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Prosecutorial Misconduct: Typologies and Need for Policy Reform

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Abstract

A gross manifestation of injustice within the criminal justice system, warranting policy development to correct, is the issue of prosecutorial misconduct. There are numerous reasons why misconduct occurs and oftentimes overlooked within the courts. Action must be taken to both prevent and rectify such wrongdoings committed by those whom are presumed to be the most virtuous of our justice system. Future policy action is paramount to the constitutionality of criminal proceedings and the abatement of prosecutorial misconduct in every capacity. The implementation of austere policies would positively influence all criminal defendants whom cross the threshold of a courthouse.

Keywords: courts, prosecutors, misconduct, wrongful convictions

Prosecutorial Misconduct: Typologies and Need for Policy Reform

> *One man committed a crime one man did not. One man was sentenced to ten days in jail, while one was sentenced to life in prison. One man spent five days in jail, while one spent twenty-five years in prison. Michael Morton was sentenced in 1988 to life in prison for the murder of his wife. Then in 2013, twenty-five years into his life sentence, DNA evidence exonerated the wrongfully convicted man. Ken Anderson was sentenced to ten days in jail for withholding exculpatory evidence in Michael Morton's case. He was released five days into a ten-day sentence. These two cases juxtapose the grave injustices that occur within a system that prides itself on the idyllic task of achieving justice for all.*

The scales of justice are imbalanced due to prosecutorial misconduct. Within the court system, the issue of wrongdoings perpetrated by state actors, mainly, prosecutors, is copiously prevalent. Prosecutorial misconduct is a significant problem within the criminal justice system that needs to be understood and admonished in order for justice officials to implement policies, regulations, and punishments to subsequently deter, rectify, and eradicate misconduct. The research presented identifies and discusses the typologies of misconduct, in order to uncover remedies to eradicate the ever-rampant issue of prosecutorial misconduct.

The prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape, nor innocence suffer" (*Berger v. United States,* 1935). Prosecutors hold an imperative role in the United States criminal justice system. With this great power comes great responsibility and, as a consequence, prosecutors are able to commit ethical violations in criminal proceedings oftentimes resulting in prosecutorial misconduct. There are multiple academic and legal definitions that effectively encompass a wholesome characterization of prosecutorial misconduct. Platania and Small (2010) define the act as any intentional use of illegal or improper methods to convict a defendant in a criminal trial. Browning (2014) states the act occurs when a prosecutor deliberately engages in dishonest or fraudulent behavior calculated to produce an unjust result.

Title 42 U.S.C. § 1983 of the Civil Rights Act was enacted as a means by which citizens could address civil wrongs perpetrated by state actors. This particular United States' Code states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

When the code states, “deprivation of rights, privileges, or immunities secured by the Constitution and laws,” it distinctly outlines the stipulations that can be considered violations by state actors, namely hereof, prosecutors. When considered together, these definitions enable the breadth of prosecutorial misconduct to be fully understood.

This issue can be examined first by evaluating the multiple types of prosecutorial misconduct in an effort to better understand the issue. Next, one should analyze the motivations of culpable prosecutors in order to comprehend why such acts are committed. Understanding the provocations of these rogue justice workers thoroughly exposes how such reprehensible acts are perpetuated. Then, by discussing the negative repercussions of such wrongdoings, the atrociousness of the issue is appropriately put into the perspective of reality. Finally, it is fundamental to outline both current procedures in place to negate misconduct as well as discuss the implementation of further policy measures to eradicate completely this serious matter within the criminal justice system.

Types of Prosecutorial Misconduct

There are five types of prosecutorial misconduct that encompass the majority of these cases, including misuse of broad prosecutorial discretionary power (Misner, 1996), withholding exculpatory evidence (Sullivan, 2015), using false or perjured testimony (Lucas, Graif, & Lovaglia, 2006), improper arguments (Platania and Small, 2010), and the introduction of false evidence (Lucas, Graif, & Lovaglia, 2006).

Misuse of Broad Prosecutorial Discretionary Power

First, it is important to note that prosecutors yield great power in the court system, as they have the discretion to decide which cases are tried in a court of law. This practice is known as prosecutorial discretion. Due to the high volume of crime that occurs within each jurisdiction, it is not feasible for prosecutors’ offices to charge each offender. As a result, prosecutors are given discretion upon which cases they choose to file charges. Further, the prosecutor’s authority is evident in bail hearings, grants of immunity, and in trial strategy (Misner, 1996). However,

prosecutors' influence on charging, bargaining, and sentencing is their most powerful function. Because of this, it is clear prosecutors play a pivotal role in the criminal justice process.

Within the courts, there have been countless attempts to formulate "a common law of prosecutorial discretion," which have proved unsuccessful (Misner, 1996). Three trends continue to promote the authority of the prosecutor. First, current criminal codes contain many overlapping provisions that the choice of *how* to characterize conduct as criminal has passed to the prosecutor (1996). Second, the increase in reported crime without a simultaneous increase in resources dedicated to the prosecution and defense of criminal conduct has resulted in a criminal process highly dependent upon plea-bargaining (1996). Third, the development of sentencing guidelines and a growth of statutes with mandatory minimum sentences have increased the importance of the charging decision since the charging decision determines the range of sentences available to the court (1996).

The misuse of prosecutorial discretion increases the likelihood of prosecutorial misconduct. Without a standard merit on how prosecutors choose which cases to pursue, prosecutors can theoretically choose cases to try founded on biased sentiments pertaining to a defendant's gender, race, class level, or any other arbitrary prejudices. This illogical system practiced by prosecutors disables outsiders to distinguish easily any rhyme or reason to sentencing, which allows for the proliferation of both unchecked prosecutorial power and prosecutorial misconduct.

Withholding Exculpatory Evidence

The second type of misconduct is the failure to disclose exculpatory evidence. This is also known as the *Brady* rule. This rule stems from the landmark Supreme Court case *Brady v. Maryland* (1963).

***Brady v. Maryland* (1963).** In this case, two men, Brady and Boblit were tried separately for the same murder. Both men were found guilty of murder in the first degree and were subsequently sentenced to death. At trial, Brady took the stand and admitted being an accomplice to the murder, but that Boblit committed the actual murder. However, in closing arguments, Brady's attorneys conceded that Brady was guilty of murder, but asked the jury to find him guilty without capital punishment. Despite the defense's plea for clemency, the jury found Brady guilty of first-degree murder and sentenced him to death. Prior to trial, unbeknownst to the defense and the jury alike, Brady's counsel had requested the prosecution

to release to the defense Boblit's extrajudicial statements. Several of the statements were shown to the defense, but one dated July 9, 1958, in which Boblit admitted to the actual homicide, was withheld by the prosecution. Brady's case was appealed all the way up to the highest court in the land. The Supreme Court held in *Brady v. Maryland* that the Constitution requires prosecutors to turn over to the defense exculpatory evidence.

Disclosing exculpatory evidence is now referred to as the *Brady* Rule, which requires the disclosure of exculpatory evidence that is material to the accused's guilt or punishment (Sullivan, 2015). *Brady*'s requirement for disclosure of exculpatory evidence extends beyond discovery of evidence that would necessarily establish the accused's innocence by showing that he could not have committed the crime, or that someone else did, in fact, commit the offense (2015). Withholding evidence is in a direct violation of due process. According to Jones (2010), the government's duty to disclose favorable evidence to the defense under *Brady v. Maryland* has become one of the most unenforced constitutional mandates in criminal law. The intentional or bad faith withholding of *Brady* evidence is by far the most egregious type of *Brady* violation and has led to wrongful convictions, near executions, and other miscarriages of justice (Jones, 2010).

Thompson v. Connick (2011). Another incidence of prosecutorial misconduct, in the form of a Brady violation, occurred in Thompson v. Connick (2011). The Supreme Court overturned a jury verdict from New Orleans that sentenced John Thompson to death in 1999. Within weeks of Thompson's execution date, it had come to light that the prosecution, led by district attorney Harry Connick Sr., hid a blood test among other evidence that would have exonerated the innocent man. The case was appealed to the Supreme Court. The Court then overturned the jury verdict, freeing the innocent man after fourteen years on death row.

Defendants in criminal proceedings have a constitutional right to the evidence that is both for and against proving his or her innocence. The suppression of evidence is often considered the most egregious form of prosecutorial misconduct (Sullivan & Possley, 2016).

Using False or Perjured Testimony

Using false or perjured testimony in trial is another type of prosecutorial misconduct. The courts have ruled that use of false testimony is a constitutional violation of due process. In *Mooney v. Holohan* (1935), it was questioned whether the defendant's due process was violated when

perjured testimony was knowingly used by the prosecution. In the case, the Court ruled on what nondisclosure by a prosecutor violates due process:

> …if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

In this opinion, the Court laid the foundation for the argument that a prosecutor's knowing use of false testimony is a violation of due process, and therefore unconstitutional. False or perjured testimony can deceitfully sway a judge and/or jury by misleading these deciding entities about the facts of the case. This is a significant issue, as it is an imperative aspect of the criminal justice system that cases are decided truthfully and justly.

Improper Arguments

Another type of prosecutorial misconduct is the improper argument in opening and closing statements at trial. This misconduct refers to a prosecutor’s use of certain types of arguments such as asserting facts not in evidence, misstating laws, vouching for the credibility of a witness, and mischaracterizing evidence. Prosecutorial misconduct also includes discrimination in jury selection, interference with a defendant’s right to representation, improper communications with a judge or juror, improper use of the media, and failure to train subordinates, maintain systems of compliance, and failure to report a violation of the rules of professional accountability. According to Platania and Small (2010), prosecutorial misconduct in the form of improper closing arguments has been identified as a leading cause of unfairness in capital trials. For example, prosecutors and other public officials exploit the victims of crime and the death penalty for political gain by stirring up and pandering to fears of crime as part of their strategy urging death sentences, prosecutors portray mentally ill defendants’ demeanor as “flat” or “unremorseful,” tapping into popular fear and ignorance of mental illness (Perlin, 2016). Misconduct in the form of improper prosecutor argument is likely to mislead the jury not only about its role but also about the possible consequences of its choices.

The Introduction of False Evidence

The introduction of false evidence is another approach that prosecutors use to commit misconduct. An example of misconduct involving the introduction of false evidence is *Napue v. Illinois* (1959).

***Napue v. Illinois* (1959).** In this case, Napue was convicted of murder and the state's key witness was an accomplice to the crime, who was already serving a 199-year sentence for the same murder. The witness testified that he had received no promise of reduced sentence for his testimony against the defendant. However, the assistant state attorney trying this case did in fact assure a lesser sentence for the witness's falsified testimony. In the *Napue* decision, the Supreme Court held that the Constitution prohibits prosecutors from introducing false evidence, including false testimonies and it also requires the prosecution to correct falsehoods.

In one of the most noteworthy Supreme Court cases regarding prosecutorial misconduct, *Berger v. United States* (1935), Supreme Court Justice George Sutherland outlined several different instances of this type of prosecutorial misconduct in his opinion as,

> …that the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.

Justice Sutherland's opinion is an effectual characterization of what constitutes this type of prosecutorial misconduct. While this type of misconduct can occur in many different propensities, it is important that types are distinguished in court opinions in order for precedent to be set for future instances of wrongdoings by court actors.

These typologies, shown in Table 1: Typologies of Prosecutorial Misconduct, are only a few of the many facets of prosecutorial misconduct that can, and have, occurred in existent court cases within the United States criminal justice system. Each case in which prosecutorial misconduct has occurred is unique in and of itself.

Table 1: Typologies of Prosecutorial Misconduct

Type of Misconduct	Outcome	Relevant Cases
Broad Prosecutorial Discretionary Power	Influences who faces charges and for what crime(s), who receives a plea bargain, and the potential sentence served in response to charges filed	
Withholding exculpatory evidence	Direct violation of due process of law; may lead to wrongful conviction, near executions, and other miscarriages of justice	*Brady v. Maryland* (1963) *Thompson v. Connick* (2011)
False or perjured testimony	Constitutional violation of due process when perjured testimony is knowingly used by the prosecution	*Mooney v. Holohan* (1935)
Improper arguments	Leading cause of unfairness in capital trials; exploits the victims of crime and the death penalty for political gain	
Introduction of false evidence	Creates gross manifestations of injustice by clearing guilty offenders and violates due process during trial	*Napue v. Illinois* (1959) *Berger v. United States* (1935)

The facts of each case differ; however, the common themes, as well as prosecutor's underlying motivations, remain similar in nature.

Motivations

There are many factors that motivate prosecutors to commit acts of misconduct, including pressure to convict (Platania & Small, 2010), failure to report (Grier, 2006), and lack of discipline (Sullivan & Possley, 2016). These motivations result in an increased risk of the occurrence of prosecutorial misconduct.

Pressure to Convict

According to Platania and Small (2010), the pressure to engage in misconduct in order to secure a conviction and subsequent death sentence is often related to the likelihood that misconduct will occur. A study conducted by Lucas, Graif, and Lovaglia (2006) found the results of a controlled laboratory experiment supported the theory that the personal importance of a conviction for prosecutors of severe crimes combines with a stronger perception of the guilt of

defendants in serious cases; this combination encourages greater misconduct in the prosecution of severe crimes. Prosecutors' offices feel pressure from the media and society at large to secure a conviction in especially high-profile cases. A possible explanation to understand pressure to convict is related to the fact that most prosecutors are elected to their position. High-profile cases often illicit increased media exposure. Voters are more likely to re-elect a prosecutor whom the public perceives as "tough on crime." To validate this claim, studies indicate that prosecutors are more likely to take cases to trial, and less likely to offer plea bargains, when running for re-election (McCannon, 2013). Pressure to convict at nearly any cost can result in a wrongful conviction due to prosecutorial misconduct.

Failure to Report Misconduct

Failure to report misconduct to the proper disciplinary entities is a significant issue surrounding prosecutorial misconduct. American Bar Association Model Rules of Professional Conduct Rule 8.3(a) holds lawyers accountable for reporting another attorney's misconduct:

> A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Even though the American Bar Association (ABA) has rules against unethical behavior, a lack of reporting has resulted in very few punishments in these cases. Often, prosecutors who break the rules are rarely – if ever – reported to the ABA. Despite the rules, the common practice is that few lawyers come forward. Many times, fellow lawyers are concerned that filing a grievance will result in "career suicide" (Grier, 2006). Fears related to reporting misconduct are largely due to the culture of the legal community, which fosters the idea that attorneys look out for other attorneys. While this comradery is conducive to an amiable work environment, it does not ensure that justice will prevail. Reporting misconduct is paramount to the abatement of misconduct. The ABA Comment to Rule 8.3 cited that reporting is necessary because "an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." In other words, one known instance of misconduct can be an indicator of past and/or future misconduct. Only a disciplinary investigation into misconduct claims can gauge the full extent of a prosecutor's wrongdoings.

Failure to Punish

A third cause of prosecutorial misconduct is the failure to employ sanctions against those who are found to have committed ethics violations. The failure to punish prosecutors who engage in misconduct is not a recent phenomenon. Prosecutorial misconduct appears to often go unpunished, even after it is identified. According to Sullivan and Possley (2016), a survey of alleged prosecutorial misconduct in more than 11,000 criminal proceedings found 2,000 cases where the appellate courts reduced sentences, dismissed charges, or vacated convictions. However, the courts disciplined prosecutors only forty-four times in the cases reviewed. Another study of criminal prosecutions by the Department of Justice found 201 cases where federal prosecutors acted improperly, but in review of bar records could only locate a single instance where a federal prosecutor was disbarred in the last twelve years (Sullivan & Possley, 2016). A more recent study shows that very few ethical rules are enforced against any type of lawyers. State lawyer disciplinary agencies reported 118,891 complaints concerning alleged lawyer misconduct. Only about five percent of all complaints result in any sanctions against lawyers (Grier, 2006).

Further, even when prosecutorial misconduct is known by disciplinary agents, the entities are poorly equipped to conduct and enforce disciplinary sanctions. Even though all states have adopted disciplinary rules that forbid prosecutors from suppressing exculpatory evidence or falsifying evidence, prosecutors who engage in this proscribed behavior are sanctioned infrequently—if at all. The Department of Justice's Office of Professional Responsibility, tasked with overseeing federal prosecutors and other agents, began investigations in only 9 percent of the 4,000 complaints filed against officials in the last twenty years (Sullivan & Possley, 2016). Further, a mere 4 percent of those were determined to have merit, and the Office of Professional Responsibility provided little disclosure about what punishments it applied. Courts and ethics bodies rarely sanction prosecutors, and the rare disciplinary measures tend to be mere slaps on the wrist (2016). Without fear of punishment, there is little incentive to discontinue unethical acts, especially when the advantages of committing misconduct (ex: securing a conviction in a high-profile case) outweigh the disadvantages (ex: a small sanction or "slap on the wrist").

It is imperative to understand the types, causes, and prevalence of prosecutorial misconduct in order for effective policy reform to occur. Defendants such as Brady, Thompson, Napue, and others have been severely and negatively affected by prosecutorial misconduct. These

defendants, and other victims of a corrupted justice system, possess similar attributes. They are often minorities, of lower socioeconomic status, and/or mentally incompetent. These populations, who often need the most protection in a society gauged against them, are the most likely to be manipulated and prejudiced against by the criminal justice system. The motivations for prosecutorial misconduct, summarized in Table 2, exacerbate the risks for those facing criminal charges and potential conviction.

Table 2: Motivations for Prosecutorial Misconduct

Motivation for Misconduct	
Pressure to convict	• Risk of appearing "soft on crime" may prevent re-election • Risk increases with media exposure of high-profile cases
Failure to report misconduct	• Reporting misconduct of a colleague may result in "career suicide" • Comradery creates amiable working conditions but does not address misconduct
Lack of consequences	• Prosecutors who are reported often do not receive sanctions • Courts are more likely to reduce sentences, dismiss charges, or vacate convictions of prosecutors found guilty of misconduct

The implications of such egregious acts by the most esteemed of the justice system drastically affect the lives of those whose constitutional right to due process has been impeded.

Repercussions of Prosecutorial Misconduct

The reality of prosecutorial misconduct is clear, while the repercussions are bleak. Marvin Anderson, one wrongly-convicted individual, discussed how it felt to be exonerated:

> I can remember my first day coming home from prison, I sat up and watched the sun come up that morning. And you see the sunlight every morning rise in prison, but to actually feel it, you know, as a free man outside of the fences it was a totally different experience. And the whole time I am watching it come up I am saying I'm free, I am truly free (West & Meterko, 2016).

This is a testimony to the reality of how actual people are negatively affected by the injustices of a system fixated on convictions more than justice itself is.

The negative aftermath of prosecutorial misconduct is both severe and palpable for those affected first-hand by the transgressions. By putting its prevalence into proper perspective, one can better grasp the reality of the affects committing such acts can have on the victims of misconduct.

Since 1973, there have been 157 death row exonerations; that is approximately one exoneration for every ten executions (Givens, 2017). Most of these exonerations are due in large part to improved DNA testing (West & Meterko, 2016). According to West and Meterko, the wrongly convicted spent, on average, fourteen years in prison for crimes they did not commit. During those years, they lost time with loved ones, opportunities for education and work experience, and endured the daily dehumanization and violence of prison life. Because of this, the process of successfully reintegrating into society after incarceration is difficult. Further, studies have shown that individuals who were wrongfully convicted adopt coping strategies to survive in prison, and struggle with anxiety, depression, and Post-Traumatic Stress Disorder (2016).

Another consequence of wrongful conviction is the likelihood of the exonerated persons offending once being released on proof of innocence. According to Shlosberg, West, and Callaghan (2014), failure to expunge an exoneree's record is associated with a significant increase in the risk of post-exoneration offending, which is consistent with labeling theory. This theory contends that an individual who has been labeled has a transformation of identity (2014). Ex-offenders face certain challenges including securing employment and participating in conventional society due to the negative label of "ex-convict". These obstacles increase the likelihood of offending. This is significant, because even when the wrongly convicted may not have been an offender before conviction, now he or she has an increased likelihood of becoming an offender as a result of the injustice inflicted upon them.

Another important repercussion to note is when a person is wrongly convicted of a crime; the actual perpetrator of the crime goes unpunished and is free to commit more offenses. This increases victimization rates. As a result, victims and their families suffer avoidable crimes. Research has shown based on convictions for subsequent violent crimes, sixty-eight perpetrators whose crimes went apprehended went on to commit 142 violent crimes (West & Meterko, 2016). Further, of these, seventy-seven were rapes, thirty-four were homicides and thirty-one were other violent crimes (e.g., armed robbery, attempted homicide) (2016). These statistics are terrifying when put into context of real-life victims who were needlessly harmed by

a repeat offender who was not convicted of a prior crime due to the ineffectiveness of a criminal justice system.

As demonstrated above, there are explicit consequences to prosecutors' actions inside and outside the courtroom. It is crucial to address the motivations of prosecutors by way of policy reform. By employing safeguards to prevent unethical attorneys' ability to practice law, misconduct can be avoided, therefore, precluding undue hardship on criminal defendants. It is equally key to develop a legal environment in which prosecutors are not tempted to commit unethical acts for underlying reasons. Additionally, it is vital to reprimand guilty parties with implementation of strict punishment clearly defined in operative policy. Effective policy implementation is crucial to protecting all defendants, and their constitutional rights, upon entrance into the criminal justice system. Policy reform in this area will undoubtedly have positive implications for not only the court system, but the criminal justice system as a whole.

Policy Proposals

The sole path to complete eradication of prosecutorial misconduct is through policy reform. Without development and implementation of improved policies, the criminal justice system will continue to be plagued by gross miscarriages of injustice. Policy reform must be done swiftly in order to protect future criminal defendants from undue hardship. There are multiple remedies in which can be introduced into the court system as to better prevent misconduct and subsequently protect criminal defendants. These solutions include judicial responsibility (Sullivan & Possley, 2016), increased punitive sanctions (Grier, 2006), and compensation for exonerees (West & Meterko, 2016). Table 3: Recommended Policy Reforms, highlights each of the proposed recommendations.

Table 3: Recommended Policy Reforms

Proposed Policy	Recommendation
Judicial responsibility	• Trial judges enter pretrial orders that provide for full compliance with prosecutor's obligation to produce exculpatory evidence • Trial judges recognize when misconduct occurs • Trial judges take steps to rectify misconduct
Increased punitive sanctions	• Assign independent investigators to review grievances • Multiple incidents of misconduct should prevent prosecutors from trying capital cases

	• Prosecutors who tried cases where the convicted is later exonerated should face criminal charges
Compensation for exonerees	• Provide those wrongfully convicted with the tools and resources to seek compensation in those states where legislation does not exist

Proper implementation of these strategies will undoubtedly resolve the issue at hand.

Judicial Responsibility

One proposed reform to the rampant issue of prosecutorial misconduct is the solution of trial court judges complying with their obligations to report serious lawyer misconduct to disciplinary authorities (Sullivan & Possley, 2016). According to Sullivan and Possley, trial judges get to know many of the prosecutors who practice before them and learn which ones are inclined to push or cross the limits of acceptable behavior. This allows judges to keep a strict eye on those prosecutors most likely to commit misconduct. District court judges are in a better position than the appellate courts to ensure that a prosecutor properly fulfills the duties and obligations of his or her office, as trial court is where issues of prosecutorial misconduct are the most likely to occur. However, personal relationships may make it difficult to report to disciplinary authorities (2016). Judges' compliance, despite personal relationships with attorneys, is crucial, however. As noted by Sullivan and Possley, while the silent judge may have integrity, consider the price of the judge's silence: the unreported offensive conduct will continue to infest the legal system. Judges should demonstrate the responsibility to take action and thereby protect the court system they serve.

To effectively implement the solution of judicial accountability, the criminal justice system must take measures to ensure such duties are being observed. The typical approach by courts reviewing claims of prosecutorial misconduct is to determine (1) whether the conduct violated an established rule of trial practice, and if it did, (2) whether that violation prejudiced the jury's ability to decide the case on the evidence (Gershman, 1998). However, additional measures should be taken to prevent unethical acts from occurring within the courtroom.

First, trial judges should enter pretrial orders that provide for full compliance with prosecutors' obligations to produce exculpatory evidence, and that contain quickly available sanctions for non-compliance. This role possessed by trial judges is crucial to ethical proceedings, as it idealistically prevents misconduct from initially occurring. Trial judges have the power to require

prosecutors to make pretrial production of exculpatory evidence as required by the *Brady* Rule. This rule imposes what may be a distasteful obligation to prosecutors—to provide the defense with witnesses and evidence that undermine the prosecution's case—and hence the temptation to grasp for reasons for non-disclosure may be strong (Sullivan & Possley, 2016).

Next, court judges must competently recognize when misconduct has or does occur. Judges must keep a keen watch on attorneys that come before them at every point in the trial process to ensure they are strictly adhering to all ethical guidelines. Judges' first and foremost responsibility while serving on the bench is to see that justice is done. An important aspect of this duty is to ensure prosecutors are complying with their own ethical duties as servants of justice.

Third, when judges recognize misconduct occurring, they must take the proper steps in order to rectify the violations. Judges have an ethical duty to consider whether the matter requires him to inform the appropriate disciplinary authority or take other action (2016). For example, in *United States v. Wilson* (1998), potential disciplinary remedies available to trial courts were outlined:

> On the matter of professional misconduct of prosecutors, the realities require that we defer to our colleagues in the district courts to take the lead. The district courts have many potential remedies available: (1) contempt citations; (2) fines; (3) reprimands; (4) suspension from the court's bar; (5) removal or disqualification from office; and (6) recommendations to bar associations to take disciplinary action.

This proposed solution does not request that judges hold themselves to a higher standard; it simply calls for judges to hold prosecutors to a higher standard. If trial judges comply with the mandatory provisions of the Code of Judicial Conduct, they will help rid the judicial system of delinquent prosecutors and increase the fairness of the system as a whole. This is an important policy reform, but as discussed, recommendations are not being followed, especially by trial court judges. Judges must view their responsibility as a justice overseer sincerely enough to value righteousness over amity.

Increased Punitive Sanctions

While judicial responsibility to recognize and subsequently identify disciplinary agencies of misconduct is important to honorable court proceedings, the idea of increased severity in sanctions is imperative, due to its both preventative and retributive effects.

The leniency on prosecutors can be seen in the number of private versus public punishments. One study found that private sanctions are imposed almost twice as often as any other type of sanction (Grier, 2006). Lawyers often receive several private warnings before they are disciplined publicly. Even if a lawyer is suspended, the length of the suspension is often so brief that it does not interrupt a lawyer's practice (2006). Without threat of severe punitive action, attorneys are unlikely to be deterred from acting unethically. Current punitive measures can include public sanction, suspension, disbarment, and/or loss of license and employment. It can be argued that these measures can be effective; however, they should both be better enforced and increased in severity.

The first step that should be taken to increase punitive measures is to have independent investigators to look into the grievances (Grier, 2006). If people outside of the law profession investigated claims of misconduct, more lawyers may be disciplined or receive harsher sanctions (2006). Fellow lawyers may understand the pressures of the profession, and they may be more lenient in the punishment phase of an investigation. Secondly, prosecutors who commit misconduct more than once should be prohibited from trying death penalty cases (2006). Capital punishment cases are quite literally life or death situations and a mistake, purposely committed or not, could cost an innocent defendant his life. Until repeat offenders change their unethical habits, they should not be placed in a position where an innocent person could be executed. Thirdly, prosecutors in criminal trials who commit ethical breaches, such as *Brady* violations, that lead to an innocent person being convicted should be held criminally liable (2006). Violators of ethical guidelines should be held, not only civilly liable, but criminally as well. An unprecedented case of criminally charging a prosecutor for withholding exculpatory evidence, occurred in 2011 in Texas. Ken Anderson, who prosecuted Michael Morton in 1987, pleaded no contest to felony charges of criminal contempt of court, resulting in a short jail sentence (ten days), and forfeiture of his law license (Colloff, 2013). These acts are as egregiously criminal as the charges brought against the defendant prosecutors are attempting to convict and should be treated as such. Further, such as “tough on crime” initiatives in which decrease the crime rates due to their detrimental effect, an increase in the severity of sanctions against guilty court officials will likely cause a decrease in misconduct occurrences.

Effective disciplinary measures are vital, not only in rectifying injustices committed by prosecutors, but also in dissuading other prosecutors from committing similar unethical behaviors. The effect of strict disciplinary proceedings is twofold: harsh sanctions both punish

guilty perpetrators of injustice as well as serve as a warning to other attorneys who may be tempted to stray from the ethical path.

Compensation for Exonerees

Both judicial responsibility and increased putative sanctions are imperative measures that should be employed to prevent future misconduct from initially occurring and prevent unethical prosecutors from committing further offenses. However, there also needs to be policy implemented to rectify the criminalities perpetrated upon wrongfully convicted, innocent defendants; of whom, have on average spent fourteen years in prison for crime they did not commit (West & Meterko, 2016). While no amount of money can truly compensate exonerees for the time lost and pain experienced during such an unimaginable ordeal, but it can assist in rebuilding the lives lost to injustice in a dignified manner. Issues such as homelessness, joblessness, and untreated medical conditions are created and/or exacerbated by wrongful conviction. Monetary compensation and support services help exonerees face the challenges of reentry after incarceration.

According to West and Meterko (2016), there are three ways in which exonerees are generally compensated: through state statutes, private bills, and/or civil suits. Statistically, seventy-three percent of exonerees have been awarded some type of compensation (2016). Of those who were awarded compensation, state statute compensation was the most common type at fifty-six percent, followed by civil suit awards at forty-four percent, and private bills at eleven percent (2016).

First, in states with compensation statutes, qualifying exonerees are automatically awarded compensation in accordance with the law (West & Meterko, 2016). The federal government and more than thirty states have compensation statutes written into law. For example, in New Hampshire, compensation is capped at $20,000. In Texas, however, exonerees are entitled to $80,000 per year of wrongful incarceration, plus an annuity of $80,000 per year until death, and other social benefits.

Kansas Governor Jeff Colyer recently signed House Bill 2579 making Kansas the 33rd state to “enact a wrongful conviction compensation statute” (Carpenter, 2018), following the exoneration of Floyd Bledsoe in 2015 and Lamonte McIntyre and Richard Jones in 2017. The three men each spent from 16 to 23 years in prisons operated by the Kansas Department of Corrections

for violent offenses they did not commit. The bill would include financial compensation, health insurance, college tuition, housing assistance, and other social services as necessary for an individual to rebuild his or her life following the wrongful conviction. In addition, the bill would provide individuals "$65,000 for each year incarcerated for that conviction and $25,000 for each year wrongfully served on parole, probation or on a sex offender registry" (2018). The bill indicates that "payments are not subject to state or federal taxation" and exonerees are provided a "'certificate of innocence and expungement' designed to formally clear their names" (2018). This legislation is referred to as the gold standard by advocates, and one that should be enacted by all states.

In states without compensation statutes, the legislature may consider a private bill to compensate one individual victim of wrongful conviction (West & Meterko, 2016). For example, Georgia has no compensation statute, so when Clarence Harrison was exonerated in 2004, after serving more than seventeen years for a rape he did not commit, he was forced to lobby the state government for compensation. While bill enactment is better than no compensation at all, this route to compensation is difficult and further exploits already abused victims of government.

The last option available to exonerees is to file a civil suit for compensation. Wrongfully-convicted persons may file this type of suit if there were civil rights violations in the case. It is important to note, however, that this is not a guaranteed route to compensation and the process can be expensive, time consuming, and stressful.

There have been multiple Supreme Court opinions that touch on this issue. For example, in *Thompson v. Connick* (2011), while the Supreme Court overturned the jury verdict, they did not award the defendant civil damages for being the victim of Connick's misconduct. Justice Bader-Ginsburg dissented this decision, divided 5 – 4 by saying:

> John Thompson spent fourteen years isolated on death row before the truth came to light. He was innocent of the crimes that sent him to prison and prosecutors had dishonored their obligation to present the true facts to the jury… I would affirm the judgment of the U. S. Court of Appeals for the Fifth Circuit. Like that court and, before it, the District Court, I would uphold the jury's verdict awarding damages to Thompson for the gross, deliberately indifferent, and long-continuing violation of his fair trial right.

Unfortunately, for both Thompson and future precedent, the Supreme Court denied the right to civil damages for such an egregious Constitutional violation. It can be hoped that in future cases of similar fact, the Court chooses to forge new precedent by awarding monetary compensation for undue wrongs committed against innocent citizens. Ultimately, however, it is crucial that all states enact statutes that appropriately compensate victims of injustice for their time and suffering during unjust justice processes.

The implications of such a policy implementation are clear. First, it would shed light on issues of prosecutorial misconduct. In turn, prosecutors would experience pressure from colleagues, legislatures, and taxpayers to approach cases and trials with due diligence rather than engaging in misconduct to ensure a conviction. Second and most important, wrongful conviction policies would improve the quality of life and ease the exoneree's reentry into the free world.

Conclusion

The implications of the prescribed policy proposals are significant. If the criminal justice system as a whole condemns prosecutorial misconduct and collectively works toward a solution, the issue will likely see a decrease in its prevalence. The culture among attorneys and judges is typically one of comradeship, where lawyers look out for other lawyers. While this is conducive to a pleasant work environment, it also allows misconduct to flourish. If attorneys communally take a stand against misconduct and refuse to aid and abed unethical attorneys, the system as a whole will benefit significantly.

Within the system, criminal defendants will drastically benefit from policy reforms in this area of the criminal justice system. For example, awarding those wrongly convicted due to injustices perpetrated by the justice system would significantly improve their quality of life. Further, defendants on trial for capital cases, will no longer be wrongfully sentenced to death. This alone deems the policy suggestions vital to improving the court system. If even one innocent person is saved from either death or wrongful imprisonment, the policy implementations can be judged successful.

As Sir William Blackstone, a prominent judge of the eighteenth century, stated over two hundred years ago, "better that ten guilty persons escape than one innocent suffer." The forefathers of the United States had the idea for a nation that presumed the accused are innocent until proven guilty and that each citizen has the right to due process and a fair trial so that no unjust

hardships occur to those wrongly accused. These principle ideals have become reversed in the eyes of those prosecutors who believe that conviction is the paramount goal, rather than protecting the innocent. In some respects, the United States' criminal justice system is one that is broken and overrun with corruption and injustice. This system needs to be reexamined and redefined in order to properly administer justice, regardless of the defendant's guilt or innocence. The criminal justice system should strive to protect the innocent and convict the guilty. As famously stated in *Berger v. United States* (1935), "the primary duty of a prosecutor is not that he shall win a case, but that justice shall be done."

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