitley</i> (1995)	5,709 (19 years)	1,792	31.4%	23.7%
<i>Napue v. Illinois</i> (1959)	3,651 (55 years)	1,066	29.2%	8.2%
Totals	75,164	21,314	28.4%	Avg.: 13.6%

¹⁸⁴ <http://www.next.westlaw.com> (search for a given case's citation; then select the "Citing References" tab; then view "Cases"). The data does not account for decisions that may cite to more than one of the above listed cases, nor does it exclude circumstances in which the same matter was considered by more than one court of appeals. It is meant only to show the increasingly high number of appellate cases dealing with prosecutorial misconduct issues.

A. Solutions Within the Existing Common Law Framework; Closing the Cumulativeness Loophole and Burden Shifting

As discussed above, *Kyles* requires a court to consider prosecutorial misconduct cumulatively, not item by item,¹⁸⁵ but the court has left open the question of the proper standard of materiality to be applied in cumulative consideration of instances of misconduct where those instances include more than one type of misconduct. Disagreement and uncertainty among the circuits on the question is exemplified by the Ninth Circuit's opinion in *Hein v. Sullivan* and the Sixth Circuit's opinion in *Rosencrantz v. Lafler*.¹⁸⁶

As a general rule, the Supreme Court is reticent to make sweeping changes in the law, particularly in more recent years. Decisions that represent a sea change in the law are rare indeed. Thus, it may be unlikely that the Court will adopt substantial and far-reaching changes any time soon. Should the Court recognize the pervasiveness of the problem of prosecutorial misconduct and act,¹⁸⁷ one approach it could take that would represent only a moderate change, but one that would meaningfully improve remedies available to aggrieved defendants, would be to hold that in cases in which prosecutors have engaged in misconduct of more than one type, the standard of materiality applied to cumulative analysis will be the standard most favorable to the defendant. For example, suppose a prosecutor knowingly used false testimony and also failed to disclose evidence. Rather than considering the false testimony under the *Napue* standard of "any reasonable likelihood" of an effect on the verdict while separately considering the failure to disclose under the *Brady/Bagley* standard of a "reasonable probability of a different outcome," all misconduct would be considered cumulatively under the more defendant-friendly *Napue* standard. This was precisely the approach taken by the Ninth Circuit in *Hein*, where the court applied the *Brady* materiality standard in examining the cumulative impact of a failure to disclose as well as improper prosecutorial comments, rather than applying the *Brady* standard to the failure to disclose and the *Darden* "so infected the trial with unfairness," standard to the improper comments.¹⁸⁸ Though it would represent only a minor shift in the way courts evaluate the prejudicial effect of prosecutorial misconduct, such a holding would incrementally lower the burden of proof where defendants have been victimized by prosecutorial misconduct. Moreover, it would place a greater onus on prosecutors to be cautious and minimize misconduct, since cumulative consideration would generally have an easier path to a

¹⁸⁵ *Kyles v. Whitley*, 514 U.S. 419 (1995).

¹⁸⁶ Compare *Hein v. Sullivan*, 601 F.3d 897 (9th Cir. 2010) (employing reasonable probability standard), with *Rosencrantz v. Lafler*, 568 F.3d 577 (6th Cir. 2009) (employing harmless error standard).

¹⁸⁷ Notwithstanding its recent refusal to do so in *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

¹⁸⁸ *Hein*, 601 F.3d at 914-15.

demonstration of prejudice, and would present a clear standard for both the courts and prosecutors to respectively evaluate and avoid misconduct.

There is a second approach the Supreme Court could take without disrupting the present framework of prosecutorial misconduct jurisprudence, albeit one that would represent a sea change in the law. As the current common law dictates, even when a defendant has conclusively demonstrated that a prosecutor engaged in misconduct in the course of trial, the defendant still must further demonstrate prejudice by showing the misconduct was material, with the standard used to show materiality differing based on the type of misconduct. The difficulty of such a demonstration varies with the type of misconduct and its respective materiality standard, ranging from reasonably possible to nearly impossible. In the case of the use of false testimony, the *Napue* “any reasonable likelihood” of a different verdict is a standard that is realistically possible to meet, and, in fact, the knowing use of false testimony sometimes will lead to a new trial. The *Brady* “reasonable probability of a different outcome” standard is considerably more difficult, and defendants are not often successful even when they have shown a *Brady* violation, unless the material suppressed is highly relevant and favorable to the defendant. In any case, both standards are highly subjective; as applied, the outcome is usually dependent on whether a judge or court reasons that other evidence is sufficient to show a defendant is probably guilty. The subjectivity alone makes it difficult for a defendant to carry the burden of proof. Finally, the *Darden* standard of “so infecting a trial with unfairness” is extremely difficult to meet, and cases are rarely overturned.

The requirement that a defendant must first prove that misconduct of some type occurred, and then further prove that the misconduct was material, is offensive to any reasonable notion of fair play and justice. Where a prosecutor engages in misconduct during the course of a trial, he or she gets the benefit of the doubt that the misconduct was not material, while the defendant, who was in no way responsible for the misconduct and in many cases may not have even been aware of it until after—even years after—the trial, must prove the misconduct did not affect the verdict. This seems almost Kafkaesque. Moreover, it is open to severe abuse; any prosecutor who wants to falsely imprison someone and who is willing to accept the possibility of professional discipline can engage in misconduct to accomplish his or her nefarious goal, and it is up to the defendant to prove the misconduct impacted the verdict instead of the prosecutor to show the misconduct was irrelevant. Fairness demands that when a defendant can demonstrate that misconduct has occurred, the burden of proof should be *on the prosecutor* to show that the misconduct was *not material* to the verdict. Such a burden shift, creating a rebuttable presumption of materiality when a defendant has shown misconduct occurred, would comport with reasonable notions of fair play and justice, and would force prosecutors to go to greater lengths to explain their conduct. It also might persuade prosecutors to ensure compliance with ethical rules, since failure to do so would force them to carry a burden to ensure continued incarceration, and in turn may increase voter pressure to avoid overturned convictions by obeying the rules.

B. Failure to Disclose and Use of False Testimony; One Standard of Materiality and Independent Evaluation

The Canadian and English systems' similar treatment of failure to disclose and of knowing use of false testimony makes far more sense than the American approach, which applies a different standard of materiality for each. After all, a failure to disclose is no less a deception on the court and the defendant than is the knowing use of false testimony; in both cases, truthful information is being hidden. Moreover, in both cases, the defendant may very well be unable to discover the misconduct until after the trial is over and conviction adjudicated, and in both cases, the damage to an accused's ability to present a defense can be devastating. Thus, there are strong reasons to adopt an approach similar to those taken in Canada¹⁸⁹ and England¹⁹⁰ and treat the two types of misconduct the same with respect to determining whether the misconduct is material to a verdict. If the two are treated similarly in U.S. courts, applying the more lenient *Napue* standard (rather than the *Brady* standard) in all situations involving prosecutorial deception of the court, including failure to disclose and the knowing use of false testimony, is the most logical and fair solution. After all, as the Court recognized in *Mooney*, "a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."¹⁹¹

The Canadian¹⁹² and English¹⁹³ systems' addition of a second layer of inquiry beyond simply evaluating whether there is a reasonable possibility whether misconduct affected the reliability of a verdict, to wit, whether the misconduct had an effect on the overall fairness of a trial, would also represent a meaningful and important improvement over the American one-step inquiry when misconduct is found to have occurred. Adding this second layer of analysis would require reviewing courts to consider not just the bare record and whether that record tends to show the guilt of the accused, but also whether, if the true information had been available to the defendant, the defendant might have pursued an alternative line of defense. As with a shift of the burden of proof, this approach seems far more logical and reasonable than a simplistic "effect on the verdict" approach, which fails to account for the fact that misconduct may have the effect of depriving a defendant of the opportunity to present an effective defense.

In sum, once prosecutorial misconduct—in the form of a failure to disclose or the knowing use of false testimony—is found to have occurred, three changes should be made to the current American approach to adjudicating the aggrieved defendant's plea for relief: (1) use the *Napue* standard of materiality for both failure to disclose and knowing use of false testimony, effectively eliminating the *Brady*

¹⁸⁹ R. v. McNeil, 2009 SCC 3, [2009] 1 S.C.R. 66, para. 49 (Can.).

¹⁹⁰ R. v. Mills, [1998] A.C. 382 (H.L.) (appeal taken from Eng.).

¹⁹¹ *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

¹⁹² R. v. Dixon, [1998] 1 S.C.R. 244 (Can.).

¹⁹³ R. v. Brown, [1998] A.C. 367 (H.L.) (appeal taken from Eng.).

materiality standard; (2) add a second layer of inquiry beyond the *Napue* standard, specifically, whether the overall fairness of the trial was affected by the misconduct; and (3) shift the burden of proof so that, once misconduct has been shown to have occurred, the prosecutor must show that there is no reasonable likelihood that the misconduct had an effect on the verdict or on the overall fairness of the trial. Such changes would go a long way toward assuring that when prosecutors engage in deception, an aggrieved defendant will have the chance to get a new and fair trial, unless there is overwhelming evidence of guilt. It also would establish a realistically meaningful vehicle for relief for those wrongly convicted due to prosecutor misbehavior, without removing the ability of prosecutorial offices to punish the guilty (through retrial or if there is overwhelming evidence of guilt). As such, this approach would strike a balance between the two competing interests cited in *Brady*,¹⁹⁴ protecting society and ensuring fair trials, as opposed to the present system in which defendants are at a significant disadvantage in seeking relief.

The above discussed solutions only address one part of the issue respecting failure to disclose and knowing use of false testimony, namely, relief for an aggrieved defendant. There still remains the question of whether better safeguards can be erected to prevent such misconduct from occurring in the first place. With respect to disclosure, the present American system is completely counterintuitive; prosecutors are commanded to turn over evidence favorable to an accused.¹⁹⁵ Thus, the very person who is charged with prosecuting a defendant, and upon whom pressure to obtain a conviction is significant, is also responsible for determining what evidence is “favorable” to an accused person and so must be turned over to the defense. There is no system of checks and balances to ensure prosecutorial compliance. Moreover, whether evidence is “favorable” to an accused is an inherently subjective judgment; making that determination should not fall on the adversary of the accused, but on his or her advocate, or at least on an independent source, such as a court. Both Canada and England have recognized this by holding that information must be disclosed if there is a reasonable possibility suppression will impair the defense,¹⁹⁶ and in giving the right to full disclosure a broad scope by including even material that may only be of marginal value.¹⁹⁷ This places the onus on prosecutors to disclose anything even questionable. U.S. courts should provide for no less; to do otherwise sets up a conflict of interest inherent in the American system of criminal justice.

Of course, those who prefer the current system will no doubt contend that prosecutors are interested in the administration of justice, and thus have an interest in the fairness of a trial. But this argument completely ignores the realities of the American criminal justice system, in which enormous pressure is heaped upon prosecutors to obtain convictions, sometimes by any means necessary. A truly balanced system would take the French approach and smartly remove disclosure

¹⁹⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁹⁵ *United States v. Bagley*, 473 U.S. 667 (1985).

¹⁹⁶ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Can.).

¹⁹⁷ *R. v. Dixon*, [1998] 1 S.C.R. 244, para. 23 (Can.).

discretion from prosecutors altogether, and put it in the hands of the courts.¹⁹⁸ While this represents an ideal, it is perhaps somewhat unrealistic, simply because overloaded American courts lack the capacity to conduct review of every case file to determine what ought to be subject to disclosure. Instead, the Canadian/English approach to disclosure could be enforced by adopting the Chinese requirement that a prosecutor who intentionally conceals facts must be investigated.¹⁹⁹ Where the investigation reveals suppression, the severity of punishment can depend on the severity of the suppression; minor oversights can be dealt with through bar associations with fines. More serious violations may warrant automatic suspension or even disbarment from the practice of law. And in the most serious cases, where intentional suppression leads to wrongful conviction, criminal charges should be pursued against the offending prosecutor. There can be little doubt that after a few prosecutors are jailed for evidentiary suppression, others will exercise a great deal of caution to avoid a similar fate. The knowing use of false testimony should be treated no differently; if disclosure is complete, a prosecutor will not be able to knowingly elicit false testimony without the defense being aware of it. An additional safeguard can be drawn from China, where the falsification of evidence by a prosecutor is a criminal offense.²⁰⁰

C. Improper Comments; Little Modification Needed

Of the types of prosecutorial misconduct, improper comments require the least modification to comport with reasonable notions of fair play and justice. In large part, this is because there is no opportunity for deception or concealment on the part of the prosecutor; instead, when a prosecutor engages in this type of misconduct, the misbehavior is there for all, including the defense and the court, to see. Moreover, there is little to be gained from examining the approach taken in other nations to improper prosecutorial comments; the Chinese and French allowance of prosecutorial opinion at trial means that many comments considered improper in the American system would be entirely proper in the trial courts of those nations. One way to slightly improve the American approach would be to require strong curative instructions in the same way that Canadian courts do. As discussed above, U.S. courts will only overturn a conviction due to improper prosecutorial comments if those comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”²⁰¹ Canada takes the same approach, but places substantial importance on curative instructions.²⁰² Thus, there is at least an added measure of protection in Canada, where a judge must recognize the impropriety of a comment and give an instruction to the jury to mitigate any

¹⁹⁸ Code of Criminal Procedure, *supra* note 85, art. 278.

¹⁹⁹ Criminal Procedure Law of the People’s Republic of China, *supra* note 80.

²⁰⁰ Public Procurators Law of the People’s Republic of China, *supra* note 79.

²⁰¹ *Parker v. Mathews*, 132 S. Ct. 2148 (2012).

²⁰² *R. v. Rose*, [1998] 3 S.C.R. 262 (Can.).

impact such a comment might have. This would be a change that would be minimally intrusive to the American trial process, but would add a safeguard to avoid the improper jury influence that is the primary concern of improper comments. Of course, more meaningful punishment by state bar associations would go a long way towards encouraging prosecutors to watch what they say in the context of trials. But in the vast majority of cases, improper comments can be dealt with at the trial level with a required curative instruction, or, in severe cases, a declaration of a mistrial at the discretion of the trial court. Failure to give an instruction would warrant reversal, as in Canada, while allegations of insufficient instructions or that a mistrial should have been declared can be reviewed under an abuse of discretion standard.

D. Eliminating Prosecutorial Immunity

No single change in U.S. jurisprudence would simultaneously have more of an impact and create more controversy than the elimination of prosecutorial immunity. While many of the changes discussed above and the approaches taken in other nations would seriously reduce the occurrence of misconduct, ultimately, prosecutors must be held personally accountable for their actions when they transgress ethical lines, and prosecutorial offices must be held accountable for failing to hire, train, and supervise prosecutors to prevent ethical transgressions. It should also be noted that attorneys in all other areas of law face liability for malpractice; prosecutors should be no different. No single change in U.S. jurisprudence is more critical than the elimination of prosecutorial immunity. The current state of the law in the United States allows for very little opportunity to redress grievances when a defendant is victimized by the impermissible actions of an unscrupulous or incompetent prosecutor. Prosecutors have absolute immunity from personal liability, and prosecutorial offices have qualified immunity, as described above.²⁰³ Realistically, only actions taken pursuant to official government policy or actions highly pervasive and widespread throughout a prosecutorial office will give rise to prosecutorial civil liability under § 1983.²⁰⁴ There are reasonable rationales for these immunities, most notably including (1) protecting independent decision making by ensuring prosecutors are unencumbered by worries of litigation; (2) avoiding what might be a flood of lawsuits filed by bitter defendants, clogging the court system and imposing substantial costs on government; (3) preventing virtual retrials of criminal offenses in a civil forum; and (4) pre-empting criminal defendants and their advocates from using the threat of civil suit to leverage better deals. At the same time, the United States constitutionally recognizes the compelling importance of a citizen's private right of action when aggrieved, through the First Amendment (redress of grievances), the Seventh Amendment, and, to some extent, the Fourteenth

²⁰³ *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

²⁰⁴ *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

Amendment and substantive due process. Canada²⁰⁵ and England²⁰⁶ similarly recognize the importance of private rights of action. Though the interests on both sides of the equation are critically important, it is not difficult to establish meaningful opportunities for redress for genuinely wronged defendants whilst ensuring the unfettered functionality of the criminal justice system.

The obvious question is just what would a reasonably functional system allowing prosecutorial civil liability, both for individual prosecutors as well as prosecuting agencies, look like? The nations examined above provide the answer; all allow some element of prosecutorial liability beyond that permitted in the United States, and it has not seemed to disrupt their systems. Most likely, the French system of virtual per se liability where a defendant is acquitted²⁰⁷ would be unworkable in the United States. The incredibly high number of prosecutions²⁰⁸ across the nation and the high burden of proof to a finding of guilt would mean that adopting a French-style system would clog the courts with countless cases and impose incredibly high costs on the criminal justice system. Instead, a reinvigoration of the tort of malicious prosecution, borrowed from the Canadian²⁰⁹ and English²¹⁰ systems (and newly adopted in China²¹¹), would be a reasonable way to balance the competing interests at stake.

The tort of malicious prosecution in Canada and England has 4 elements: (1) the respondent initiated the prosecution; (2) the prosecution resulted in the appellant's acquittal; (3) the Crown prosecutor did not have reasonable and probable cause upon which to found the charges brought against the appellant; and (4) the prosecution was motivated by an improper purpose. The first element is self-explanatory, and would apply in the United States as well; while in England there may be a question respecting this element due to the existence there of private prosecutions, in the United States, this would be an easily answered question of who the jurisdictional prosecuting agency and individual prosecutor were in the criminal prosecution giving rise to the tort. The second element must be altered for clarity; trial acquittal cannot be the only circumstance permitting the imposition of liability. Convictions overturned on review, as well as dismissal or dropping of charges when prosecution has been substantially pursued to the detriment of an accused, must also fit this element, especially since evidentiary suppression and the knowing use of false testimony often will not be discovered until after trial. It is tempting here to insert into this element a requirement of actual innocence; however, to do so would mean that the tort case would require a virtual retrial of the criminal charge in which the former accused would have to

²⁰⁵ *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (Can.).

²⁰⁶ *Singh v. Reading*, [2013] 1 W.L.R. 3052 (appeal taken from Eng.).

²⁰⁷ *Hauser*, *supra* note 178.

²⁰⁸ Of course, the high number of prosecutions may itself be unreasonable, but that is another topic entirely.

²⁰⁹ *Proulx v. Quebec (Att'y General)*, 2001 SCC 66, [2001] 3 S.C.R. 9 (Can.).

²¹⁰ *Martin v. Watson*, [1996] A.C. 74 (H.L.) (appeal taken from Eng.).

²¹¹ *MAYER BROWN JSM*, *supra* note 175.

prove innocence, an incredibly difficult task.²¹² In any case, even one who is guilty may have a right to redress if maliciously prosecuted; substantial overcharging²¹³ and selective prosecution²¹⁴ are examples in which guilty defendants may have such a right even morally. By eliminating a requirement for actual innocence, the tort case becomes an issue of whether the prosecutor engaged in misconduct, not whether the former accused is guilty or innocent.

The first two elements should be prerequisites to a tort of malicious prosecution. The remaining elements would then be disjunctive; a showing of the existence of any one of them in addition to the first two elements would trigger liability. The disjunctive elements would include those from the Canadian and English torts listed above. They would also include Justice White's argued for exception to immunity where a prosecutor unconstitutionally suppresses evidence as well as a prosecutor's knowing use of material false testimony.

Finally, there should be a catchall provision triggering liability where a prosecutor's improper conduct has the effect of depriving an accused of the opportunity for a fair trial, amounting to a denial of due process. Whether misconduct is intentional or negligent would be a factor in determining damages, but should not be a factor in whether liability exists, since the effect on the defendant is the same. Thus, the tort of malicious prosecution that emerges would impose liability on a prosecutor if

- (1) the respondent initiated the prosecution;
- (2) the prosecution resulted in acquittal, a conviction being overturned, or charges being ultimately dismissed or dropped after a prosecution has been substantially pursued; and
- (3) any one of the following:
 - (a) the prosecutor did not have reasonable and probable cause upon which to found the charges brought against the accused;
 - (b) the prosecution was motivated by an improper purpose;
 - (c) the prosecutor, at any point in the prosecution, suppressed material evidence or presented material testimony he or she knew or should have known to be false; or
 - (d) a prosecutor's improper conduct so infected a trial as to deny the accused an opportunity for a fair trial.

As for the question of liability to be imposed on the prosecuting agency, the same rules which govern the imputation of liability to an employer in the private sector

²¹² To illustrate the difficulty of proving a negative, i.e. one did not do something, consider these challenges: Prove you have never read *Catcher in the Rye*, or prove you have never been to Arizona.

²¹³ For example, charging a school student with attempted murder for a simple playground fight.

²¹⁴ For example, only prosecuting minorities, or women, or young people with certain crimes.

should apply. To avoid liability, a prosecuting agency would have to show that the misbehaving prosecutor was acting outside of the scope of employment.

Whether through the adoption of a tort of malicious prosecution similar to that described above, or by borrowing from approaches of other nations, it is of critical importance that, if the United States is to seriously address the problem of prosecutorial misconduct, the immunity of prosecutors from civil liability be abolished. At minimum, no prosecutor should be absolutely immune from liability; for effective deterrence, not even qualified immunity should be provided. Though such a marked departure from historical American jurisprudence would be highly controversial, and though many might complain of negative effects the removal of immunity could have on the criminal justice system, other nations have shown that removing prosecutorial immunity does not inevitably lead to court-clogging litigation or discouragement of legitimate prosecutions. The approaches described above would balance all societal interests, including those of an aggrieved defendant as well as those of the community.

V. CONCLUSION

As Chief Judge Kozinski recently remarked in *United States v. Olsen*, “*Brady* violations have reached epidemic proportions in recent years.”²¹⁵ But failures to disclose material evidence are not the only ethical transgressions that have become increasingly common; likewise, the knowing use of false testimony in violation of *Napue* and improper prosecutorial comments in violation of *Darden* occur with regularity. At present, the difficult materiality standards that a defendant must meet for a new trial and the near complete absence of consequences to individual prosecutors and/or prosecuting agencies combine to create a lack of accountability and a lack of redress for prosecutors and aggrieved defendants respectively. But, as shown by the approaches to similar issues taken in Canada, England, China, and France, this problem in the United States is not one without solutions that have proven to be effective. By starting with incremental changes, such as closing the cumulativeness loophole and shifting the burden of proof, and moving on to more sweeping changes, such as eliminating prosecutorial immunity, American courts can strike a balance between the rights of aggrieved defendants and the interests of society in effective criminal justice. Until American courts embark on a course of committing to change, however, the United States will continue to lag behind other nations by turning a blind eye to the transgressions of prosecutors. As a result, the American criminal justice system, tilted so decidedly against the rights of an accused, cannot be said to be meeting the lofty ideal of being the fairest system in the world.

²¹⁵ 737 F.3d 625 (9th Cir. 2013) (Kozinski, C.J., dissenting).

