PREVENTING WRONGFUL CONVICTIONS: AN INVESTIGATION INTO THE ROOTS, EFFECTS, AND DETERRENTS OF PROSECUTORIAL MISCONDUCT

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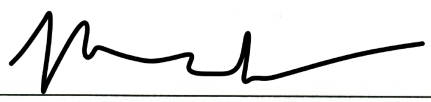

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ABSTRACT

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Between 1989 and 2021, nearly 3,000 people have been exonerated from prison after being wrongfully convicted, sometimes for decades. Many of these wrongful convictions were due in part to the misconduct of the prosecuting attorney on the case. Prosecutorial misconduct – and the wrongful convictions it can cause – have grave consequences for both individuals and society at large. The deterrence of these miscarriages of justice is imperative for maintaining the integrity of our democratic society.

This thesis sets out to find effective ways to combat prosecutorial misconduct by evaluating both prevention and punishment mechanisms of the criminal justice system. Some of these deterrents are already in place, while others are necessary adjustments or replacements. Because of the unreliability of data regarding the frequency of prosecutorial malfeasance, assessing the efficacy of these mechanisms through quantitative means is currently a near impossible task. Hence, an investigation into the root causes of misconduct – the systemic factors that both incentivize it and allow it to occur – is needed as the basis for creating a set of criteria with which to evaluate deterrents. When considering the evolution of public opinion as a crucial catalyst for reform, the near elimination of wrongful convictions caused by prosecutors is possible, though largely dependent on the electoral process.

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INTRODUCTION

On August 18, 1992 in Somerville, Texas, the bodies of Bobbie Davis and her grandchildren were found by law enforcement responding to a call about a house on fire. Facing pressure from investigators who deduced that the crime could not have been committed by one person, the perpetrator, Robert Carter, pointed to his wife's cousin, 26-year-old Anthony Graves, as his accomplice. Despite Graves' solid alibi, a lack of physical evidence tying him to the scene, and numerous recantations by Carter of his accusation, Graves was found guilty at trial and sentenced to death on November 1, 1994 (Colloff, "Time and Punishment"). In the years after the trial, Carter repeatedly insisted that Graves was innocent and that he had lied on the stand; these were Carter's final words before being executed in 2000 by the State. Nevertheless, Graves's appeals for a new trial were repeatedly denied until 2006, when the U.S. Court of Appeals for the Fifth Circuit finally vacated his sentence. The new investigators assigned to retry the case, including special prosecutor Kelly Siegler, determined that Graves was in fact innocent and dropped all charges against him, and Graves was released from prison after eighteen years (NRE, "Anthony Graves").

How did Anthony Graves spend almost two decades behind bars and on death row as an innocent man? How was he convicted despite a lack of evidence; despite Carter recanting his accusation of Graves in front of the grand jury; despite Carter's repeated insistence to the prosecution that he had lied? The answer lies in the actions of the case's lead prosecutor, Charles Sebesta. The morning before Graves's trial, Carter met with Sebesta and refused to implicate Graves on the stand. However, Sebesta was working on a deal with Carter to testify against Graves as his star witness. After it became clear to Sebesta that Carter's true accomplice was his wife Teresa, Sebesta revised the deal, promising that if Carter testified for him, he would ask

only questions about Graves and none about Teresa. Graves's defense team was not informed of this conversation. At Graves's appeal years later, The Fifth Circuit Court determined that Sebesta had committed misconduct by failing to turn over exculpatory evidence – materials that can point to the innocence of a defendant – to the defense. This included all of Carter's contradictory statements made before and during the trial, as well as his conversation with Sebesta, which challenged Carter's credibility as the prosecution's witness (Gross, et al., "Government" 85). The new prosecutors also determined in their reinvestigation that Sebesta had "misled jurors, manufactured evidence, elicited false testimony and concealed evidence of Graves's innocence." Sebesta was disbarred in 2016 after having already retired (NRE, "Anthony Graves").

A similar case occurred in Austin, Texas in August 1986, when the body of Christine Morton was found in her bed, sexually assaulted and beaten to death. Various forms of evidence led investigators away from her husband Michael as the prime suspect. The Mortons' neighbors had reported an unfamiliar green van parking repeatedly on the street. Furthermore, Christine's stolen credit card turned up in San Antonio, Texas, and a check made out to her was cashed nine days after her death (Polzer, et al. 652). Finally, Christine and Michael's three-year-old son Eric reported that a "monster" had come in and killed his mother while "Daddy was not home" (Innocence Project, "Michael Morton"). All this evidence was given to the prosecution by the chief investigator, Sergeant Don Wood. However, Sergeant Wood was not called to the stand to testify on that evidence for the prosecution; in fact, none of that information ever came to light at all. Williamson County's District Attorney Ken Anderson, who personally prosecuted the case, maintained a closed-file policy – he would turn over only those items that he decided were exculpatory upon request, while keeping the rest of the case files and offense reports private (TDCAA, "Mandatory Brady Training"). When the trial judge ordered the prosecution to turn

over all the reports given to them by law enforcement, these items of evidence were excluded. The prosecution insisted on Michael's guilt, alleging that he raped and murdered Christine in a fit of rage because she would not sleep with him on the night of his birthday. In 1987, Morton was convicted and sentenced to life (Innocence Project, "Michael Morton").

In 2011, almost a quarter of a century later, DNA evidence exonerated Morton. It was not until this evidence came to light that all the prosecution's files were finally turned over and Morton's defense was able to see what Anderson had been hiding (TDCAA, "Mandatory Brady Training"). The overturned conviction prompted the Texas Supreme Court, in an unprecedent move, to order a Court of Inquiry to determine if Anderson, who had since become a judge, had committed misconduct while lead prosecutor. During the proceedings, the District Court of Williamson County found that Anderson, named "Prosecutor of the Year" in 1995 by the State Bar of Texas, had in fact violated the law during Morton's trial (Grissom). According to the court, "Mr. Anderson committed contempt, under Texas Government Code Section 21.002(a), 'failing to comply with Judge Lott's order to produce Sgt. Wood's complete set of reports and notes'" for the trial court. This action, the Court said, also amounted to evidence tampering, which is a violation of the Texas Penal Code Section 37 (District Court of Williamson County). The former prosecutor was fined just $500 and served only part of a ten-day sentence (Selby). His license to practice law was also permanently revoked, and he was forced to resign from his judgeship (Polzer, et al. 653).

The wrongful convictions of Graves and Morton, and the misconduct by the lead prosecutors that caused them, are not unique. In 2007, Mike Nifong, District Attorney for Durham County, North Carolina, was infamously disbarred for misconduct during the prosecution of members of Duke University's lacrosse team (Jackman). The same year in

Oklahoma, Curtis McCarty was exonerated after being in prison for 21 years for a murder someone else committed because forensic evidence was intentionally misrepresented during his trial (Innocence Project, "Curtis McCarty"). Jabbar Collins was also exonerated fifteen years into his 34-to-life sentence in Brooklyn. He was wrongly convicted because the prosecutor allowed witnesses to lie on the stand, claiming that they had made no deals with the DA's office in exchange for their testimony (Gross, et al., "Government" 100).

Unfortunately, the list of cases that sound just like these is a long one – wrongful convictions occur all too frequently at the hands of prosecutors. The National Registry of Exonerations has recorded almost 3,000 convictions that have been overturned since 1989, and the list grows longer every week (National Registry of Exonerations).[1] Of all recorded wrongful convictions in the last three decades, 861 (about 31%) were at least partly the result of prosecutorial misconduct. However, only two prosecutors have ever faced criminal sanctions for committing misconduct that led to a wrongful conviction: Mike Nifong, for his actions during the Duke lacrosse case in North Carolina, and Ken Anderson, for wrongfully convicting Michael Morton. In fact, their sentences, however meager, set a brand-new precedent, as they are only prosecutors in the nation to ever serve jail time for misconduct that led to a wrongful conviction (Selby).[2] Just a handful of other prosecutors have been disbarred and had their licenses revoked for such miscarriages of justice (Gross, et al., "Government" 101). Granted, most prosecutors are devoted public servants who seek to uphold the law in a just and ethical manner. But prosecutors can be incentivized by political structures or their own ambition to commit misconduct. However occasionally that may occur, the justice system cannot truly be just until instances of

[1] As of May 10, 2021, the exact number of exonerations nationwide in the registry is 2,783. 388 of these cases occurred in Texas specifically. 38 exonerations nationwide have been added so far in 2021 alone. (National Registry of Exonerations)

[2] Nifong was held in contempt of court for his actions, disbarred, and sentenced to one day in jail. (Jackman)

prosecutorial misconduct and wrongful convictions become virtually nonexistent. Thus, the aim of this paper is to determine the optimal ways to prevent and punish both prosecutorial misconduct and the wrongful convictions that arise from it.

The deterrence of wrongful convictions is imperative, as they have overwhelmingly negative consequences for both individuals and society at large. When an individual is wrongfully convicted, they undeservedly lose time, money, and potentially their own life. According to a 2020 report published by the National Registry of Exonerations (NRE), "The average time a murder exoneree spent in custody from conviction to release was 13.9 years" (Gross, et al., "Government" 20). But truly democratic societies, including that of the U.S., require that miscarriages of justice are anomalies and, if they do occur, are swiftly remedied. In addition, there is evidence that wrongful convictions are more likely to occur in cases involving serious and violent crimes; these cases carry long sentences and even capital punishment. Of all known wrongful convictions listed in the NRE, 72% were for murder cases, and in the vast majority of them, the exonerees were released from death row after receiving a capital sentence (Gross, et al., "Government" 15).[3] This is likely because investigators and prosecutors are more motivated to solve serious crimes because of public and institutional pressure, even when those cases lack an abundance of evidence (Gross, et al., "Government" 16).[4] Furthermore, if the wrong person is convicted for a crime, the true perpetrator gets to walk free, posing a danger to the community, particularly if the crime was violent. Thus, wrongful convictions also undermine the public's confidence in the justice system. Not only can this make people less likely to

[3] Exoneration (post-conviction release from prison) rates, which are comprehensively recorded by the National Registry of Exonerations (NRE), are frequently used as a metric for wrongful convictions, as they are the result of cases that have been officially deemed as such.

[4] It is likely that this figure is also high because more effort and resources are put toward rectifying wrongful convictions with the harshest sentences. (Gross, et al., "Government" 17)

cooperate with investigations and criminal proceedings – thereby increasing the difficulty of convicting the right people – but it also "places a burden on the integrity, prestige, reputation, credibility, and effectiveness of the entire criminal justice system" (Ramsey and Frank 438).

Addressing wrongful convictions is also necessary because they likely occur more often than we realize. There are three primary reasons that the current known rate of wrongful imprisonment may be understated. First, many convictions are overturned as a "result of some serendipitous circumstance," such as gratuitous individuals or organizations (like the Innocence Project) who happen to take note of a case and devote themselves to correcting the injustice (Ramsey and Frank 441). Thus, it is reasonable to assume that many cases do not receive the same luck and attention; the defendants in those cases remain incarcerated. Second, many cases are overturned years after the original conviction because of the development of DNA science. However, DNA evidence is not available or able to be tested in all cases; this is exacerbated by the fact that many cases occurred years, even decades, before such science became available. For cases with no useable DNA evidence, it becomes even more difficult to obtain an exoneration and catch the true guilty party (Ramsey and Frank 442). Third, wrongful convictions for lesser crimes go largely unnoticed. In the same way that investigators focus their efforts on more serious cases, individuals and organizations that work to correct miscarriages of justice direct more attention to felony cases with high sentences. Furthermore, low-level crimes are much more likely to end in plea deals rather than trials. Plea deals, which force defendants to forgo a trial, allow many instances of evidence suppression and coercion to escape the scrutiny of judges and juries. Wrongful convictions for lesser felonies or misdemeanors are likely occurring frequently, but these cases have less opportunity to be noticed, let alone corrected (Gross, et al.,

"Government" 26).[5] For these reasons, preventing wrongful convictions is vital, and addressing prosecutorial misconduct is a necessary step to accomplishing that goal.

This thesis will begin by giving a broad overview of prosecutors, their powers, and the development of regulating their actions to prevent misconduct. Prosecutorial misconduct gets its definition from statutes, codes of conduct, Supreme Court rulings, and judicial standards for review. However, there is no universal definition for misconduct, nor is there a consensus on often it occurs; inconsistent characterization of prosecutorial malfeasance and bias within camps makes its frequency difficult to determine, but various viewpoints and pieces of evidence will be put forth. These factors are a few of many other issues that allow misconduct to continue, such as cognitive biases, expanded prosecutorial powers, the electoral process, and the culture of the criminal justice system. An analysis of these root causes is essential for determining which solutions can best address prosecutorial misconduct.

The systemic elements that allow misconduct to occur are heavily intertwined: norms of district attorneys' offices and law enforcement agencies are strongly influenced by the chief prosecutors who are elected to office. A conviction-focused culture, when paired with a lack of accountability and an adversarial system, can incentivize ambitious prosecutors to commit misconduct. But as some of the most powerful actors in the criminal justice system, district attorneys have the ability to control the common practices and attitudes of the government agents they work with. Therefore, many of the elements that can promote misconduct can also be developed into deterrents. An evaluation of the systems in various sectors of the criminal justice system that are currently in place to prevent misconduct highlights this duality and the potential

[5] Only 4% of exonerations in the Registry were for misdemeanor crimes; most were uncovered all at once in Harris County, Texas, when the forensic department was undergoing an overhaul. This demonstrates that only a "fraction of false misdemeanor convictions are ever pursued to the point of exoneration – unless routine but unexpected laboratory tests happen to show up and conclusively prove innocence." (Gross, et al., "Government" 26)

of the criminal justice system to continue its progress toward reform. Ultimately, increasing transparency and accountability, primarily through the democratic process, is essential to preventing misconduct and the wrongful convictions that ensue.

CHAPTER I: THE POWER OF PROSECUTORS

Prosecutorial Powers and Discretion

Prosecutors are public attorneys who represent the government's executive branch in criminal proceedings by bringing charges and pursuing cases against alleged violators of the law (DeShay and Worrall 4070). Chief prosecutors are most often chosen in popular elections and hire their assistant attorneys to lead many of their cases; as the heads of their offices, they are typically not required to report to any superiors (Davis, "Reimagining" 6). They can represent one's local, state, or federal government as a district, county, state's, or U.S. attorney, respectively. There are significant differences in the power, jurisdiction, resources, and standards for local and federal prosecutors, the most notable being that nationwide, only about 5% of exonerations in the last three decades arose from federal court (Gross, et al., "Government" 108). Hence, the problem of misconduct and wrongful convictions is a bigger problem at the local level in district attorneys' (DA's) offices.

As some of the most powerful actors in government, prosecutors' primary duty is to ensure that they act in the name of justice by pursuing charges against people who are guilty of the crimes of which they are accused. In order to fulfill this duty, prosecutors are granted extensive agency. In the words of Renée McDonald Hutchinson, "The criminal law does not obligate a prosecutor to do anything. Instead, it creates an array of choices from which the

prosecutor may select" (17). Prosecutors' discretion grants them the power to make decisions about:

> …how criminal investigations should proceed, which suspects to charge, which charges to bring, when to bring the charges, whether to convene a grand jury, what bail and release conditions to seek, which witnesses to put on the stand, which exhibits to present to the judge or jury, which codefendants get a favorable 'deal' in exchange for that [*sic*] cooperation, which codefendants are granted immunity for cooperation, what plea deals to extend and which to reject, which charges and which complaints will be dismissed, what amount of jail or prison time is 'enough,' which defendants will be charged with death penalty-eligible offenses, which dismissed charges will be refiled, which appeals will be brought and which foregone, and so on. (MacLean 739)

With more agency and less oversight, prosecutors can make many decisions that are not subject to review unless a case is actively challenged on an appeal, the prosecutors' actions are brought to the attention of the State Bar, or a grievance is filed under state codes. In fact, since the 1960s, prosecutors have been granted even more discretion and power within the plea deal system that dominates criminal proceedings (Rakoff 1430).

Prosecutors' significant accumulation of power, particularly over the last few decades, underscores the necessity of oversight and regulation of their actions, particularly because this increase in power has played an important role in contributing to misconduct. When a prosecutor acts unethically or violates regulation to imprison a defendant, it can have devastating effects on any number of steps in a trial, and a wrongful conviction can easily occur through many avenues. Their recent increase in power marks a need for an investigation into the effects prosecutorial misconduct has on the criminal justice system and how those consequences can be prevented.

Consequences of Misconduct

Many of the personal and societal harms of prosecutorial misconduct come from the wrongful convictions that they can result in. When a defendant is found guilty of a crime they did not commit, their constitutional Due Process rights have been violated. But the negative consequences of misconduct, and thereby the urgency of deterring it, go beyond the outcome of a trial or plea deal. Even in cases that do not lead to wrongful convictions, prosecutors have a significant impact on both the individuals that cross their paths and society at large; when unethical decisions are made, these effects can be highly detrimental. Misconduct causes a spectrum of consequences that, although not necessarily harmful to the same degree as a wrongful conviction, are still worthy of deterrence and redress.

For example, when it is revealed that a prosecutor commits misconduct during a case, the revelation casts doubt (in the defendant and in observing members of society) on the outcome of the case, even if the defendant was truly guilty. Such a case can also create skepticism about the integrity of the justice system. In fact, someone who has witnessed misconduct occur without consequence may develop a "lifelong distrust and resentment of the government," regardless of the verdict (Starr 1511). There is also evidence that prosecutorial misconduct can pose an obstacle to identifying a crime's true perpetrator (Weintraub 1201). Finally, prosecutorial misconduct can lead to delays in trial, as a judge may become aware of misconduct before the trial ends. Extensive trial delays not only have the potential to violate defendants' Sixth Amendment rights to a speedy trial, but they also cause financial burdens and psychological stress for defendants, even if the judge is able to rectify the problem and avoid a tainted verdict (Starr 1511).

Prosecutorial misconduct also reinforces racial disparities in the legal system. For example, the plea bargain process leads to racial inequality in prisons: "The disparities may be the result of implicit bias or the result of race neutral factors that have a racial impact," such as the link between race and socioeconomic inequity (Davis, "Reimagining Prosecution" 5). However, the National Registry of Exonerations (NRE) found that the rate of prosecutorial misconduct does not differ significantly between Black and White defendants. Police misconduct, on the other hand, has been statistically linked to racial bias. For example, as of 2017, 55% of Black murder exonerees were wrongfully convicted due to police misconduct, while that number was only 33% for White murder exonerees (Gross, et al., "Race" 6). Police officers hide exculpatory evidence almost twice as often in cases with Black defendants as those with White defendants (Gross, et al., "Race" 6). Furthermore, Black suspects are highly susceptible to racial profiling by investigators (Gross, et al., "Race" 20). If prosecutors are overly focused on a conviction and inattentive to the quality of evidence coming from law enforcement, they can contribute to the racial disparity of the American carceral state. And this disparity is notable: Black people account for just 13% of the U.S. population but about half of all exonerations on record (Gross, et al., "Race" 1). Therefore, prosecutors must handle cases properly from start to finish to combat the racial disparity in wrongful convictions.

Brady v. Maryland (1963)

There are several forms of prosecutorial misconduct, but none has been more influential in forming ethical principles, codes of conduct, legislation, and popular discourse than evidence-related misconduct. The suppression of exculpatory evidence was first formally addressed in the Supreme Court Case *Brady v. Maryland (1963)*. According to the ruling, the prosecution must,

upon request, turn over exculpatory evidence to the defense team. The primary holding of the case was: "Suppression by the prosecution of evidence favorable to an accused who has requested it 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" (US Supreme Court, *Brady*). The ruling thus lays out two necessary characteristics that deem pieces of evidence as "*Brady* materials": they must be both *favorable* and *material* (Polzer, et al. 654). Evidence is favorable if it has the potential to help clear the defendant (i.e., *exculpatory* evidence) or if it can undermine the evidence of the prosecutor (i.e., *impeachment* evidence).[6] It is material if its suppression could have led to a different verdict by the jury.[7] The *Brady* rule also requires that the prosecution must turn over such evidence in a timely manner, before trial (Kreag 305-306). The final cornerstone of *Brady*'s primary ruling is that the intent of the prosecutor is irrelevant; if *Brady* materials are not turned over, the rule has been violated, regardless of the thoughts of the prosecutor at the time.

Brady was undoubtedly a watershed case for the criminal justice system; nonetheless, it left some loopholes in its implementation. Firstly, by leaving it up to the prosecution to determine the exculpatory nature of the evidence in their files, prosecutors get vast discretion in deciding what parts of their file the defense gets to see, which poses a threat to the fairness and transparency of criminal proceedings. In addition, some critics of the ruling have argued that, because *Brady* materials have a dual requirement of materiality and favorability, prosecutors frequently conceal exculpatory evidence: they, with their own discretion, may believe that evidence is favorable for the defendant but not material enough to make a difference at trial. Because this aspect of the decision leaves more room for interpretation of evidence in the hands

[6] Exculpatory evidence is a broad category of evidence; impeachment evidence falls under its umbrella. (Kreag 306)
[7] The definition of "materiality" was clarified in the Supreme Court case *United States v. Bagley (1985)*.

of the prosecution, critics have suggested eliminating the "materiality" prong of *Brady* and broadening its requirement by mandating that prosecutors turn over all favorable evidence, regardless of materiality (Polzer, et al. 654).

Furthermore, although both the Court and supervisory institutions have advised prosecutors to "err on the side of disclosure" when in doubt, the *Brady* rule does not impose a mandatory "open-file" policy – the prosecution need not turn over the entire case file (Kreag 306). Therefore, unless the defense were to successfully file a motion to receive all of the prosecutor's files, they would have virtually no way of knowing what the prosecutor is holding back. Generally, it requires either luck or a great deal of work and investigation after a conviction to discover that a *Brady* violation was committed in the first place (California Innocence Project). For example, if Charles Sebesta had not let slip during a television interview that Robert Carter admitted Anthony Graves was innocent, Graves would likely have been executed by now (Colloff, "Innocence Lost"). In the words of Alex Kozinki, former Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, "If a prosecutor fails to disclose exculpatory evidence to the defense, who is to know?" (Gross, et al., "Government" 19). Hence, the ruling in *Brady* creates subjectivity and a lack of transparency in the handling of evidence.

In addition, *Brady* does not require the prosecution to find all favorable information; it only requires that they turn over what they already have (Kreag 306). While it would be unrealistic to require investigators to find all evidence in existence (as they would not reasonably be able to know everything to look for), it does allow the prosecution to stop their search for information when they please, once they feel they have enough evidence to back up their own theory. Such a procedure can cause the prosecution to get stuck in tunnel vision, where they only

focus on evidence that bolsters their case while disregarding evidence that undermines it. Such a practice can lead to the suppression of impeachment evidence.

Finally, the *Brady* rule does not apply retroactively to exculpatory evidence discovered post-conviction.[8] Thus, if law enforcement or the DA's office finds exculpatory evidence that favorably points to the potential innocence of a convict, they are not required under *Brady* to turn it over to the original defense team. This limitation of *Brady* can keep wrongfully convicted persons in jail even if exculpatory evidence is eventually discovered (US Supreme Court, *Osborne*).

The gaps in *Brady*'s construction and implementation reflect the broader weaknesses of the criminal justice system that allow misconduct to occur. Firstly, the ruling of *Brady* is understandably tricky to follow and evaluate, as in some cases it can be difficult to determine whether evidence amounts to *Brady* materials until after the trial is well underway. In fact, having to predict at all whether a piece of evidence has, or would have had, the material power to change a trial's outcome leaves much room for subjectivity and inconsistency; these issues play an important role in the lack of correction for many instances of misconduct. *Brady*'s failure to address disclosure post-conviction also enables prosecutors to escape accountability after a trial has concluded. Furthermore, *Brady* is not set up to address prosecutorial intent or to deter prosecutors from falling into tunnel vision; the cognitive biases that prosecutors face, when unaddressed, can lead even well-intentioned prosecutors down a path to unethical decision-making. Lastly, *Brady*'s allowance of closed-file policies contributes to and reflects a lack of transparency in the way prosecutors operate. In this way, *Brady* illustrates a lack of

[8] The Supreme Court precluded exculpatory evidence uncovered after a conviction from discovery rules in *District Attorney's Office for Third Judicial District v. Osborne (2009)*: "[The Ninth Circuit] erred in extended the *Brady* right of pretrial disclosure to the postconviction context."

accountability, consistency, and transparency that pervades the legal system and allows misconduct to occur. However, before the enablers of misconduct are explored in more detail, it is necessary to determine how misconduct is defined and assess how frequently it occurs, as these questions provide additional insight into why misconduct has been difficult to deter.

CHAPTER II: DEFINING, REVIEWING, AND QUANTIFYING MISCONDUCT

Prosecutorial misconduct encompasses a variety of actions by prosecutors that violate ethical or legal standards. Some misconduct is defined by case law, such as *Brady v. Maryland (1963)*, some is defined by statutes passed by legislatures, such as the Michael Morton Act in Texas, and some are defined by various codes of ethical and professional conduct, which have been written by the American Bar Association (ABA), the National District Attorneys Association (NDAA), and State Bars. Because misconduct is outlined and defined in various places, the legal sphere lacks a universal definition of what constitutes prosecutorial misconduct.

The lack of a unanimous definition is one of many reasons that there is inconsistency and subjectivity in the study and review of prosecutorial misconduct. One gray area is that of intent. Depending on where misconduct is defined, some sources of regulation (such as codes of conduct) consider prosecutors' intentions and knowledge, while others (such as *Brady*) do not. Therefore, the difference between an error and an ethical violation leads to disparity in identifying misconduct and may allow some poor decisions of prosecutors going unaddressed.

Additionally, the standards used by judges to review prosecutors' actions during appeals are highly subjective and difficult to implement consistently. The fact that individual prosecutors and judges are granted wide discretion in reviewing evidence and conduct, respectively, adds to the inconsistency, as determinations made on a case-by-case basis are inevitably subjective.

These issues, and their consequences, are further illustrated when attempting to quantify the frequency of misconduct. Getting a clear sense of how often misconduct occurs has proved to be difficult, which further poses an obstacle to preventing it.

Defining and Categorizing Misconduct

Distinguishing Ethical Violations from Error

Differences in the treatment of prosecutorial misconduct between case law, statutes, and codes of conduct highlight an important distinction between error and ethical violations. For example, *Brady v. Maryland (1963)* does not consider the prosecutor's intent. Therefore, a *Brady* violation can be either error, if the suppression of evidence is accidental, or an ethical violation, if it was intentional. Instances of suppressing exculpatory evidence are interchangeably referred to as *Brady* error and *Brady* misconduct because, for the purposes of identifying violations under *Brady*'s precedent, the difference is not a distinction that matters.

The immateriality of prosecutorial intent is laid down in the ruling because as a Supreme Court case, *Brady* is concerned with upholding the constitutional rights of citizens – in this case, the Due Process Clause of the Fourteenth Amendment (Gross, et al., "Government" 78). *Brady* concerns itself with remedying concrete harms to the defendant (which are incurred regardless of intent), not with punishing the prosecutor, so prosecutors are not presented directly with negative reinforcement for *Brady* violations. Thus, *Brady* cannot be wholly effective as a deterrent of misconduct for prosecutors who are willing to violate the law to get a conviction, especially if they know they are unlikely to be held accountable. However, because the remedy of *Brady* focuses on the defendant's constitutional rights, *Brady* dominates the discourse and treatment of evidence suppression nonetheless (Gross, et al., "Government" 80).

Other rules, however, such as Rule 3.09 of the State Bar of Texas's Disciplinary Rules of Professional Conduct (TDRPC), impose sanctions only for intentional ethical violations, when "the prosecutor had actual knowledge of the evidence that was suppressed" (Popps 430). This is also true of the American Bar Association's (ABA) Model Rules, which the TDRPC are based on. Whereas *Brady* disregards the prosecutor's intent, these rules ignore the "materiality" requirement of evidence, instead mandating that all exculpatory evidence be turned over (Gross, et al., "Government" 78). Furthermore, the rules govern forms of misconduct such as lying and suborning perjury in court, which involve knowledge on the part of the prosecutor that the statements being made are false. This difference in scope exists because codes of conduct have the opposite function of *Brady* – they are concerned only with reviewing the prosecutor's actions, not with remedying the harm those actions have on defendants. The ability to overturn a conviction (which addresses the defendant) mostly lies in the hands of the courts, while the decision to revoke an attorney's license (which addresses the prosecutor) is made by the State Bar.

Although there are clear distinctions between errors and ethical encroachments, this paper will search for remedies that address both. Ultimately, whether intentional or not, a violation of someone's Due Process rights causes them harm, and steps need to be taken to prevent such outcomes. The remainder of this chapter will identify some forms of misconduct that are directly under a prosecutor's control, and those that are not, with the end goal of determining how both forms can be prevented.

Misconduct and Ethical Violations

Despite the lack of a universal definition of misconduct (other than court rulings like *Brady* that extend unilaterally to every prosecutor under their purview), there are general forms of malfeasance that are agreed upon as ethical violations. The primary types of prosecutorial malfeasance are *evidence-related* misconduct and *courtroom* misconduct. Evidence-related misconduct is primarily comprised of mishandling physical or forensic evidence and concealing exculpatory evidence (i.e., *Brady* violations). Courtroom misconduct includes discriminating and displaying bias during jury selection, making inflammatory, improper, prejudicial, or false remarks in front of a jury (either during witness examination or arguments) and knowingly permitting perjury on the stand (Platania 741).

Concealing exculpatory evidence, a form of evidence-based misconduct, is the most frequent type of misconduct on record. Suppression of evidence by either prosecutors or law enforcement directly contributed to wrongful imprisonment in 44% of the cases in the NRE (Gross, et al., "Government" 30).[9] Furthermore, it is most common in murder cases, which carry the harshest sentences (Gross, et al., "Government" 81). *Brady* violations can be committed intentionally or unintentionally; this distinction is irrelevant for the purposes of overturning convictions that were granted because of such a violation.[10]

The common perception of exculpatory materials is written information and physical evidence, but verbal statements and confessions can also constitute exculpatory evidence. For example, the conversation between Robert Carter and Somerville Prosecutor Charles Sebesta on the morning of Anthony Graves's trial was never written down or reported to the defense, jury,

[9] In Texas, this rate is about 20% – 76 of 388 wrongful convictions were caused at least in part by officials withholding exculpatory evidence, as of May 9, 2021. (National Registry of Exonerations)

[10] The absence of a distinction between intentional and unintentional *Brady* violations, as well as the fact that the irrelevance of intent makes it easier to identify, may contribute to the high frequency of this type of misconduct.

or trial judge, but when that conversation came to light, it was enough to overturn Graves's conviction (Colloff, "Innocence Lost"). In another case, Brad Childers was wrongfully convicted for a string of robberies in 2004 across the Dallas-Fort Worth area because the true perpetrator's confession to the robberies was never reported (Gross, et al., "Government" 84).

Exculpatory evidence can serve one of two functions. *Substantive* evidence of innocence "helps prove an issue at stake in a trial directly" (Gross, et al., "Government" 85). For example, in the case against Michael Morton, the suppressed evidence that his wife Christine's credit card had been used after her death was crucial in pointing to her husband's innocence and could have led to a not-guilty verdict for Morton had it been disclosed. Evidence can also serve the function of *impeachment* by "challeng[ing] the credibility of a prosecution witness who has already testified" (Gross, et al., "Government" 85). During the criminal proceedings of Jesus Ramirez and Alberto Sifuentes in Littlefield, Texas, prosecutors suppressed a video that would have undermined the jury's confidence in their key eyewitness, because it proved that the witness had been at the crime scene hours earlier than she claimed in her testimony (Gross, et al., "Government" 86). In all the above cases, the *Brady* violations that directly contributed to the false conviction were committed intentionally.

If prosecutors make improper, inflammatory, or false statements in court, either during examination or during opening or closing arguments, they are committing a form of courtroom misconduct. Such comments mislead juries and judges alike, which creates an unfair trial and violates a defendant's constitutional rights. Many instances of improper or inflammatory remarks are addressed in real time with an objection by the defense; others will be permitted if the defense does not object or if the judge overrules an objection. About half of all false statements

by prosecutors, however, occur in closing arguments, where there is more allowance for what can be said and therefore less room for an objection (Gross, et al., "Government" 102).

In 1995, Daniel Villegas was being retried for murder in El Paso, Texas, after his first trial ended in a hung jury and a mistrial. During the retrial's closing arguments, the prosecution claimed that the victim's body had three bullet wounds: he argued that because Villegas, who was just sixteen at the time of the murder, had "shot the victim three times, he must have intended to kill him" (Gross, et al., "Government" 103). But the prosecutor had full knowledge that there were only two bullet wounds, as he had said so in the original trial. Villegas was wrongfully imprisoned for the crime until 2018 (NRE, "Daniel Villegas").

Prosecutors intentionally made false statements in about 2% of known wrongful convictions, making it seem relatively rare on record (National Registry of Exonerations). However, this number only includes those instances where it was proven that the prosecutor knew their statements were false; it is reasonable to assume that prosecutors lie during trial more often but that it cannot be proved. Furthermore, inflammatory or improper comments are typically not used as the basis for overturning a conviction if the judge rules that they were made unintentionally rather than maliciously (US Court of Appeals, Seventh Circuit).

Not only are prosecutors prohibited from lying, but they also cannot knowingly permit their witnesses to do so, which would constitute procuring false testimony or suborning perjury. Subornation of perjury is explicitly prohibited by the ABA's Model Rules for Professional Conduct (Rule 3.3). Because it arises from a code that specifically guides ethical decision making, this type of malfeasance involves knowledge and intent on the part of the prosecutor that the witness is committing perjury.

As seen in the case of Anthony Graves, Prosecutor Charles Sebesta suborned perjury by encouraging Carter to falsely implicate Graves as his accomplice. In another murder case in Dallas in 1995, the prosecution's key eyewitness admitted that they were "unable to identify the shooter" (Gross, et al., "Government" 38). To subvert this obstacle, the lead prosecutor directed the witness ahead of time how to falsely identify the defendant, Richard Miles, by informing them where Miles would be sitting in the courtroom. Miles was exonerated in 2012 when this information came to light and was brought before the Texas Court of Criminal Appeals (Gross, et al., "Government" 38). Prosecutors' knowledge of false testimony occurred in about 4% of wrongful convictions (National Registry of Exonerations). However, most these cases were murder cases, where "pressure is greatest and the stakes highest," making subornation of perjury a dangerous form of misconduct, despite its rarity in known exonerations (Gross, et al., "Government" 37).

The suppression of impeachment evidence and suborning perjury play important roles in the ethical nuances of making deals with witnesses in exchange for testimony. Prosecutors often convince people who are facing charges, either as a codefendant in a case or for an unrelated crime, to testify for them. In return, they promise to reduce or drop charges against the witness. Jailhouse informants serve a similar function by testifying to stories they have heard in prison that bolster a prosecutor's case in exchange for a reduced sentence or increased privileges (Gross, et al., "Government" 89). In Bedford, Texas, John Nolley was wrongfully convicted for two decades because of the testimony of an informant who claimed that Nolley confessed to him while they were in police custody together. Despite receiving a reduced sentence in exchange for testifying, the informant swore that no deals were made between him and the prosecutor (Innocence Project, "Protect Innocent Texans").

While the use of informants to testify is not explicitly barred anywhere, it is essential for juries and judges to be made aware of the underlying reason someone is testifying. Incentives to testify, characterized by some critics as "bribery," are a form of impeachment evidence that must be shared with the defense, as reduced charges and sentences can be strong enough motivators for someone to perjure themselves, especially if they believe they have a prosecutor on their side (Sheppard). Prosecutors concealed a witness's incentive to testify in a fifth of all known exonerations; thus, increasing transparency in this area and deterring this form of misconduct is crucial to preventing a large chunk of wrongful convictions (Gross, et al., "Government" 89).

Error and the Obligation for Oversight

Deliberate or not, the types of misconduct discussed above share an obviously common element despite taking many different forms: they all occur at the hands of prosecutors themselves. Courtroom misconduct, "buying" testimony, and hiding exculpatory evidence from the defense are decisions made in the DA's office and executed by its members. Prosecutors have an undeniable duty to make ethical and honest choices. However, in order to fulfill their function of upholding justice, prosecutors also need to avoid committing errors that can lead to a wrongful conviction. Needless to say, prosecutors are human, and mistakes are inevitable in any system run by people. However, some of them can be avoided: prosecutors often unknowingly present tainted evidence and dishonest witnesses at trial because of what they are given by law enforcement. Many forms of police and forensic misconduct mirror those of prosecutorial misconduct, so the unethical choices of investigators can ultimately cause a prosecutor to commit an error that leads to a wrongful conviction.

Prosecutors have coerced witnesses to give dishonest testimony on the stand, but police have also forced false information or confessions out of a suspect or witness long before the trial begins. The exoneration of Clarence Brandley in Montgomery County, Texas is a blatant example. In 1981, the investigating officer assigned to a high school student's murder told Brandley (who found the body) that he would "hang" for the crime because he was a Black man.[11] To ensure this outcome, the officer threatened an eyewitness who had seen another suspect around the crime scene with an arrest if he contradicted the theory of Brandley's guilt. Brandley was exonerated in 1990 based on perjury, false accusation, and official misconduct (Hall). His case illustrates how bias can encourage officials to commit misconduct with the goal of guaranteeing a conviction. Had prosecutors paid more attention to the treatment of both the defendant and the witness by law enforcement, as well as to the motivations of the investigating officer, they may have realized that their witness was lying and dropped the case, sparing nine years of Brandley's life.

One of the most high-profile cases in Texas in which police extracted a false confession was the wrongful convictions of Christopher Ochoa and Richard Danziger. In 1988, the two young men were brought in as suspects in the rape and murder of Nancy DePriest at the Pizza Hut where she worked. The Austin Police Department (APD) officers assigned to the case reported that Ochoa had implicated Danziger for the murder. Ochoa was offered a life sentence, instead of the death penalty, to testify against his friend and agreed to the deal. At trial, however, Ochoa changed his story, saying that he himself had pulled the trigger, while Danziger sexually assaulted her, forcing prosecutors to charge Danziger with rape instead of murder. After lengthy

[11] The other man who found the body with Brandley was White and faced no charges. (Hall)

trials with inconsistent testimony and misleading forensic evidence, both men were convicted and sentenced to life in prison by 1990 (Innocence Project, "Richard Danziger").

Ochoa and Danziger's innocence was not revealed until the true perpetrator, who had fortuitously happened to undergo a religious conversion while in prison, wrote letters to the police, the DA's office, and Governor George Bush. Detailed descriptions of the crime scene in these letters prompted APD to reopen the investigation, and DNA evidence, with the help of the Wisconsin Innocence Project, ultimately exonerated the men in 2002 (Innocence Project, "Richard Danziger"). In the process, it came to light that police had extracted a false confession from Ochoa. The officer in question, APD's Detective Hector Polanco, had used threats to force the confession out of Ochoa, whom Danziger's attorney described as a "fragile young man" who was "not particularly bright" – an easy target for manipulation from an authority figure (Sheppard). Alarmingly, APD had already attempted to fire Detective Polanco for extracting false confessions from suspects (Sheppard).

In hindsight, with the circumstances of Ochoa's false confession being revealed, the illegitimacy of the confession seemed obviously "absurd" to investigators and the original prosecutor (Sheppard). However, the DA's office used the confession as the basis for their case because the lead prosecutor, despite being honest and transparent for the entirety of her career, had not been critical enough to pay attention to the circumstances surrounding the investigation: "She just accepted it at full face value" (Sheppard).

Evidence turned over to prosecutors by investigators can also be inaccurate or incomplete. In 1985 in Lubbock, Texas, police showed a rape victim a photograph lineup of six people. The five "fillers" were people who had been arrested in the past; their photographs were standard mugshots in side-profile view. However, the suspect, Timothy Cole, had never been

arrested and had no mugshot on file. Therefore, his photograph in the lineup was a Polaroid picture of him facing the camera straight on. With his picture being visibly different, Cole looked ostensibly suspicious to the victim, who pointed him out as the assailant (Gross, et al., "Government" 39). Cole remained wrongfully imprisoned until his death in 1999 at the age of 39, without ever learning that the real perpetrator had been trying to confess to the crime since 1995 (Goodwyn).

In Cole's case, no evidence was uncovered that pointed to the police deliberately trying to implicate him. But the creation of faulty evidence by law enforcement can and does occur intentionally. The same year as Cole's conviction, Jerry Lee Evans was the prime suspect for a sexual assault in Dallas. During the investigation, Dallas police directly told the victim to select the picture of Evans from a photo lineup. Unsurprisingly, he was convicted and served 22 years of a life sentence before his exoneration (NRE, "Jerry Lee Evans").

Inaccurate evidence comes not just from police departments, but also from forensic investigators, whom prosecutors work closely with during the course of a criminal case. In fact, one third of known cases of forensic fraud leading to wrongful convictions involved investigators who had committed fraud repeatedly. One such investigator, Fred Zain, presented false evidence at seven trials in Texas and West Virginia that led to wrongful convictions (Gross, et al., "Government" 67). For example, at Gilbert Alejandro's rape trial in Uvalde County, Texas, Zain testified that his analysis of DNA evidence undoubtedly implicated Alejandro as the perpetrator; his damaging testimony secured Alejandro's conviction in 1990. But four years later, a reexamination of the DNA evidence (which ultimately cleared Alejandro) and the investigator's files revealed that Zain had not even finished testing the evidence before releasing

his report and testifying (NRE, "Gilbert Alejandro"). Zain went on to be disciplined and indicted for fraud and perjury for these cases (Gross, et al., "Government" 67, 83).

Disturbingly, when he initially moved to Texas, Zain's analysis was specifically requested by many prosecutors who had "expressed dissatisfaction with the reports they were receiving" from other investigators. These requests were made despite Zain having received complaints from officers in West Virginia where he was previously employed (Gross, et al., "Government" 157). Texas prosecutors not only had reason to believe that Zain had been dishonest in the past, but they also likely capitalized on his willingness to commit fraud in order to secure convictions.

Instances of investigatory misconduct, particularly those that involved misconduct by repeat offenders like Hector Polanco and Fred Zain, highlight a problem with the current scope of prosecutorial responsibility. In the best-case scenario, the DA's office was simply not questioning or paying enough attention to the faulty evidence they were receiving, nor were they skeptical of who was obtaining and presenting it. In the worst-case scenario, the prosecution ignored or capitalized on a history and willingness of investigatory misconduct. Either way, official misconduct by investigators, if gone unnoticed or unaddressed by the DA's office, has the power to strongly influence the outcome of a trial. In fact, faulty eyewitness identifications are the leading cause of wrongful convictions (TDCAA Training Subcommittee 27). A prosecutor can do everything right, following *Brady* and every code of conduct to the letter, but a wrongful conviction can occur, nonetheless. Some may argue that police misconduct and its consequences fall outside of the purview of the chief prosecutors, because they operate in independent departments. However, although the DA's office, law enforcement, and forensic specialists have their own offices, they work very closely together throughout criminal

procedures and are highly intertwined, as the prosecution relies on investigators to continuously provide them any information needed to prosecute a case (Sheppard).

District attorneys are some of the most powerful elected officials in the nation; with their influence and reach, they have the power to help control the culture of the investigative agencies they work with. Furthermore, as stated previously, the actions of investigators that occur without the DA's knowledge or approval can force a prosecutor to unwittingly commit misconduct or error; their actions can also affect the overall outcome of the trial. Not only should DAs be able to proactively monitor police actions and be more critical of the evidence they receive, but they should be motivated to do so, as well.

The ABA's Criminal Justice Standards of Prosecutorial Investigations lays out several guidelines for prosecutors to follow when collaborating with investigatory agencies. For example, Standard 1.3(b) states: "The prosecutor should take steps to promote compliance by law enforcement agents with relevant legal rules." Standard 1.3(c) emphasizes the importance of awareness of any history of an investigator's misconduct: "The prosecutor should be aware of the experience, skills and professional abilities of police and other law enforcement agents assigned to an investigation." They also address prosecutorial intent when working with law enforcement in Standard 1.3(g): "The prosecutor should not seek to circumvent ethical rules by instructing or recommending that others use means that the prosecutor is ethically prohibited from using" (ABA, "Criminal Justice Standards" Std. 1.3).

In practice, however, prosecutors do not exercise the oversight over law enforcement that is recommended. A former Assistant District Attorney (ADA) for Travis County recalled a time when, after studies made clear to law enforcement agencies that proper, unbiased eyewitness identification required double-blind procedures, the APD refused for many years to change their

procedures. The DA's office failed to intervene and require APD to adopt improved identification procedures. In the former ADA's words, "The district attorney's office just stayed on the sidelines…when really, they should have walked over and said, 'If you don't follow this procedure, we are not going to take identifications, period'" (Sheppard).

Not every instance of official misconduct or error that occurs outside of the DA's office will be obvious or even noticed, but many are. Prosecutors have a professional and ethical obligation to ensure, to the best of their ability, that investigators are presenting them with valid evidence obtained in proper and ethical manners in order to fulfill their broader obligation to uphold justice. Courts do overturn convictions based on misconduct that arises from investigators, not just prosecutors; but miscarriages of justice cannot be wholly prevented if the culture of the criminal justice system at large is not directed toward producing ethical actions and just results.[12] But with their extensive reach and power, district attorneys have the power to control the culture of not just their own office, but of the agencies they work with.

A large part of why prosecutors commit misconduct is because they may be incentivized, due to the cultural, hierarchical, and electoral structure of the DA's office, to boast high convictions rates; these factors will be further explored in the next chapter. Investigators face their own incentives to commit misconduct: they may be acting on racial prejudice, or they may simply want to feel helpful or important in a case. In many cases, such as the identification process in Travis County mentioned above, investigatory agencies may not be set up to deter these biases. Thus, prosecutors and investigators alike fall into cognitive traps that lead them to

[12] For example, just as prosecutors withhold evidence from the defense, police can hide evidence from the prosecution; both result in the defendant lacking exculpatory evidence they need for a fair trial. But *Brady* rules do not cover the actions of law enforcement officers: if investigators hide evidence from a prosecutor, that does not constitute a *Brady* violation, which means an overturned conviction is not owed to a prisoner under the scope of *Brady* and the Due Process Clause. Thus, police officers do not operate under the imposition of a prominent Supreme Court ruling that directly guides the actions of prosecutors. (US Supreme Court, *Brady*)

commit misconduct. If the culture and structure of the justice system at large is not scrutinized, wrongful convictions will persist. The criminal justice system therefore needs district attorneys that are willing to implement more oversight of both their own departments and those that they work with.

Standards for Review

If a defendant wants to argue that they were wrongfully convicted at their trial, or that they received a harsher sentence than warranted, their defense team can file an appeal. The defense will present their case in an appellate court in front of new judges, who will review the decisions made by the trial judge. The defense can point to the actions of the prosecution that they believe led to the jury making the wrong decision pertaining to the guilt of the defendant. The appellate judge, or judges, have the power to decide whether to uphold or overturn a conviction or reduce a sentence (ABA Division for Public Education).

The principal standard for review of prosecutorial misconduct used by appellate courts for cases brought to their attention is the *harmless error doctrine*. Under harmless error review, appellate courts reviewing allegations of misconduct must determine "whether the error was significant enough to strike down the decision reached by the trial court" (Platania 742). If a particular action did not alter the outcome of the trial, it is deemed "harmless"; any convictions arising from the trial are thereby justified and allowed to stand. In these cases, the defendant will not receive reparations from the appellate court in the form of a commuted or reduced sentence, even if misconduct caused them harm in some way other than a conviction. Judges will frequently err on the side of deeming an error as harmless to avoid having to grant a remedy with

a large "windfall," such as a wrongful conviction – a remedy that may be too extreme for a defendant whose guilt or innocence is unclear (Starr 1509).

Another standard used by the courts is plain error review. Generally, appeals courts can only rectify procedural violations that were brought to the attention of a trial court (typically by means of an objection). However, it is uncommon for attorneys to object during closing arguments, as often an objection can draw attention to something that an attorney is hoping the jury will miss (Gross, et al., "Government" 104). This can allow prosecutors who make inflammatory statements, particularly those made in closing remarks, to be protected during appeals. However, the Supreme Court has emphasized an exception to this rule in the federal statutes – plain error review. Rule 52(b) of the Federal Rules of Criminal Procedure states, "[A] plain error that affects substantial rights may be considered even though it was not brought to the court's attention" (Legal Information Institute).[13] That is, if a court finds "an obvious [i.e., 'plain'] error that affected the outcome of the trial and seriously affected the fairness, integrity, or public reputation of the judicial proceedings," those actions can be grounds for reversal, even if they were not objected to during trial (U.S Court of Appeals, Seventh Circuit).

Judicial discretion, though important to the proper functioning of the justice system, has the consequence of subjectivity in reviewing instances of misconduct and its effect on the outcome of a case. A judge in one appellate court may decide that an action was a "harmless error" that would not have affected the outcome of a trial, and that conviction will not be overturned; in another court, however, the judge may have disagreed. Having to decide whether the jury was swayed by a certain piece of information that was shared at trial will vary with the perception of the presiding appellate judge. Furthermore, in reviewing certain instances of

[13] The Federal Rules of Criminal Procedure apply to all "United States district courts, the United States Court of Appeals, and the Supreme Court of the United States." (Legal Information Institute, "Rule 1(a): Scope")

misconduct, particularly courtroom-based misconduct that requires a determination of intent, judges are called upon to discern what a prosecutor may have or should have known, again requiring inconsistent judicial discretion. Because certain instances of misconduct are deemed harmless or irrelevant to a case's outcome, misconduct becomes difficult to identify, quantify, and correct.

Frequency of Misconduct

When trying to understand the gravity of prosecutorial misconduct, it is important to know its rate of frequency. However, the field of study lacks a consensus on how often it actually occurs, as identifying whether individual prosecutorial actions constitute misconduct has proved to be a subjective and inconsistent process. This inconsistency is due in part, as demonstrated in the previous sections, to the disparity of definitions of prosecutorial misconduct, as well as judicial and prosecutorial discretion. A lack of transparency and available records from disciplinary agencies exacerbates the problem. Furthermore, it may be necessary to know the prosecutor's intent in order to discern whether a violation of rules occurred, which can be a difficult task: "Determinations of this kind typically require a detailed factual analysis, something not possible from the limited information available publicly" (Popps 431). There is also understandable bias on different sides of the aisle. Prosecutors' offices and administrative agencies overseeing them are inclined to categorize misconduct through a narrow lens. Organizations such as the Innocence Project, however, whose mission is to address wrongful convictions, examine prosecutors' actions more critically. Ultimately, the dearth of knowledge of misconduct's frequency poses a problem for deterrence and future reform.

There is a significant lack of information regarding the discipline of prosecutors who are reported to the State Bar for misconduct. This is in large part due to the anonymity and confidentiality of these proceedings. Since proceedings for grievances filed against prosecutors under Rule 3.09 of the TDRPC are confidential unless an attorney is found guilty, it is challenging to determine whether a prosecutor was deemed to have committed misconduct if they are not publicly sanctioned (Popps 431). The anonymity of proceedings is necessary to protect wrongly accused prosecutors, but it presents a difficulty in accumulating complete data about "the number of complaints made against prosecutors, the nature of those complaints, and the outcomes of those complaints" (TDCAA Training Subcommittee 26). The rarity of prosecutors being reported to disciplinary agencies contributes to how little data state disciplinary agencies are able to publish (Davis, "The Legal Profession's Failure" 292). For disciplinary proceedings to be an accurate metric of prosecutorial misconduct, it is vital for the State Bar to increase transparency by publishing more complete data, even if it is de-identified.

For these reasons, exonerations are one metric often used to get an idea of how often prosecutorial misconduct is occurring. Recorded exonerations are helpful for an important reason: cases with overturned convictions based on prosecutors' actions have little to no ambiguity on whether malfeasance occurred, meaning it is easier to study misconduct in these cases. The NRE has one of the most extensive accounts of such information nation-wide, with a detailed list of 3,000 convictions that were overturned between 1989 to 2021. The Registry has categorized these cases according to what type of misconduct led to the wrongful conviction. According to their data, about 16% of the 388 exonerations in Texas were granted at least in part due to misconduct committed by prosecutors on the case (National Registry of Exonerations).

Although the record of exonerations in the nation is extensive, it does not paint the whole picture, as it only includes instances of misconduct that were exposed and ruled on by courts. Many instances of prosecutorial misconduct do not lead to exonerations, and those cases are not included in the Registry's count of misconduct.[14] Other organizations have attempted to find evidence of prosecutorial misconduct in cases that include those not leading to overturned convictions. But because of the inconsistencies outlined above, that has led to widely disparate quantifications of misconduct. A comparison of different institutions' attempts to determine the fuller extent of prosecutorial malfeasance in Texas is illustrative of that conflict, as well as of the gap in the record on certain instances of official misconduct.

In 2012, the Texas District and County Attorneys Association (TDCAA) Training Subcommittee on Emerging Issues released a report that attempted to answer the question, "What is the prevalence of 'prosecutorial misconduct' around the state?" (5). The subcommittee summarized their answer as such: "Wrongful convictions based on questionable prosecutor conduct are exceedingly rare (six of over 4.3 million cases from 2004-2008)" (5).

In this report, certain language and quantification is immediately evident that points towards a bias that the TDCAA would understandably have towards defending the ethics of their members. For example, they suggestively put "prosecutorial misconduct" in quotes, and later substitute it with the phrase "questionable prosecutor conduct" (5). They also continually emphasize that all the cases referred to in the report were instances of "alleged" misconduct (5). Furthermore, by juxtaposing the small number of confirmed cases (six) against the high total number of cases filed in Texas (4.3 million, many of which do not necessarily end in convictions

[14] It is important to note that only acts of misconduct that were determined to have consequentially influenced the outcome of the case are included in the Registry's description of the cases. Thus, many more instances of prosecutorial misconduct may have occurred in other cases and were either unnoticed or inconsequential to the outcome of the trial. (Gross, et al., "Government" 13)

or even punishment), they minimize the gravity of malfeasance's frequency. Such tactics cast an initial doubt in the mind of the reader upon the idea that prosecutorial misconduct can be clearly identified or even defined as such.

As evidence of their points, the TDCAA continues to examine a list of 91 Texas cases that went before appellate courts between 2004 and 2008; these cases were identified by the Innocence Project as instances where a prosecutor should have been publicly disciplined by the State Bar for misconduct but was not. The subcommittee goes through each case one by one and categorizes them, eventually narrowing it down to just eleven cases in which they identified misconduct. In the eliminated eighty, they argue that the Innocence Project included cases in which either no error or "harmless error" (in some cases referred to by the subcommittee as "minor trial error") was found; their final list of eleven includes only those instances of misconduct that constituted "harmful error" and "were reversed at least in part due to a prosecutor's conduct" (7, 11). Of these eleven, the subcommittee questions whether five of them should even be included on the list – they argue that some lacked sufficient public details to determine the prosecutor's intent, while others definitively involved error but not intentional misconduct. Thus, they end up with six of the Innocence Project's original 91 cases where they believe with certainty that misconduct occurred.

The TDCAA subcommittee attributes what it considers to be an "overstatement" of malfeasance in Texas to the failure of the Innocence Project to give a clear definition of prosecutorial misconduct (6). They argue, "The Innocence Project uses the terms 'prosecutorial misconduct' and 'error' interchangeably, without any elaboration of what conduct is included or excluded" (7). Indeed, the Innocence Project does seem to include errors by prosecutors that were apparently rectified by objections – something that occurs in almost every trial. As

previously stated, slip-ups (even those that may be intentional but based on charged emotions of passionate prosecutors) are not entirely avoidable in human decision-making.[15] With this in mind, the subcommittee offers its own definition of misconduct: "Prosecutorial misconduct occurs when a prosecutor deliberately engages in dishonest or fraudulent conduct calculated to produce an unjust result" (8). However, this definition may be too narrow, as the determination of whether a prosecutor was intentionally trying to be unjust is a hard one to make. As will be explored in the following chapter, prosecutors can fall into cognitive traps of their own that cause them to commit blatantly unethical acts in the name of justice – in a vast array of cases, a prosecutor's well-intentioned actions led to someone's wrongful imprisonment.

The TDCAA's conclusion that only six of 4.3 million cases could be unequivocally classified as instances of prosecutorial misconduct in a four-year span illuminates the disparity in numerical estimates of misconduct. The eleven cases identified by the TDCAA subcommittee as consequential instances of prosecutorial misconduct or error are misaligned not only with the Innocence Project report, but also with the National Registry of Exonerations. Only two of these cases – the convictions of Hicks Elliff and Anthony Graves – also appear in the NRE database as exonerations granted for prosecutorial misconduct within this time frame. A third exoneration, the conviction of Ernest Ray Willis, appears in the report and registry, but both sources clarify that the *Brady* violation that occurred did not contribute to the conviction's reversal. The remaining eight cases (three of which constituted ethical misconduct and five of which constituted error or too little information to make a determination, according to the TDCAA) did not appear in the NRE at all. In each one, misconduct or error was identified by the appellate

[15] For this reason, the ability of attorneys to object in court is imperative – if every trial were expected to proceed perfectly in a system set up without objections, they would each spend years going through the appeals process. (Cicchini)

court as harmful, leading to either a reversal or mistrial. However, they all led to subsequent guilty pleas, many for lesser sentences than the original (TDCAA Training Subcommittee 11-12; National Registry of Exonerations).

This disparity illustrates the glaring exclusion of many confirmed instances of prosecutorial misconduct on record. Exoneration figures can only include those case of misconduct that directly contributed to overturned convictions. But the many cases where misconduct occurred and had to be corrected through other means – barring retrial or granting a reduced sentence through a plea deal, for instance – are not included in that picture. Furthermore, when emphasizing that only six of 4.3 million criminal cases filed in Texas contained prosecutorial misconduct that led to a wrongful conviction, the TDCAA subcommittee does not clarify in their report that they only refer to cases of *known* instances of misconduct; there could be more wrongful convictions that have not yet been exposed or reversed.

The analysis of these opposing viewpoints, as well as the TDCAA's offered definition of misconduct, emphasizes the important role that prosecutorial intent plays in determining whether misconduct occurred. This analysis also highlights the role that "harmless error" standards play in the inconsistency in identifying misconduct. However, as previously stated, prosecutors have an obligation not just to avoid intentional misconduct, but unintentional error and rule violations, as well. Regardless of the prosecution's good or bad faith, errors lead to wrongful convictions, and steps must be taken to prevent that from happening.

In fact, although various parties have disparate beliefs on how often malfeasance occurs and how often it contributes to wrongful convictions, they all agree on one idea: wrongful convictions should never occur, and steps to deter prosecutorial misconduct need to be taken, irrespective of its frequency The very TDCAA report that validates the actions of prosecutors in

80 out of 91 cases states: "[T]he subcommittee believes that *any* true prosecutorial misconduct, no matter how rare, is unacceptable in our profession" (TDCAA Training Subcommittee 13). However, inconsistent answers to how frequency misconduct occurs in practice contribute to an overarching lack of transparency in the area. In the words of Laura Bayouth Popps, deputy counsel for the State Bar of Texas Office of Chief Disciplinary Counsel, "In the end, attempts to quantify these matters are likely to be flawed or, at best, incomplete" (431). This makes reform more difficult to implement and assess. Thus, the ambiguity in frequency cannot be disregarded entirely, as increasing transparency and data is essential to addressing misconduct.

CHAPTER III: EXAMINING FACTORS THAT ALLOW AND INCENTIVIZE MISCONDUCT

However uncommon prosecutorial misconduct may be, several aspects of the criminal justice system's setup both incentivize it and allow it to continue. Prosecutors' power has significantly increased as plea bargaining has become the predominant method for closing cases. This development, when combined with cognitive biases, limited access to information, problems with judicial remedy, and the political structure of the DA's office, illustrate a lack of transparency, consistency, and accountability for prosecutors that allows and even encourages misconduct to occur.

Increased Power of Prosecutors

Serving in a position with wide discretion and little oversight, a role which prosecutors enjoy, opens the door for misconduct to occur. Rising rates of plea deals have both widened this discretion and decreased this oversight. Plea bargains allow defendants to accept lesser sentences in order avoid going to trial, where they would receive a maximum sentence if found guilty.

Because plea deals are less costly and time consuming than a trial, they are often the preferred method of closing a case by many actors in the criminal justice system. Plea deals gradually increased in dominance as immigration boosted the U.S. population. And with rising crime rates in the 1960s and 1970s, prosecutors, armed with the discretion to present defendants with plea deals as a way to lighten their caseloads, began to rely on them more heavily. Until the 1970s, up to 20% of cases that were not closed went to trial (Rakoff 1430). But today, according to the U.S. Sentencing Commission, the percentage of cases that end in a trial consistently hovers below 3%, with the other 97% ending in a plea deal ("Interactive Data Analyzer"). When prosecutors pursue pleas, they often overcharge as a way of urging the defendant to take what seems like a better deal in comparison. Frequently in these cases, the defendant ends up accepting a deal with a harsh sentence for a crime that they could have been found innocent for, simply because they are scared into accepting the deal by the vast number of charges they are faced with (McDonald Hutchins 17).

The increased prominence of plea bargains has also laterally broadened the range of prosecutors' powers. Now more than ever, they have a great deal of not just executive power but also adjudicative power. Prosecutors' executive function is illustrated by their duty to investigate defendants, try them in court, and uphold the law, while their adjudicative role comes into play when they are given the power to decide whether to try someone or accept a plea deal and what sentence to seek. Some argue that the duality of their power is too close to a violation of the separation of powers doctrine (Barkow 871). Furthermore, the combination of these powers can lead to tunnel vision in a case: the prosecutor may begin to see a case that they are investigating with their executive arm through a distorted lens when it comes to adjudication, as the prosecutor has "already invested himself or herself" psychologically and materially to the case (Barkow

896). They may insist on trying a defendant or seeking a harsh sentence even when unwarranted because their investigation of the case has eroded their objectivity (Barkow 897).

Plea bargains pose another danger: because defendants who plead forgo the right to a trial, evidence in their case is not presented to a judge or jury in a court. Without the need to be able to prove a defendant's guilt beyond a reasonable doubt in court, prosecutors use plea deals to pursue and convict defendants quickly and without much scrutiny (Rakoff 1431). Defendants may plead guilty to charges of which they are innocent purely out of fear of being found guilty at trial. Troy Mansfield found himself in this situation in Williamson County in 1993, when prosecutor Paul Womack coerced him into pleading guilty to a murder he did not commit. Womack threatened to seek a life sentence if Mansfield went to trial. The ADA was also able to hide crucial impeachment evidence by securing a plea: had the case gone to trial, the jury would have seen that Womack's star witness was not able to identify Mansfield or accurately describe what had occurred (Gross, et al., "Government" 135).

In light of the visible dangers of broad agency in a field that determines the course of defendants' lives, why are prosecutors granted such vast discretionary powers? For one, prosecutorial discretion "alleviates the high volume and backlog of cases that enter the legal system" by removing the hoops prosecutors must jump through to open and close cases. Wide discretion also allows for more efficient allocation of time and financial resources, preventing both the delay of criminal proceedings and overspending on the justice system's limited budget. Finally, a great deal of confidence in prosecutors' competency and trustworthiness is placed on these actors (Polzer, et al. 655). Because prosecutorial agency is granted and upheld for many pragmatic and cultural reasons, it is unlikely that their discretionary powers will be tightened enough to close the door to misconduct.

Because prosecutors' vast power is unlikely to be reined in, it is vital to ensure that these powers are used ethically and responsibly to uphold justice rather than undermine it. This points to a need for several alterations to the criminal justice process: improved training for prosecutors, increased transparency and oversight of the actions taken in the DA's office, and a realignment of the culture of the justice system.

Psychological Factors

Prosecutors face conflicting expectations when confronting their roles. They are told that their primary duty is to seek justice as a powerful agent of the government (O'Brien 1006). However, lawyers are also trained to fiercely represent the interests of their clients; in the case of the prosecutor, their client is the state. According to the TDCAA Training Subcommittee on Emerging Issues, law school students receive more emphasis on being a "zealous advocate for their client" than being "ministers of justice" (15). Later in their careers, prosecutors are subject to immense pressure to get a conviction in the name of representing the government and keeping society safe. Prosecutors are constantly faced with the fear that not doing everything possible to win a case could result in letting a guilty defendant walk free, not considering that this is "always the risk [they must] run in the name of fairness and openness" (TDCAA, "Mandatory Brady Training"). This can prompt them to revert to their advocating role over their justice-seeking role.

The adversarial nature of criminal proceedings, as well as the expanded duality of prosecutorial power, exacerbates prosecutors' drive to win a case. The adversarial system focuses the prosecutor's attention on the outcome of the case rather than the process towards that

outcome (O'Brien 1023). Thus, prosecutors can make ethical missteps on their way to a win (i.e., a guilty verdict) by telling themselves that the ends justify the means.

Furthermore, prosecutors often fall into cognitive traps that can influence them to seek a conviction despite the facts at hand. One such pitfall is referred to as "confirmation bias." Confirmation bias, often referred to as tunnel vision, is a cognitive process by which a person "evaluate[s] information selectively so that it confirms preexisting or favored beliefs" (O'Brien 1011). With intense pressure to succeed, it is easy for a prosecutor to narrow in on evidence that bolsters their own theory of the crime while suppressing impeachment evidence that weakens it. Aside from intentional suppression, a prosecutor may often make up their mind about what happened too quickly and then look for facts that back up their story but simply disregard or demerit the ones that do not fit (TDCAA Training Subcommittee 16). The combination of prosecutors' adjudicative and investigative functions plays a role in creating confirmation bias, as well. Since prosecutors' attachment to certain facts has given them a fierce "will to win," their bias opens the door for misconduct to occur when trying the case (Barkow 897). In addition, in the adversarial system, prosecutors "represent only one point of view" (Rakoff 1430). Being forced to focus on just one perspective of the case can push prosecutors further into their tunnel vision.

Ken Anderson and Charles Sebesta are prominent examples of Texas prosecutors who let confirmation bias get in the way of a just trial. During his nine-hour deposition, the lead prosecutor on the case against Michael Morton was asked why he suppressed the evidence that obviously pointed to the defendant's innocence. His only answer was that he would not have normally done it, but he had no memory of why he did because so many years had passed. This answer is reflective of a prosecutor who got tunnel vision in the thick of an investigation:

Anderson decided that the exculpatory statement of Morton's son Eric was inadmissible or false because it did not fit his theory that Morton was the killer. He justified this thought with the reasoning that Eric was so young that he must have been mistaken about what happened (TDCAA, "Mandatory Brady Training"). Furthermore, at the outset of the investigation of the Davis family's murder, Charles Sebesta decided based on the initial evidence that three people must have committed the crime. Therefore, he became unwilling to concede that Anthony Graves was not the accomplice of Robert and Teresa Carter (TDCAA Training Subcommittee 16).

The adversarial nature of criminal proceedings is unlikely to change, but its negative effects on prosecutors' cognition can and should be mitigated. The psychological consequences of prosecutors' conflicting roles can be combatted with increased oversight and training. Because tunnel vision is one of the most typical causes of *Brady* violations, the prevalence of cognitive biases should be addresses in compulsory training for prosecutors, for instance (California Innocence Project). This has already begun to take effect in the TDCAA's mandatory *Brady* training. There is also a need for district attorneys themselves to mitigate the effects of the system's structure on their assistants' attitudes. Chief prosecutors must emphasize the importance of upholding justice over the importance of obtaining a conviction for the sake of winning.

Limited Access to Files

Although *Brady v. Maryland* requires the prosecution to share exculpatory evidence with the defense, it leaves the determination of what constitutes "favorable" and "material" evidence up to prosecutors' discretion. In other words, prosecutors get to sort through their files, decide

what is required of them to turn over according to *Brady*, and keep the remaining information. The construction of *Brady* leaves a hole in its implementation; prosecutors can maintain closed-file policies, where they never reveal their whole files to anyone unless explicitly requested. Prosecutors can claim that they have turned over all exculpatory evidence while keeping it hidden away, and their word would simply have to trust. Several cases of misconduct in Texas could have been prevented by an open-file policy; this includes the malfeasance that occurred in the flawed trials of Ernest Ray Willis, Anthony Graves, and Michael Morton. In each of these cases, the lead prosecutor maintained a closed-file policy, choosing not to give the defense access to offense reports and witness statements before the trial began, which enabled them to commit *Brady* violations (TDCAA Training Subcommittee 15).

Despite *Brady* becoming case law that extended to every state in the nation, Texas's own statutes lagged behind, and the rule was frequently subverted. One facilitator of the subversion of *Brady* arose in a Texas Court of Criminal Appeals, *Gaskin v. State (1961)* just two years prior to the *Brady* decision. In the ruling, the Court declared that prior witness statements collected during an investigation must be turned over to the defense only if they were "used in testifying" or "exhibited or used in the jury's presence" (Texas Court of Criminal Appeals). While this ruling, dubbed the "*Gaskin* rule," is touted by some as a rule that promotes transparency making such witness statements subject to disclosure, it left a gaping hole in evidence discovery: the *Gaskin* rule allowed many prior statements to be suppressed by the prosecution. If the prosecution obtained an exculpatory statement from a witness, they could choose to not bring it up during trial. This would make those materials not subject to disclosure and remain hidden in the prosecutor's case files long after a conviction was granted. Prosecutors were easily able to

keep *Gaskin* materials, including those that could be exculpatory, hidden because of the lack of a public information act that could force the revelation of that information (Sheppard).

The limitations of case law regulating prosecutors' information points to the need for legislative extension. Statutes that increase both defense teams' and the public's access to information is vital for ensuring that information that is material to a defendant's case cannot remain hidden. Fortunately, the Texas legislature has gradually taken steps toward increasing transparency in this area.

Subjectivity and Rarity of Appellate Remedy

Prosecutorial misconduct has no official and objective criteria for identification or review. Its definition and consequences are left to judicial discretion, which may contribute to the difficulty in addressing it. Review under the harmless error doctrine or plain error review is highly subjective and inconsistent, as it can be difficult to discern the degree to which an act of misconduct may have swayed a jury to deliver an unjust verdict. Just as difficult is determining what the intentions of the prosecutor were at the time of the misconduct.

These issues can be illustrated by the ruling of *United States v. Klemis (2017)*, in which the Seventh Circuit Court of Appeals outlined their criteria for determining whether a prosecutor's error affected the outcome of case. Richard Klemis, who was found guilty of heroin distribution, appealed his conviction based on a few inflammatory remarks made by the prosecutor during closing arguments, namely his discussion of Klemis belonging in the innermost circle of hell as described in Dante's *Inferno*. The Court admitted that the prosecutor's remarks "crossed the line" and fell "outside the bounds of proper closing argument" (US Court of Appeals, Seventh Circuit). However, the Court did not grant Klemis any reparation because it

decided that even if the prosecutor had not given his lengthy comments about Dante's *Inferno*, Klemis would still have been found guilty (US Court of Appeals, Seventh Circuit).

The *Klemis* case, which established the "harmless error" standard for review, highlights several issues with the current treatment by appellate courts of prosecutorial misconduct. The general rule that misconduct must be addressed at trial court in order to be rectified by an appeals court forces many appeals on malfeasance to be evaluated under the narrower standard of plain error review. And even when actions are objected to in trial court, review falls under the harmless error doctrine, which rarely leans in favor of the appellant (Joy 426). Furthermore, as with review under the harmless error doctrine, the determination of the impact of a statement on a jury is subjective – the court cannot provide concrete or scientific proof that the inflammatory remarks did not sway the jury.

Adjudicative solutions to misconduct, such as overturning convictions, are largely related to the outcome of a case (Levine 10). More often than not, appellate courts find misconduct to be harmless and do not overturn convictions (Joy 426). This holds true even when reviewing serious instances of misconduct, such as *Brady* violations (Starr 1514). This is largely tied to courts' reluctance to grant remedies that result in too strong a "windfall" (Starr 1509). Because "prosecutorial misconduct is almost always deemed harmless," reversals of convictions where misconduct has happened are incredibly rare, thereby allowing the vast majority of misconduct occurrences to go unpunished (Starr 1514). Thus, the harmless error doctrine disregards the spectrum of individual and societal harms that result from misconduct.

The weaknesses of the judicial review process for prosecutorial misconduct point to the need for judicial reform. Appellate courts need a remedy that can be more broadly applied to cases that vary in the severity of a prosecutor's actions and in the degree of harm caused by those

actions. In other words, issues that cause a spectrum of consequences need solutions that can also be adjusted on a spectrum to fittingly address the harm caused. Such solutions could provide tangible remedies to those defendants who were not wrongfully convicted but were harmed by prosecutorial misconduct in some other way.

Civil Immunity

Another aspect of prosecutors' power that allows their misconduct to go unpunished is their civil immunity. On both the federal and state level, prosecutors are granted immunity for their actions as investigators, administrators, and adjudicators; this immunity protects prosecutors from being sued in civil court by citizens for any decisions made while acting in their official capacity. Under federal law, for their decisions during the judicial phase of criminal proceedings (such as deciding whether and to what extent to charge someone and offering plea deals), prosecutors enjoy absolute immunity from civil suits. Prosecutors have a "quasi-judicial" function in this respect; therefore, they enjoy the same absolute immunity as judges (Grometstein and Balboni 1247). In *Imbler v. Pachtman (1976)*, which granted prosecutors this protection, Justice Lewis Powell warned that immunity protected both honest and dishonest prosecutors: "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty" (US Supreme Court, *Imbler*). In this manner, absolute immunity allows misconduct arising in prosecutors' judicial functions to perpetuate.

The *Imbler* Court seemingly did leave some room for civil redress against prosecutors' actions. For their investigative and adjudicative decisions – such as gathering information for proceedings and trying a defendant in court – prosecutors are granted qualified immunity. Unlike

absolute immunity, qualified immunity can be lost, but "only when a prosecutor should know that his or her conduct violates clearly established constitutional or statutory rights" (Joy 426n136). However, this again raises the issue of difficulty for a civil court to objectively and consistently determine what a prosecutor "should" know. A civil remedy that relies on the intentions and knowledge of a prosecutor cannot reliably prevent misconduct from occurring.

Much like the harmless error doctrine of appellate courts, civil immunity limits the extent to which courts can address misconduct in an adjudicative manner by protecting prosecutors from judicial review. However, civil immunity is vital for allowing prosecutors to exercise the full range of their powers and pursue cases to their conclusion, even when they move in unexpected directions. Without civil immunity, prosecutors would be sued for countless cases that they eventually decided to drop. Therefore, lifting its protection could be too extreme of a remedy.

Culture, Ambition, and Political Motivation

The issues explored above *allow* prosecutorial malfeasance to occur through various avenues. However, they do not explain what factors *encourage* prosecutors to commit misconduct in the first place. An examination of the culture of the DA's office and the political motivation to boast high conviction rates answers this question. These elements are strongly influenced by the chief prosecutor who is elected, and this influence can be negative or positive. In other words, just as district attorneys have the power to instill a culture that incentivizes misconduct, they also have the ability – and obligation – to discourage it. Therefore, public opinion and the electoral process play important roles in both encouraging and deterring

prosecutorial misconduct through the culture that voters effectively implement when casting their ballots.

The overarching institutions for prosecutors, such as district attorneys' associations and the ABA, explicitly promote fairness, integrity, and the pursuit of justice over getting convictions. For example, according to the ABA's Code of Professional Responsibility, "The responsibility of a public prosecutor differs from that of a usual advocate; his duty is to seek justice, not merely to convict" (DeShay and Worrall 4070). The National District Attorneys Association (NDAA) also outlines the main goals of prosecutors: "(1) to promote the fair, impartial, and expeditious pursuit of justice, (2) to ensure the [*sic*] safer communities, and (3) to promote integrity in the prosecution profession and coordination in the criminal justice system" (Polzer, et al. 655). Furthermore, the State Bar of Texas, in the TDRPC, describes lawyers as "guardians of the law" who have a "special responsibility for the quality of justice" and "play a vital role in the preservation of society" (4). Finally, member institutions such as the Texas District and County Attorneys Associations (TDCAA) requires each of its members to regularly complete a mandatory ethics training.

In short, the institutions that represent and regulate prosecutors employ rhetoric, training, and education that aim to discourage misconduct by promoting the justice-seeking mission of prosecutors. If this is the case, then the presence of a culture that allows ethical violations to occur is puzzling. But as Polzer, et al. observe, "Despite oaths and ethical standards, prosecutors operate under the conditions that can lead to misconduct" (655). The opportunity for malfeasance becomes clear when one examines not the culture of overarching institutions, but that of the DA's offices themselves.

Because high-ranking prosecutors are elected, the position becomes highly politicized and subject to electoral demands. Prosecutors face intense pressure to perform, and the primary metric for performance has traditionally been winning cases and getting convictions (Polzer, et al. 655). Department funding and election campaigns are both bolstered by high conviction rates (O'Brien 1010). One empirical study found, "When reelection pressures are strong, prosecutors increase the number of cases taken to trial and plea bargain less" (Bandyopadhyay and McCannon 155). The study's discovery illustrates that prosecutorial discretion is swayed by elections – prosecutors make decisions that they would not normally because of electoral pressure. We must consider that some of those out-of-the-ordinary decisions may be ethically questionable if they would not have been made in the absence of electoral pressure. Finally, because of the prominence of tough-on-crime rhetoric established in the 1960s and 1970s, prosecutors have "experienced public expectations that a good prosecutor [is] one who garner[s] high conviction rates" (Shjarback and Young 200; Joy 410). Thus, public opinion and politics have been influential in shaping the decisions of prosecutors.

Promotions within the DA's office are also based on measures that do not encompass how honestly a prosecutor acts in pursuance of a case. Polzer, et al. write:

> Despite justice-oriented mandates that uphold the integrity of the law…underlying core performance measures are still based more on efficiency, such as sentencing length and case processing time. In addition, performance measures include felony and misdemeanor cases closed (ratio of convictions over cases charged), sentencing length, and ratio of pleas to lesser charge over pleas charged, and average case disposition time. (655-656)

Ambitious prosecutors are motivated to pursue convictions to advance their careers. In the same way that election rates and campaign funds benefit from high conviction rates, opportunities for

advancement within some DA's offices are also dependent on guilty pleas and verdicts (O'Brien 1010). Ultimately, both DAs and their assistants are motivated to convict, and particularly ambitious prosecutors can be swayed to cross boundaries in the hopes of achieving this goal.

District attorneys set the tone and culture for their entire office in relation to the way cases are handled. As the chief prosecutor and head of their department, they have the power to pass on their culture and practices to their assistants. If a DA demonstrates that they are focused on increasing conviction rates, their ADAs will follow suit. Furthermore, if they condone some bending and breaking of rules to secure convictions, ADAs may feel more inclined to do so.

This idea was illustrated by Kelly Siegler, the special prosecutor who led the reinvestigation of Anthony Graves' case and worked under Charles Sebesta during his time in the DA's office. Siegler has built up a controversial reputation of her own, having put nineteen people on death row during her career. In 2015, she was accused by a judge in Harris County, Texas, of withholding evidence in the murder case of David Mark Temple (Malisow, "Judge Says"). The same year, the defense team of Howard Guidry accused Siegler of withholding evidence during Guidry's retrial (Malisow, "Lawyers"). His previous conviction for murder had been overturned due in part to Siegler's conduct: a federal appeals court ruled that Siegler "admitted unlawful confession into evidence and used hearsay evidence" (Malisow, "Lawyers"). Ken Anderson set a similar example for his First Assistant, Paul Womack, who coerced Troy Mansfield to plead guilty to a crime he did not commit. (Gross, et al., "Government" 135). While these examples are just correlations, they point to a pattern of district attorneys setting examples for their assistants to follow.

The electoral process of chief prosecutors has several of its own flaws that contribute to a lack of accountability for misconduct. First, the vast duties of prosecutors are not very commonly

known to voters, so those who vote often cast uninformed ballots. Also, prosecutor races are not very high-profile and receive little attention from most voters. For this reason, chief prosecutors often remain in office for decades after they are initially elected: the average incumbent win rate for prosecutors is around 95% (Hessick and Morse 1544). The lack of transparency and attention of the election of DAs makes it difficult for citizens to hold prosecutors accountable through their vote (Davis, "Reimagining" 6). These problems make it difficult (but not impossible) for the electoral system to by harnessed for reform.

As demonstrated above, DAs who value high conviction rates as a measure of success in their office can influence their assistants to acquire guilty pleas and verdicts in cases that are not worth pursuing. On the other hand, DAs can implement the opposite mentality, promoting justice and fairness over conviction rates. Any given DA's office can encourage a "tough-on-crime" or a "smart-on-crime" policy; because DAs are elected, the strategy of an area's criminal justice system depends on what that population's voters want. The democratic process plays an important role in the way criminal cases are pursued, and the duality of outcomes in an election suggests that the culture of a DA's office can be a cause or a solution to misconduct: that all depends on what voters decide. The following chapter evaluates solutions to misconduct and highlights the contingency of many solutions upon public opinion and the electoral process.

CHAPTER IV: SYSTEMIC APPROACHES TO ADDRESSING MISCONDUCT

Some argue that "the criminal justice system has made many advances in both science and procedure that have decreased the chances of wrongful convictions since the 1980s" (TDCAA Training Subcommittee 5). Despite the development of DNA science, and despite many prevention mechanisms having been in place for decades, prosecutorial misconduct

persists, and innocent people continue to be imprisoned. This points to a problem in the way the criminal justice system is currently poised to handle malfeasance. Nonetheless, we cannot discount the efforts that have been made to discourage misconduct, which have likely been effective in reducing its occurrence to some degree.

This chapter outlines disciplinary, legislative, judicial, and internal deterrents that are currently in place and investigates whether they are effective in discouraging misconduct. It also evaluates both suggested alterations to these strategies and entirely new methods for preventing prosecutorial malfeasance. The deterrents vary in that some are reactive to misconduct that has already occurred, and others proactively attempt to prevent it, both of which are effective strategies for deterring malfeasance. The final part of the chapter will consider the crucial role of the public and the electoral system in implementing many of these strategies by spinning some causes of misconduct into solutions.

Criteria for Evaluation

After an analysis of the various causes of misconduct and the elements they share, a few criteria rise to the surface as most important in determining what systemic solutions must look like. First, transparency is essential to reforming the justice system and preventing misconduct, as its absence leads to both the ability of prosecutors to commit misconduct and the inability for scholars and legal actors to have a clear sense of when and where misconduct is occurring. Second, both proactive and reactive measures have the power to deter misconduct, and both are necessary.[16] The criminal justice system needs barriers that prevent prosecutors from committing

[16] The Supreme Court reasoned in *Connick v. Thompson (2011)* that fear of discipline (a reactive consequence) would presumably prompt prosecutors to avoid misconduct out of fear of punishment (thus functioning as a proactive deterrent). (Kreag 312)

misconduct in the first place. However, those instances of malfeasance that escape prevention must be addressed if they happen. This leads into the third main criteria: when misconduct occurs, the system must respond in a way that addresses both defendants and prosecutors. Because a democratic society owes its citizens protection of rights, victims who have experienced harm at the hands of a prosecutor should receive tangible redress. On the other hand, prosecutors should be held accountable and receive appropriate sanctions for their actions. Lastly, for misconduct to be fully prevented, it is imperative to change the culture of the systems that allow it to happen. This means not just changing the ambitious, adversarial, conviction-focused culture of the DA's office itself, but also addressing the misconduct that occurs in the entire criminal justice system. Chief prosecutors' immense power bestows upon them the obligation to oversee not just the ethics of their own offices, but the actions of the investigatory departments that they oversee. For this to occur, evolving public opinions must be harnessed to elect DAs who are willing to implement changes that increase transparency and accountability.

The long list of criteria for evaluation has an important implication: there is no panacea for prosecutorial misconduct. Because no single solution can truly meet every criterion that is needed for effective reform, many regions of the criminal justice system must be altered to effect change. Several solutions must be implemented in various branches of the legal system; changes within attorney member associations, the state legislature, the State Bar, courts, and the DA's office must be considered as avenues through which to remedy and deter prosecutorial misconduct.

Member Association Rules

The American Bar Association (ABA), one of the most prominent voluntary member associations for attorneys, developed a set of Criminal Justice Standards in 1968, supplemented with their Model Rules for Professional Conduct, that address the responsibilities of prosecutors (Allen 1-4). The Criminal Justice Standards outline, among other attorney obligations, the ethical and professional duties of prosecutors; these include standards regarding discovery and disclosure of exculpatory evidence, cooperation with investigatory agencies, treatment of victims and witnesses, and many other potential areas where misconduct can occur (ABA, "Criminal Justice Standards"). The Model Rules for Professional Conduct, implemented in 1983, serve a similar function, outlining the professional responsibilities of all licensed attorneys, including prosecutors. For example, Rule 3.8(d) of the Model Rules addresses discovery and the disclosure of exculpatory evidence.[17] Similar to the ABA, the National District Attorneys Association (NDAA), a large non-profit member association for lawyers, has their own set of ethical standards that prosecutors are expected to follow, although they are less thorough than the ABA standards (Allen 4).

Because these two institutions are prominent national member associations, both the ABA's and the NDAA's rules serve as a reference for state conduct codes, court rulings, and disciplinary decisions. In fact, the Supreme Court has referenced the ABA standards in many court rulings (Marcus 10). But the ABA and NDAA are private and non-profit institutions, rather than government agencies. Furthermore, membership in the ABA is voluntary – it is not

[17] Specifically, every state has some version or parts of Model Rule 3.8 in their own codes of conduct. ABA Model Rule 3.8(d) states: "The prosecutor in a criminal case shall make timely disclosure of all evidence of information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." (American Bar Association, "Model Rules for Professional Conduct" Rule 3.8)

mandatory for an attorney to join the ABA in order to practice law. Thus, "The ABA is not a lawyer disciplinary agency and has no authority to investigate or act upon complaints filed by members" (ABA Center for Professional Responsibility).

For these reasons, ABA and NDAA rules are simply ethical guidelines; there are no automatic criminal or professional sanctions for district attorneys who violate them. The existence of institutional codes of conduct are not enough to punish or deter prosecutorial misconduct on their own. Because of the ABA and NDAA's private institutional status, they are not the best areas to implement effective reform, as their structure is unlikely to change voluntarily, and they do not cover every licensed prosecutor. Rather, the ABA and NDAA guidelines must be adopted and implemented by states into their own codes of conduct, statutes, and court proceedings (Polzer, et al. 653).

State Bar Discipline

Unlike the ABA and NDAA, membership in the State Bar of Texas is compulsory for an attorney to legally practice. However, the ABA's and NDAA's rules serve as models for the State Bar's professional conduct codes, which combat the ineffectiveness of private institutions' rules by establishing binding disciplinary procedures for attorneys.[18] In Texas, attorneys are required to be licensed by the State Bar in order to practice law (70th Texas Legislature). Therefore, any prosecutor in Texas who violates procedures or ethical standards mandated by the

[18] Rule 8.04 of the Texas Disciplinary Rules of Professional Conduct (TDRPC) outlines a list of actions that constitute misconduct, the first of which includes violation of any part of the Rules themselves. (State Bar of Texas, "TDRPC" 117)

State Bar is subject to their disciplinary hearings and sanctions (State Bar of Texas, "Mandatory Bar Challenges").[19]

The State Bar of Texas lists special requirements for prosecutors and has adopted parts of the ABA Model Rules under Texas Disciplinary Rules of Professional Conduct (TDRPC) Rule 3.09, which broadly addresses several forms of misconduct and prosecutors' duty to prioritize justice over convictions.[20] However, although Rule 3.09 takes parts of the ABA Model Rules word for word, it has its limitations. For example, it does not oblige prosecutors to respond to or act on new evidence of innocence.[21]

Although rules governing prosecutors' actions are found in several different codes of conduct, they all imply that misconduct is defined by intentional ethical and rule violations (State

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[19] There are four primary sources of professional obligations upheld by the State Bar of Texas that attorneys, including prosecutors, must follow:

- The Texas Rules of Disciplinary Procedure (TRDP) "establish the procedures to be used in the professional disciplinary and disability system for attorneys in the State of Texas." (State Bar of Texas, "TRDP" 3)
- The Texas Disciplinary Rules of Professional Conduct (TDRPC) "define proper conduct [of attorneys] for purposes of professional discipline." (State Bar of Texas, "TDRPC" 5)
- The State Bar Act is part of Texas Government Code Chapter 81 and establishes the State Bar of Texas as the agency overseeing and licensing all practicing attorneys in the State of Texas. (70th Texas Legislature)
- The State Bar Rules are used for the "operation, maintenance, and conduct of the State Bar and for the disciplining of its members." (State Bar of Texas, "State Bar Rules" 2)

The State Bar of Texas requires all licensed attorneys in the state to follow the guidelines in the TRDP and TDRPC, which the State Bar itself has written. (State Bar of Texas, "TDRPC" 118)

[20] TDRPC Rule 3.09 states, "The prosecutor in a criminal case shall:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial, or post-trial rights;
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.07. (State Bar of Texas, "TDRPC" 72-73)

[21] ABA Model Rule 3.8(h) includes the requirement of prosecutors to "respond to clear and convincing evidence of innocence." (American Bar Association, "Model Rules for Professional Conduct" Rule 3.8)

Bar of Texas, "TDRPC" 117-118). Therefore, they entail consequences for prosecutors who violate them; punishment for violating the codes can entail "public or private reprimands, suspension, or disbarment" by the State Bar (Polzer, et al. 653). Violations of the ethics and conduct rules are not automatically enforceable by law, but they can lead to discipline if a grievance against a prosecutor is filed with the State Bar. In theory, if an attorney with the DA's office was to violate any of these rules, they would be referred to State Bar authorities and be subject to a disciplinary hearing (Kreag 311 [nn 77, 79]; Davis, "The Legal Profession's Failure" 277).

In cases such as *Connick v. Thompson (2011)*, the Supreme Court has endorsed the attorney disciplinary process as a method to deter and punish misconduct. The Court's reasoning in *Connick* was that if DAs and ADAs know they could face consequences for misconduct, they would presumably steer clear of any malfeasance for fear of punishment (Kreag 312). However, some scholars point out that is rare for the State Bar to actually discipline prosecutors under their rules (Polzer, et al. 653). According to the NRE, of the 729 exonerations in their database where prosecutorial misconduct contributed to a wrongful conviction, only 26 resulted in discipline for the prosecutor – just 4% (Gross, et al., "Government" 116). The TDCAA Training Subcommittee on Emerging Issues argues that the rarity of prosecutorial discipline highlights the efficacy of existing sanctions as a deterrent to misconduct; they argue that prosecutors are not disciplined because the disciplinary process itself effectively prevents them from committing misconduct (20). But some scholars disagree, pointing to the State Bar's rare use of the disciplinary process as evidence of its ineffectiveness.

Scholars attribute the lack of discipline partly to the fact that institutions tasked with disciplining prosecutors remain unaware of most cases of impropriety. This is due to

underfunding of these organizations, court authorities' failure to report misconduct, bias against defendants who seem guilty, and defense attorneys' unwillingness to report prosecutors (Kreag 313, Davis, "The Legal Profession's Failure" 292). Even judges have reported that they rarely report an attorney to The Justice Department's Office of Professional Responsibility (OPR) or the State Bar (Hooper, et al. 29).

Furthermore, because prosecutorial decisions often present a gray area with respect to what constitutes misconduct, the few attorneys who are reported to disciplinary authorities often go unpunished (Kreag 314). According to the Center for Public Integrity, between 1970 and 2007, only 44 prosecutors faced "disciplinary proceedings for misconduct that adversely affected criminal defendants" after being referred to the bar (Davis, "The Legal Profession's Failure" 291). Out of these forty-four attorneys, ten did not personally receive any sanctions whatsoever (Davis, "The Legal Profession's Failure" 291). Angela Davis argues that the rules themselves are too thin and vague to ensure that prosecutors are punished for wrongdoing ("The Legal Profession's Failure" 284). Finally, comprehensive investigations can be very costly: the proceedings surrounding the *Brady* violations that occurred during the investigation of Alaska Senator Ted Stevens, for example, cost around $1 million (Kreag 317).[22] Ultimately, although they should be the among the most reliable ways to hold prosecutors accountable, many scholars argue that attorney disciplinary proceedings are ineffective methods for addressing misconduct.

In her work titled "The Legal Profession's Failure to Discipline Unethical Prosecutors," Davis proposes several reforms to the attorney disciplinary process that she believes are crucial to reducing the system's inefficiency. She suggests that reform begin with in-depth

[22] The most comprehensive disciplinary investigations are conducted by well-resourced independent authorities at the federal level, such as the Justice Department's Office of Professional Responsibility (OPR). The investigation against Senator Ted Stevens was a federal investigation. But in-depth State Bar disciplinary investigations can become very expensive, as well. (Davis, "The Legal Profession's Failure to Discipline Unethical Prosecutors" 284)

investigations of disciplinary proceedings to determine "why they have not been effective" and "what changes might make the process more effective" (309). Davis also calls upon bar associations to form task forces for evaluating their processes and to make the changes that the task forces find necessary for increasing efficacy in discipline (309). Finally, she urges bar associations to "undertake a comprehensive study and review of the Model Rules of Professional Conduct with the specific goal of determining the extent to which these rules fail to address critical aspects of the prosecution function" (310). She highlights the necessity of immediate and sweeping reform in light of the Supreme Court's characterization of the process as the best available remedy to prosecutorial misconduct (309).

Legislation

State legislatures also have their own legal criminal procedures regulating the conduct of prosecutors.[23] For example, the Texas Criminal Procedure Code addresses the "primary duty of all prosecuting attorneys, including any special prosecutors, not to convict but to see that justice is done" (59th Texas Legislature Ch. 2). The Code also includes rules, such as those addressing discovery, by which prosecutors must abide that align with that mission.[24]

But the rarity of legal punishment under statutory codes is the case for most states across the country, as is a lack of formal or all-encompassing rules. Although most states have codes and statutes in place to address *Brady* violations, California become the first and only state in

[23] Different state legislatures' legal criminal procedures can be broadly grouped into three categories: "Those with a rule requiring the prosecutor to disclose exculpatory evidence automatically, those with a rule requiring the prosecutor to disclose exculpatory evidence in response to a defendant's motion, and those without a rule addressing exculpatory evidence" at all. Interestingly, the last two categories do not meet the constitutional floor set by *Brady*. Texas falls into the first category, requiring prosecutors to disclose automatically. (Allen 7-8)

[24] Section 39.14(h) of the Texas Criminal Procedure Code states: "The state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charges." (59th Texas Legislature)

2016 to actually "impose criminal penalties for prosecutors who 'intentionally and in bad faith' withhold exculpatory evidence" – violation is punishable by a felony charge and up to three years in prison (Allen 9). But in all other states, including Texas, criminal procedure codes do not impose sanctions against prosecutors themselves – the legal redress for violations of the codes revolve around amending the outcome of the cases, such as by overturning a conviction. In fact, judges have admitted that they seldom hold prosecutors in contempt for violating the codes, probably because the courts rely more heavily on remedies that are explicitly provided for in statutes. These remedies are typically case-related and focus on redressing defendants' violation of rights rather than sanctioning prosecutors (Hooper, et al. 29). Indeed, the only reason Ken Anderson received criminal charges and a conviction was because the court found him to have violated parts of the Texas Penal Code, which explicitly entails criminal sanctions (District Court of Williamson County).

The lack of legal sanctions against misconduct in the DA's office is concerning. In theory, it should be automatic, or at least easy, for states to adopt binding and punishable statutes in their penal codes that align with the foundations that have already been laid down by the Supreme Court, ABA, and NDAA. Some argue that a lack of state discipline and criminal sanctions can be explained by state legislatures' lack of incentive. According to these scholars, legislators lack the motivation to punish prosecutors because they rely on these agents of the court to implement their tough-on-crime policies (Levine 4). Indeed, since the explosion of tough-on-crime rhetoric that began in the 1960s, legislatures have been politically incentivized to crack down on criminal justice, steering them away from reform (Shjarback and Young 200). Therefore, they argue, even future proposals for legislative regulation of prosecutorial

misconduct will be ineffective without the proper incentivization for lawmakers to turn away from their deeply ingrained crime rhetoric (Barkow 880).

There are, however, two important examples of legislation in Texas that undermine this argument: the Public Information Act and the Michael Morton Act. In both cases, when the Texas Legislature became aware of holes in the way that current law, dominated by *Brady v. Maryland (1963)* and *Gaskin v. State (1961)* dealt with the disclosure of exculpatory evidence, they passed statutes that addressed their weaknesses. This demonstrates that there is at least one incentive, likely the evolution of public opinion, for legislatures to rein in the actions of prosecutors.

Brady and *Gaskin* allowed much information in a case to remain hidden, specifically through *Brady*'s allowance of closed-file policies and *Gaskin*'s focus on only those statements made in front of a jury. The lack of access to the information that remained hidden away in prosecutors' files after a case was closed contributed to many people remaining behind bars for years longer than they should have. This pointed to a need for increased transparency of the information in the possession of prosecutors.

To solve this problem, the current Texas Public Information Act (PIA), located in Chapter 552 of the Texas Government Code, was enacted in 1993 (Office of the Attorney General 1). Under the PIA, governmental bodies (excluding the judiciary) must "promptly" turn over any public information to a private citizen within ten days of a written or electronic request being made (Office of the Attorney General 22). The act applies to prosecutors' offices and law enforcement, who upon request must produce offense reports and case files after a case is closed or a trial ends (i.e., when the files are no longer in "active use"), unless those documents are specifically confidential (Office of the Attorney General 7-8, 24). The PIA makes an exception

for information pertinent to an ongoing case that, if revealed, could interfere with the investigation or prosecution.[25] If a case has concluded and led to a conviction, even if it was wrongful, the information does not fall into the exception category and is subject to production under the PIA. However, neither the defense nor the public can see files through the PIA during an ongoing case. Thus, the PIA cannot be used as a preventative measure against *Brady* violations.

Despite its inability to eliminate *Brady* error or misconduct entirely, the PIA has made the *Brady* rule easier to properly implement and violators easier to be caught after a case has closed. But before the PIA was passed and put into practice, it was incredibly difficult for *Brady* violations to be uncovered. Many prosecutors practiced "closed-file" policies, electing not to preemptively reveal files or offense reports to witnesses or the defense; without the PIA, the entirety of evidence in their possession would stay hidden long after a case was closed, and there was no way to force a prosecutor to make it public. Such an incident occurred in the prosecution of Michael Morton in 1986, before the current version of the PIA was passed, prompting legal discourse surrounding prosecutorial misconduct and wrongful convictions to take a new form in Texas.

In the wake of Morton's exoneration, the Michael Morton Act (MMA) was passed by the Texas Legislature and took effect on January 1, 2014 (Polzer, et al. 657). The law instituted a

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[25] Section 552.108 of the Texas Government Code makes four main exceptions to what information a prosecutor or law enforcement agency is required to turn over:

1) "information the release of which would interfere with the detection, investigation, or prosecution of crime or law enforcement;
2) information relating to an investigation that did not result in a conviction or deferred adjudication;
3) information relating to a threat against a peace officer or detention officer collected or disseminated under section 411.048; and
4) information that is prepared by a prosecutor in anticipation or in preparation for criminal litigation or that reflects the prosecutor's mental impressions or legal reasoning."

This list does not include information regarding children or the identities of sexual assault victims, which are also named as exceptions. (Office of the Attorney General 93-94)

mandatory open-file policy, requiring the prosecution to give the defense access to or copies of the following information, regardless of its materiality or exculpatory nature:

> [A]ny offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement ... or any designated books, accounts, letters, photographs, or objects or other tangible things ... that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state... (83rd Texas Legislature)

The act echoes the requirements laid down in *Brady* and Texas codes while broadening them by removing the materiality requirement. Thus, if a prosecutor in Texas is abiding by the MMA, they will automatically be in step with all other rules and case law. The act has established a new regulatory floor for the disclosure of exculpatory evidence.

The MMA was passed by the Texas Legislature after the exoneration of Michael Morton publicly revealed blatant misconduct by prosecutor Ken Anderson. The passage of the statute demonstrates that legislatures can, in fact, be motivated to pass laws that prevent misconduct, likely due to effects of evolving public opinion.

Judicial Oversight

Trial and Appellate Courts

Much of the responsibility of addressing wrongful convictions and any contributing evidence-based or courtroom malfeasance lies with the judiciary. As we have seen, courts rarely deliver sanctions to prosecutors for violating statutes or penal codes; most of their strategies for addressing misconduct are focused on the conviction and defendant. The category of methods that includes dismissing charges, calling a mistrial, and vacating a sentence already falls under

judicial authority (Starr 1514). However, some argue that these remedies have not proved to be effective deterrent: either they are not strong enough to make much of a difference, or they are too strong to be granted frequently. Both problems mean that the existing strategies for trial and appellate judges to address misconduct, while important, are not wholly effective.

One of the most problematic forms of courtroom misconduct is when prosecutors make improper remarks during closing arguments. The current methods for addressing this form of malfeasance are all reactive. The defense can immediately make an objection to the statement for the record, which can then be overruled or sustained by the trial judge according to their discretion. If the objection is sustained, the judge may deliver a curative statement or, in extreme cases, grant a mistrial. While this process is an essential component of criminal proceedings, these reactive remedies are not sufficient to address every instance of misconduct on their own.

Although attorneys have been equipped with the ability to object to a statement from the other side in court, objections have several weak spots that make then not wholly effective in combating inflammatory prosecutorial remarks in arguments, making the use of objections rare in the argument portion of trial (Gross, et al., "Government" 104). Objections must be made immediately after an improper statement; if the defense hesitates, the prosecutor will continue with their argument and the opportunity to object will be lost (Cicchini 913). The judge may choose to overrule the objection, in which case the prosecutor's remark is allowed to stand. This again brings up the issue of subjectivity and inconsistency that underlies judicial discretion. If overruled, objecting to a statement simply draws more attention to a prosecutor's prejudicial statement that the defense does not want the jury to notice (Cicchini 915). Overruled objections may also paint the prosecution in a more positive light in the eyes of the jury if the objection is overruled (Cicchini 914). Finally, even if an objection is sustained, it may be too late: the jury

has already heard the prosecutor's statement and may carry that prejudice into deliberations. Therefore, on their own, objections are not powerful enough remedies of courtroom misconduct, nor do they have enough scare power to consistently deter a prosecutor from making improper remarks at trial.

To mitigate the effects of an inflammatory remark on the jury, judges often deliver curative statements after an objection has been sustained. Curative statements clarify to the jury how to interpret a prosecutor's comment and whether to consider that information when making their final decision. The decision to deliver a curative instruction, and what its content will be, is up to the judge's discretion. Much like defense attorneys who must make objections immediately, judges are not given much time to formulate a meaningful and effective curative statement on the spot, which can reduce their effectiveness (Cicchini 916). Furthermore, even when well-crafted, they may not be enough to remedy the problem, as the jury has already heard the prosecutor's statement (Cicchini 917). Curative instructions, like objections, cannot wholly prevent the jury from allowing prejudicial remarks to sway their decision toward an unwarranted guilty verdict.

Because of the limitations of objections and subsequent curative instructions, judges have the option to grant a mistrial if they believe that a prosecutor's improper remarks are serious enough to jeopardize the integrity of the trial and its outcome. When a mistrial is declared for either courtroom or evidence-based misconduct, the charges against the defendant are dropped, and they do not receive an innocent verdict, conviction, or sentence. Again, this decision is entirely left up to the trial judge.[26] But unless the judge bars retrial of the defendant, the DA can

[26] Although trial judges have full discretion when deciding whether to grant a mistrial, there are several frameworks that can help guide their decision. For example, one framework lists out the following criteria for consideration:

1) "the nature and seriousness of the prosecutorial misconduct;
2) whether the prosecutor's statements were invited by conduct of defense counsel;

simply bring charges against the defendant again, which happens frequently (Cicchini 918-919).[27] The disparity among records of prosecutorial misconduct's frequency illustrates this problem: many cases of serious prosecutorial misconduct that led to mistrials are not recorded in the NRE because they were simply retried or pled out. Mistrials also can also be very stressful to a defendant and cost them significant time, money, and energy. Furthermore, the steps by which the defense must request a mistrial can vary by court, which makes acquiring a mistrial difficult and complicated (Cicchini 919). These issues, combined with courts' reluctance to grant remedies with large "windfalls," suggest that mistrials may not be granted as frequently as warranted. For these reasons, mistrials are not always effective remedies of prosecutorial misconduct.

Objections and curative instructions are beneficial in that they react to courtroom misconduct immediately and are not focused on the outcome of the case. Thus, they can address misconduct and its spectrum of harms without running into the "windfall" problem that more extreme remedies face. On the other hand, they are not strong enough deterrents to prevent misconduct, nor do they always properly rectify the harms of misconduct in the courtroom. Mistrials could have more scare power to deter prosecutors from misconduct, but because they are a more costly remedy, they are not granted frequently enough for this to be the case. These problems pose a hindrance for trial judges in properly addressing prosecutorial misconduct.

To combat these issues, some scholars argue that there is a need for more proactive, rather than reactive, methods for dealing with courtroom misconduct: "The battle must be won

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3) whether the trial court['s curative] instructions to the jury were adequate;
4) whether the defense was able to counter the improper arguments through rebuttal; and
5) the weight of the evidence against the defendant. (Cicchini 918)

[27] "[T]he Supreme Court of the United States held that the defendant's double jeopardy protections only extend to cases where the prosecutor's misconduct was committed 'in order to goad the [defendant] into requesting a mistrial.'" Because of the difficulty in determining prosecutorial intent, this double jeopardy protection is not granted frequently. (Cicchini 918, quoting *Oregon v. Kennedy, 1982*)

before it is fought" (Cicchini 923). Michael Cicchini suggests that a motion in limine, which is a pretrial motion that seeks to preclude certain statements of evidence that are likely to be used during the trial, would be an effective preemptive approach. If the defense anticipates the prosecutor will use certain improper ideas or language during arguments, they can file a motion in limine with the judge ahead of time to prohibit the prosecutor from making those statements (889). The motion in limine should include some course of action, from a curative instruction to sanctions for the prosecutor, if the precluded statements are made by the prosecutor in court (923).

The main drawback of motions in limine is the unlikelihood that the defense will be able to anticipate every potential improper statement that the prosecutor could make. Nevertheless, they have the important benefit of lifting the burden of objecting off the defense, protecting them from the unwanted side effects that objections often carry. The motions would also "preserve the prosecutor's misconduct for meaningful review" on the record for post-conviction or disciplinary hearings, increasing the transparency of the occurrence of misconduct (923). This makes them a beneficial tool for both trial judges and disciplinary agencies to deter and rectify courtroom misconduct.

Aside from trial judges, appellate judges are important figures in remedying both evidence-based and courtroom misconduct. Judges presiding over appeals have the power to uphold or reverse a lower trial court's decision. If warranted, they can either reduce the appellant's sentence or commute it entirely. The latter option dominates the discourse of prosecutorial malfeasance because of misconduct's potential to cause a wrongful conviction that must be overturned. But sentence reversal, and the appeals process in general, has important limitations as a remedy to prosecutorial misconduct. Generally, appellate courts can only rectify

violations that were brought to the trial court's attention by means of an objection, which are not always the best option for the defense. This caveat protects prosecutors from being punished for courtroom misconduct that went unobjected. The infrequency of mistrials has implications for the likelihood of a reversal in future appeals, as well. Appellate courts typically rely on the opinion of the trial court when deciding whether an error was consequential in a decision. Therefore, if the trial judge did not already grant a mistrial due to a prosecutor's actions, the appellate court is unlikely to reverse the decision after the fact (Joy 426n137).

Finally, courts are often unwilling to overturn convictions entirely. According to Sonja B. Starr, the primary reason for this reluctance is reversal's "all or nothing" nature: courts must either let a defendant be convicted and serve out their full sentence or let them free (1510-1511). *U.S. v. Klemis* underscores the unfortunate all-or-nothing nature of appealing prosecutorial misconduct: the Court explicitly admits in their ruling that the prosecutor breached ethical boundaries, but because that breach did not affect the trial's outcome, no consequences or reparations of any kind are dealt for the misconduct. The lack of punishment for "mild" or occasional misconduct perpetuates its occurrence by providing little incentive to refrain from unethical behavior (US Court of Appeals, Seventh Circuit). Also, according to Starr, the finality of these outcomes leads courts to avoid vacating a sentence or declaring a mistrial, as such a decision can be detrimental to society if the conviction was valid: "[Judges] are not in the business of letting someone out on a technicality" (1511). Furthermore, this practice cannot reflect the degree to which the misconduct may have affected the outcome (1513). Only at its worst does prosecutorial misconduct lead to the conviction of an innocent person. More frequently, it can instill a resentment and lack of trust of the government in a defendant, as well as cause them and their family undue stress (1511). In other words, misconduct causes harm

even when it does not lead to a wrongful conviction. Therefore, it should be addressed with milder remedies that can be "tailored to the violation" (1513).

In order to eliminate the dilemma that mistrials, dismissed charges, and overturned convictions pose to judges, Starr has proposed heavier reliance on sentence reduction as a supplement, which, in addition to being deterrent, is both "corrective and expressive" (1513). Sentence reduction can reaffirm the dignity and rights of a defendant that were diminished by an unethical prosecutor during trial by granting the victim of misconduct a concrete remedy. It can also vary according to the degree of harm resulting from misconduct without causing "major windfalls" associated with immediate release of a convict who is guilty of their crime (1513). Because of its flexibility and milder nature, judges would be more willing to grant sentence reduction to victims of prosecutorial misconduct, making it a remedy that could commonly be used in practice rather than avoided by courts.

Sentence reduction is not a sufficient remedy for when a wrongful conviction occurs; it would be appropriate only in those cases in which a defendant deserved to be convicted but was harmed to a lesser degree than they would be from unjust imprisonment. Nevertheless, reduction of sentences can ultimately be an effective deterrent against wrongful convictions caused by prosecutorial misconduct. Due to "political pressures, ideology, office policy and culture, and career interests," prosecutors prefer for their convictions to result in longer sentences (Starr 1513). Furthermore, prosecutors would be likely to avoid actions that would lead to their convictions being altered, as such consequences cause embarrassment and detriment to their political and social reputations (Starr 1513). It may seem counterintuitive to suggest that a less harsh punishment would be more effective in preventing misconduct; but lesser reparations are more likely to be granted than the most drastic ones. Prosecutors would be more pressed to avoid

milder consequences that occur with more frequency than harsher alternatives that are rarely dealt.

Overall, sentence reduction appears to be an effective strategy for addressing prosecutorial misconduct. Because of the flexibility of sentence reduction (regarding at what point in criminal proceedings and the degree to which it can be granted) as well as the fact that a structure for it already exists (meaning it only needs to be implemented more frequently, not constructed from scratch), it would be a relatively easy remedy to encourage (Starr 1519). Sentence reduction also addresses both the defendant and prosecutor, making it remedial and deterrent. Furthermore, it addresses the adversarial process by giving the prosecutor a loss. Sentence reduction does not try to eliminate the adversarial system; the remedy views the adversarial process as a tool to prevent misconduct rather than as a mechanism that allows it. This remedy highlights that the adversarial system, much like the culture and political structure of the DA's office, can be pivoted from something that incentivizes misconduct to something that deters it. Finally, sentence reduction would allow for misconduct to be more accurately quantified, as we could start to use not just exonerations but reduced sentences as a metric. Thus, if sentence reduction increased, transparency in the system would increase with it.

Judicial Discipline

Another way courts can redress and deter prosecutorial misconduct is through judicial discipline. Courts already have the function of imposing criminal sanctions on anyone who breaks the law; this has only happened to two prosecutors, Ken Anderson and Mike Nifong. They also play important functions in addressing misconduct during trials and appeals. But Samuel Levine suggests that courts take up another role: leading judicial disciplinary hearings

for prosecutors who commit ethical violations. These disciplinary hearings would be similar to those of State Bars, dealing with the ethical obligations of prosecutors, but it would be run by the courts instead.[28] Levine proposes a twofold approach that is comprised of both "expansive judicial interpretation of current ethics rules" and "enactment and enforcement of more extensive ethics rules" (1). After a necessary expansion of ethical rules and their interpretation, were a prosecutor to violate these rules, they would be subject to disciplinary hearings led by the courts. And if the courts were to find that misconduct occurred, the prosecutor would be sanctioned accordingly (8).[29]

Levine suggests several benefits to judicial oversight and discipline. First, combating prosecutorial misconduct could improve a judge's image, especially as public opinion has evolved to be more aware of and angry about miscarriages of justice (Grometstein and Balboni 1278). Furthermore, judicial discipline would actually provide incentive for future internal reform: chief prosecutors would want their ADAs to avoid any disciplinary hearings, as it would cost them time and undermine their reputation (Levine 8).[30] In addition, civil immunity and the harmless error doctrine limit how much courts can do to punish prosecutors in an adjudicative manner, but they do not limit disciplinary power: "The issue of prosecutorial ethics can be examined independent of questions of the availability of criminal or civil remedies" (Levine 8-10). Judicial oversight also revolves around "the conduct of the prosecutor rather than the outcome of the case," so it need not be subject to the issues that arise with providing direct

[28] Because the State Bar of Texas is established by legislative codes and statutes, as is its mandatory membership, it is an offshoot of the legislative branch of the government and is distinct from the judicial branch.
[29] Because this idea involves expanding ethics rules, which are primarily laid down by the legislature, State Bar, and member associations, Levine's solution would require cooperation on the part of courts and external institutions.
[30] An undermined image of the DA's office is contingent upon the disciplinary referrals or proceedings being made public. As it currently stands, this information is only publicized if a prosecutor actually receives sanctions. This limitation would not be the case if the judicial disciplinary were constructed in such a way that all referrals and proceeding details were made public, regardless of outcome.

remedy to a defendant by overturning or reducing their sentence – these methods are subject to the more limited adjudicatory review (Levine 10).

A current barrier to this idea is the notion of separation of powers. Some scholars believe that judges do not have the power to "review the prosecutorial charging decision" (Levine 2). They believe that such actions would constitute judicial overreach. But Levine responds that in many states and in many circumstances, courts have in fact conducted reviews of charging decisions (2). For example, Pennsylvania's Supreme Court upheld the state's Rule of Criminal Procedure 13(b)(2), which allows for "judicial review of a district attorney's decision not to approve a private citizen's criminal complaint," and the U.S. Supreme Court affirmed (Brown 269-271). The fact that, in every state, judges already have the power to impose criminal sanctions on prosecutors (the infrequency of this notwithstanding) points to an inherent judicial power that should allow the courts to police prosecutors in any state (Levine 3).

Internal Reform and the Electoral Process

Given that legislative reforms and disciplinary methods are currently not ensuring that prosecutorial misconduct is always addressed, some scholars have argued for restructuring prosecutors' offices instead. For example, Rachel Barkow, who believes that legislatures are a dead end, advocates for separating the executive and adjudicative roles of prosecutors (888). To that end, she suggests implementing procedures ensuring that those who investigate a case do not adjudicate it, and vice versa. For example, prosecutors involved in investigation or pre-trial indictment decisions should not make adjudicative decisions about trying the defendant or accepting a plea deal. If a prosecutor learns information about a defendant that would be deemed

irrelevant at trial but may be prejudicial, they should be removed from adjudicative decisions, as well (898).[31]

The idea of internal reform is not without its merits – in theory, prosecutors' offices would best know how to address their own issues. According to Barry Scheck, the co-founder of the Innocence Project, "The best way to effectively prevent *Brady* violations and other forms of prosecutorial misconduct that cause wrongful convictions is internal regulation of the District Attorney's office" (2215). According to some scholars, however, Barkow and other proponents of internal reform fail to provide an answer as to what would incentivize prosecutors to enact it. They argue that there are no mandates for DA's offices to implement internal changes, nor is there any intrinsic motivation for them to change on their own volition (Levine 6n29). The lack of incentive and tough-on-crime rhetoric rampant among legislatures translates from lawmakers to prosecutors themselves. Prosecutors receive both internal and external pressure to be tough on crime. High conviction rates and sentence lengths on a prosecutor's record reflect favorably upon them in the context of both promotions and elections. According to this argument, pressing for internal reform will not be any more effective than legislative action because prosecutors lack both incentive and enforcement mechanisms to do so.

However, it can be argued that review of misconduct that occurred in a DA's office falls under the responsibilities of the office's chief prosecutor: The Supreme Court's decision in *Imbler v. Pachtman* upheld absolute immunity in part because of what they argued was the duty of prosecutors to review and correct claims of innocence from defendants they previously charged (Scheck 2249). Furthermore, new reforms within DA's offices undermine the argument

[31] Barkow suggests these reforms for federal prosecutors' offices; however, district attorneys and their assistants enjoy the same dual power dynamic and could also be subjected to the separation of powers outlined above.

that internal reform is a dead end. A primary example of such changes is the creation of Conviction Integrity Units.

Conviction Integrity Units (CIUs) are programs established within a DA's office, often by reform-minded prosecutors, that investigate past cases that may have resulted in wrongful convictions (Scheck 2217). CIUs are promising tools for rectifying prosecutorial misconduct. The Dallas County CIU, established by then-DA Craig Watkins in 2007, serves as an example of an effective CIU (Scheck 2250; Dallas County).[32] Upon a credible claim of innocence, the CIU automatically makes all relevant case files available. The Unit also works closely with the public defender's office to freely exchange information. Furthermore, in addition to investigating claims of innocence, the CIU allows third-party institutions, such as the Innocence Project, to undertake their own investigations and collaborate with them through the process in order to reduce bias and increase the objectivity of the investigation (Scheck 2250-2251). The practices of the Dallas County CIU increase transparency, reduce institutional bias, and give ADAs an in-house supervisory and investigatory department, making them valuable instruments for promoting a more justice-oriented culture within the DA's office.

CIUs have been touted as promising remedies for misconduct and wrongful convictions. In the words of Barry Scheck, "Conviction Integrity programs present a new, practical and promising approach to internal regulation that would not only reduce erroneous failures to disclose correct miscarriages of justice, but would also systematically improve the performance of line prosecutors and supervisors…" (2218). The NRE provides evidence of the effectiveness of CIUs. For example, 42 of the 65 exonerations recorded in Dallas County were granted after

[32] The Dallas County CIU was the first CIU to be established in Texas in 2007. Since then, four other major counties in Texas (Bexar, Harris, Travis, and Tarrant) have established their own CIUs that have each successfully led to exonerations in their own districts. (National Registry of Exonerations, "Conviction Integrity Units")

the CIU's establishment in 2007; the CIU contributed to all but four of these exonerations (National Registry of Exonerations).[33] In Texas as a whole, CIUs played a role in more than half of all exonerations, and exonerations in the state have been increasing more frequently since the state's CIUs were established.[34]

Many prosecutors are also required to undergo ethics training, which can be implemented either by member associations or the DA's office itself. The TDCAA requires each of its members to regularly undergo a mandatory ethics and Brady training that was implemented in 2014, shortly after the enactment of the Michael Morton Act. The hour-long course begins with an empathetic video message from Michael Morton himself, which stresses the importance of following *Brady* procedures for "average" people's daily lives, appeals to the morality of prosecutors ("You are not the bad guys"), and emphasizes the power that prosecutors have. The video ends with the message, "If it could happen to me, it could happen to you." The training continues with several modules outlining the legislative requirements that prosecutors must operate under in Texas – *Brady*, the Michael Morton Act, and Rule 3.09 of the TDCRP, dubbed the "legal trinity" – and the relationship between the three. The modules give the reasoning and important behind these rules, echoing the rhetoric of the ABA's code about justice taking precedence over getting convictions. The training then outlines in deeper detail exactly what type of material prosecutors are required to turn over, when and how it should be turned over during

[33] Because science and technology improve constantly, the uptick in exonerations since the establishment of CIUs may be correlated with the rise of DNA science as an exoneration tool. However, the role of CIUs in gaining exonerations cannot be wholly disregarded. After the development of DNA forensic science, levels of DNA exonerations recorded by the Innocence Project peaked in 2002. However, almost all of the nation's CIUs were established after 2010. (Innocence Project, "DNA's Revolutionary Role in Freeing the Innocent"; National Registry of Exonerations, "Conviction Integrity Units")

[34] CIUs contributed to 196 out of 388 exonerations in Texas. Only about a quarter of the 388 exonerations in Texas were granted before the CIUs. The vast majority of Texas's 388 exonerations occurred after 2007, signaling that CIUs are likely playing an important role in overturning wrongful convictions. (National Registry of Exonerations)

proceedings, how prosecutors should work with law enforcement, and what aspects to keep in mind throughout the pursuance of a criminal case (TDCAA, "Mandatory Brady Training").

Training modules such as this are vital, as they are the most reliable way to systemically educate prosecutors and eliminate the cognitive biases they encounter. Training can effectively educate prosecutors about discovery and other requirements, which are not always easy to consistently adhere to due to tricky legal nuances. They are also the primary method for reducing cognitive biases of prosecutors on a systemic, rather than individual, level. In fact, the TDCAA Training Subcommittee has urged the TDCAA to "develop appropriate training to educate prosecutors on research relating to cognitive bias and 'tunnel vision' and how to avoid mistakes attributable to these phenomena" (26).

The implementation of the TDCAA *Brady* training shortly after the highly publicized exoneration of Michael Morton, as well as the increase in Conviction Integrity Units both in Texas and across the nation, is illustrative of an important idea: public opinion informs how voters cast their ballots, which can lead to the election of prosecutors who are motivated to implement reform. Because of recent campaigns by nonprofit institutions such as the American Civil Liberties Union (ACLU) and Color of Change, the recent exposure of police violence against people of color, and increased propaganda for criminal justice reform in the media, more of the public's attention has been drawn to prosecutorial elections, making them more promising mechanisms for reform (Davis, "Reimagining" 6-7). The evolution of the public's opinion and knowledge is demonstrated by the recent elections of several "progressive prosecutors" in major counties across the nation, including José Garza in Travis County, Texas.[35]

[35] Other notable progressive prosecutors who have been recently elected in other states include: Kim Foxx – Cook County, IL, 2016; Larry Krasner – Philadelphia, PA, 2018; Dan Satterberg – King County, WA, 2007; Aramis Ayala – SA for Ninth Judicial Circuit of FL, 2016; and Rachael Rollins – Suffolk County, MA, 2018. (Davis, "Reimagining Prosecution")

Each of these progressive prosecutors ran on campaigns of sweeping reform, such as increasing transparency within the DA's office, reforming bail and plea deal systems, amending sentencing and charging policies, addressing socioeconomic and racial inequality, and ending mass incarceration (Davis, "Reimagining" 7-15). José Garza's campaign for DA was centered on a clear vision of reform and the public voice: "Together, our communities can reimagine our DA's office as one that respects the dignity of our communities of color, working families, and immigrants, and one that righteously delivers justice for survivors" (José Garza Campaign). His progressive and reform-minded platform, which included promises to implement an open-file policy, hold police officers accountable for misconduct, and investigate misconduct within the Travis County DA's office, allowed him to beat the incumbent, Margaret Moore, in the Democratic primaries in July of 2020 (José Garza Campaign).

Progressive prosecutors undoubtedly face challenges when they enter an arena with a culture as deeply rooted as that of the DA's office and the criminal justice system. They may face political pushback from legislatures, police departments, or interest groups, as was the case with Larry Krasner in Philadelphia and Kim Foxx in Chicago (Davis, "Reimagining" 23). Chief prosecutors must also limit most of their reforms to what their electorate will accept if they want to be reelected (Davis, "Reimagining" 23). They may also need to clean house in the DA's office and hire many new assistants whose visions align with theirs, which can be a difficult process (Davis, "Reimagining" 24). Ultimately, progressive prosecutors cannot expect to overhaul the system overnight; they need to be prepared for a slow-moving and difficult reform process (Davis, "Reimagining" 27). As long as they are prepared to overcome these challenges, however, they can bring about concrete improvements in the criminal justice system. According to some scholars, the "tough-on crime phase of our national politics…seems to be ending already," while

progressive prosecutors seem to be having more and more success running on "smart-on-crime" policies, instead (Hessick and Morse 1543).

Changing public opinion and the election of progressive prosecutors can effect positive change in many areas that need reform. Within the DA's office itself, progressive prosecutors can establish Conviction Integrity Units, implement open-file policies, require ethics training, and publish more data and information about their cases. These changes can help increase accountability in the DA's office by promoting transparency and instilling a more justice-oriented culture. Prosecutors who promote seeking justice over convictions can work to quash misconduct at its roots, not just in the DA's office but in the criminal justice system as whole. Furthermore, many progressive prosecutors have made efforts to be more aware of the actions of the law enforcement agencies they work with, which has the power to deter not just ethical violations but prosecutorial error that police and forensic misconduct can lead to.

Interdepartmental Strategies

While the above strategies are concentrated within individual branches of the government, some effective solutions may involve interdepartmental collaboration. For example, as an alternative to external discipline, Jason Kreag has suggested what he calls the *Brady* Violation Disclosure Letter. This strategy would entail statutory establishment by the legislature, implementation and oversight by the judiciary, and compliance by the DA's office.

Kreag's envisioned letter is a statement, issued by a court that finds an occurrence of misconduct, that outlines the violation and its effect on the case's outcome. The letter would be sent to all "stakeholders" in a particular case: the jury, attorneys, witnesses, investigators, victim, and their family. It would also be disclosed to any agencies involved, such the DA's office, the

office of public defenders, the police chief, and victims' rights agencies. The letter should be informative, including details about the case, who was involved, and the defendant's current state (322).

The disclosure letter's ultimate purpose is to create exposure and transparency surrounding prosecutorial misconduct. This is especially necessary considering how many cases of prosecutorial impropriety go unnoticed, especially those that do not lead to a wrongful or overturned conviction. By publicly exposing individual instances of wrongdoing, the strategy can bring attention to the broader issue of prosecutorial misconduct. This would contribute to public awareness and opinion, which could encourage further reform. It would also make quantifying misconduct and evaluating its deterrents easier.

A secondary purpose accomplished by the letter is proper vindication to the victims of misconduct. While some solutions, such as professional discipline, punish prosecutors, they do not redress prior attacks on the dignity and rights of the defendant (Kreag 314). However, the disclosure letter is a direct acknowledgement of the wrongdoing inflicted upon a victim and those close to them. Much like the strategy of sentence reduction, it prioritizes redress to a defendant over punishment of a prosecutor.

As with the reduction of a prison term, the disclosure letter is, according to Kreag, easily implementable due to its flexibility. It can easily be incorporated into habitual criminal proceedings by slightly altering existing statutes (325). Furthermore, the power to require its dissemination already falls within the scope of judges' authority (299). The letter would not place excess burdens on smaller jurisdictions that may be underserved or underfunded, as it is not costly to implement (340). A disclosure letter can also be flexible in its form; for example, a prosecutor could come forward on their own volition and publicly admit to wrongdoing,

eliminating the need for a letter to be drafted and sent (324). Most importantly, although Kreag focuses his suggestion on *Brady* violations, the scope of his proposed letter can easily be expanded to other forms of prosecutorial misconduct that warrant disclosure.

Although most strategies are separated by governmental branches, it is imperative that these sectors work together and collaborate in the implementation of each strategy. If, for example, the DA's office faces pushback from legislatures, or if the judiciary does not properly interpret or uphold new statutes, their reforms will be challenging or even useless to implement. Thus, the push toward misconduct and wrongful conviction reform must be cohesive and collaborative across the entire criminal justice system.

CONCLUSION

Obstacles to Reform

There are several factors that, if gone unaddressed, pose hindrances to preventing prosecutorial misconduct and wrongful convictions. For example, progressive prosecutors may face pushback from the agencies they work with against their agendas, particularly if those departments are less reform minded. Other hurdles are rooted in a lack of transparency; for example, a lack of data, particularly in disciplinary hearings, makes it "impossible to accurately assess the efficacy of the State Bar's discipline of prosecutors" (TDCAA Training Subcommittee 26).

The difficulty in definitively measuring the frequency of prosecutorial misconduct poses one of the biggest obstacles for reform. In order to understand the magnitude of prosecutorial misconduct, it is essential to be able to measure its frequency. Knowing how often malfeasance occurs is also necessary to know if reform is working. Exonerations as a metric can only help

highlight a few instances, usually the very worst instances, of misconduct. But there are many cases where prosecutorial misconduct occurs that have not resulted in exonerations and thus are unaccounted for. Without being able to factor in those cases, the field lacks an accurate estimate of frequency. Exonerations are granted for prosecutorial misconduct so infrequently – in Texas, just a handful per year, if any – that measuring the efficacy of implemented changes through overturned convictions is not very insightful with such small numbers and a high margin of error (National Registry of Exonerations).

A time lag in instances of wrongful convictions presents another issue. The average time that goes by between a conviction and an exoneration is about 11 years; for murder cases specifically, the average is 15 years (Gross, et al., "Government" 128). Because of the time that goes by before prosecutorial misconduct is usually revealed, it requires decades to determine whether certain reforms have decreased misconduct over time – at least for exonerations, which are the least subjective metric currently available (Gross, et al., "Government" 17). For example, The Michael Morton Act was only passed a few years ago, so evaluation of its efficacy, and that of other statutes like it, through available statistics does not reveal much credible evidence of reform. Therefore, an apparent decline in misconduct may simply reflect the fact that the malfeasance has not yet been exposed.

The Future of Criminal Justice

Despite the existence of obstacles, the future of criminal justice reform with respect to prosecutorial misconduct and wrongful convictions is promising. Many of the proposed solutions are feasible and, if implemented, could be very effective in targeting certain root causes of misconduct. The more solutions that are enacted, the more systemic issues can be addressed and

mitigated. Public opinion is incredibly important in securing many of these reforms, as voters elect the legislators, judges, and prosecutors who would be tasked with implementing them. Fortunately, the election of many progressive prosecutors, the increase of Conviction Integrity Units, the expansion of training, and the prominence of criminal justice reform in popular discourse signal that public opinion is moving in a direction to make this feasible. With the improvement of procedures and science, the collaboration of the branches of governments, and the evolution of public opinion, the near elimination of prosecutorial misconduct and subsequent wrongful convictions is possible and perhaps even probable.

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BIOGRAPHY

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Alizeh was an undergraduate writing consultant at the University Writing Center and a legislative intern during the 2019 Legislative Session at the Texas House of Representatives. After graduating, she will spend her gap year working at a law firm and plans to attend law school to pursue a career as a criminal or civil rights attorney.