



# RUTGERS LAW RECORD

*The Digital Journal of Rutgers Law School*  
[lawrecord.com](http://lawrecord.com)

Volume 47

2019-2020

---

## FREE OF CHARGE: AN ANALYSIS OF ABSOLUTE IMMUNITY IN PROSECUTORIAL MISCONDUCT

PAULINA DEARAUJO<sup>1</sup>

### I. Introduction.

A prosecutor is considered to be a position of power in the American criminal justice system.<sup>2</sup> The primary duty of a prosecutor is to “seek justice within the bounds of the law, not merely to convict”.<sup>3</sup> Essentially, a prosecutor has the duty to ensure that innocent people are not convicted nor punished and thus, guarantees that justice is served.<sup>4</sup> To perform this burdensome but powerful task requires each prosecutor to exercise discretion and use independent judgment to make decisions.<sup>5</sup> Therefore, the power given to a prosecutor to make these important decisions is often immense and

---

<sup>1</sup> J.D. Candidate 2020, Rutgers Law School; B.S. Accounting, Stockton University. Special thanks to my mother Ana Fedorczyk and fiancé Michael Nycz for their unconditional love and support.

<sup>2</sup> Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 DROIT ET CULTURES 55, 55-60 (2005).

<sup>3</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (AM. BAR ASS'N 1981) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”).

<sup>4</sup> Bennett L. Gershman, *The Prosecutor's Contribution to Wrongful Convictions*, IN EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 109 (Allison D. Redlich et al., eds. 2014).

<sup>5</sup> Brue Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 77 (2016).

unrestricted.<sup>6</sup> For example, prosecutors have discretion in who to charge, what to charge them with, the number and severity of the charges, and whether to extend a plea-bargain.<sup>7</sup>

However, since the 1990s, prosecutors around the country have come under fire for misusing or abusing the power of prosecutorial discretion.<sup>8</sup> Recently, the public has focused on how prosecutorial misconduct may result in convicting an innocent person and therefore, contributing to wrongful conviction rates.<sup>9</sup> Prosecutorial misconduct can take many forms, such as withholding evidence, purposefully delaying the trial, or not giving the defense proper time to prepare their case.<sup>10</sup> However, the current procedures in place are weak and ineffective as it relates to reprimanding a prosecutor for abusing that discretion or breaking rules.<sup>11</sup> Prosecutorial misconduct is defined as any conduct which violates court rules or ethical standards of a practicing attorney<sup>12</sup> and does not include good-faith errors.<sup>13</sup> All prosecutors across the United States have immunity for acts done within the scope of their employment.<sup>14</sup> Therefore, unless a state has adopted legislation to strip prosecutors of their absolute immunity, there is generally no liability or penalty for prosecutorial misconduct.<sup>15</sup> In cases where a prosecutor commits misconduct, the state is in charge of reprimanding the prosecutor.<sup>16</sup> The American Bar Association (ABA) has guidelines and model rules that states can choose to adopt

---

<sup>6</sup> *Id.* at 52. In the past, public discourse in the media and court system typically considered prosecutorial misconduct the misdeeds or a “few bad apples” and considered only intentional acts rather than abuse of discretion. *Id.*

<sup>7</sup> See generally Stephanos Bibas, *The Need for Prosecutorial Discretion* (U. Pa. Faculty Scholarship Paper 1427, 2010), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2428&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2428&context=faculty_scholarship).

<sup>8</sup> Green & Yaroshefsky, *supra* note 5, at 52.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See generally H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51 (2013).

<sup>13</sup> *Id.* at 90.

<sup>14</sup> See generally Frederick Block, *Let's Put an End to Prosecutorial Immunity*, THE MARSHALL PROJECT (March 13, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity>.

<sup>15</sup> Peter Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 426 (2006). Currently, no states have implemented such a rule. *Id.* On the federal level, qualified immunity is lost only in extreme cases, such as when the prosecutor knew or should have known that his or her conduct violated a clearly established constitutional or statutory right. *Id.* at 426 n. 136.

<sup>16</sup> *Id.* at 401.

to hold prosecutors accountable.<sup>17</sup> It is uncommon to hear of a prosecutor being sanctioned or reprimanded for any type of misconduct.<sup>18</sup>

Recently, prosecutors have come under heat from the public and media as a result of numerous cases where a prosecutor's actions have led to a wrongful conviction.<sup>19</sup> Additionally, a significant percentage of wrongful convictions cases have shown that prosecutorial misconduct played a part.<sup>20</sup> Interestingly, Texas previously had one of the highest wrongful conviction rates and is currently leading the country in exoneration rates.<sup>21</sup> New Jersey, on the other hand, has one of the lowest wrongful conviction rates in the country.<sup>22</sup> Although these states vary in size, they also have different procedures and prosecutorial cultures.

This note will discuss how prosecutorial misconduct contributes to wrongful conviction rates and how this problem can be alleviated. First, this note will consider how prosecutorial misconduct contributes to wrongful conviction rates generally. Second, this note will focus specifically on instances of prosecutorial misconduct in Texas, examining its wrongful conviction rate and how Texas is currently reforming and implementing new laws to prevent future wrongful convictions. Third, this note will discuss New Jersey's prosecutorial misconduct, wrongful conviction rates, and if the system currently in place prevents prosecutorial misconduct. Fourth, this note will compare the two states and further discuss what factors contribute to wrongful convictions caused by prosecutorial

---

<sup>17</sup> *Id.*

<sup>18</sup> *See generally* *Misconduct and Punishment: State disciplinary authorities investigate prosecutors accused of misconduct*, CENTER FOR PUBLIC INTEGRITY (June 26, 2003), <https://publicintegrity.org/politics/state-politics/harmful-error/misconduct-and-punishment/>.

<sup>19</sup> GERSHMAN, *supra* note 3.

<sup>20</sup> JoAnne Musick, *Texas Trifecta and Prosecutors' "Win At All Costs" Tactics*, MIMESIS LAW (Nov. 10, 2016), <http://mimesislaw.com/fault-lines/texas-trifecta-and-prosecutors-win-at-all-costs-tactics/14134>.

<sup>21</sup> Samuel Wiseman, *Innocence After Death*, 60 CASE W. RES. L. REV. 687, 719-721 (2010) (discussing the failure of current exoneration procedures, despite introduction of new bills providing for post-sentencing DNA testing); *See also* *Exonerations by State, Year*, NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Dec. 21, 2019).

<sup>22</sup> *ACLU-NJ Report Finds Gaps in Prosecutorial Accountability*, ACLU OF NEW JERSEY, <https://www.aclu-nj.org/theissues/criminaljustice/proscondreport> (last visited Oct. 21, 2019).

misconduct. Last, this note will consider what changes can be executed to cease prosecutorial misconduct from contributing to wrongful convictions.

## **I. Prosecutorial Misconduct Contributing to Wrongful Conviction Rates in America.**

It is not uncommon to hear a story of innocent people being convicted of horrific crimes. Such a story is exemplified by the case of Mark Sodersten, who was convicted and found guilty of a murder he did not commit.<sup>23</sup> Here, the prosecutor withheld exculpatory evidence, consisting of audiotapes that likely would have proved his innocence and exonerated him.<sup>24</sup> Due to the prosecutor's conduct, Sodersten spent twenty-five years in prison and died before his conviction was reversed.<sup>25</sup> Additionally, John Thompson served eighteen years in prison for murder and was placed on death row.<sup>26</sup> Similarly, the prosecutor in Thompson's case withheld forensic evidence that proved categorically that Thompson was innocent of the crime he was being tried for.<sup>27</sup> Also, in a high profile instance, Senator Ted Stevens was indicted for fraud and the prosecutor failed to disclose exculpatory evidence which would have aided the late Senator.<sup>28</sup> The Senator was finally exonerated two and a half years later, and the indictment was dismissed.<sup>29</sup> These small sample of cases illustrate the detrimental and life-altering effects prosecutorial misconduct can have. Although these types of stories may seem like a rare occurrence, there are many cases of prosecutorial misconduct that often go unreported or are classified by the courts as "harmless error" rather than "harmful error".

---

<sup>23</sup> Mark Curriden, *Harmless Error? New Study Claims Prosecutorial Misconduct is Rampant in California*, THE ABA JOURNAL (Dec. 1, 2010: 7:14 AM), [http://www.abajournal.com/magazine/article/harmless\\_error\\_new\\_study\\_claims\\_prosecutorial\\_misconduct\\_rampant](http://www.abajournal.com/magazine/article/harmless_error_new_study_claims_prosecutorial_misconduct_rampant); *See also* In re Sodersten, 53 Cal. Rptr. 3d 572, 576 (Ct. App. 2007).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Connick v. Thompson, 563 U.S. 51, 52-53 (2011).

<sup>27</sup> Sam Roberts, *John Thompson, Cleared After 14 Years on Death Row, Dies at 55*, THE NEW YORK TIMES (Oct. 4, 2017), <https://www.nytimes.com/2017/10/04/obituaries/john-thompson-cleared-after-14-years-on-death-row-dies-at-55.html>.

<sup>28</sup> Carrie Johnson, *Report: Prosecutor Hid Evidence In Ted Stevens Case*, NPR (March 15, 2012: 5:56 PM), <https://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case>; *see also* United States v. Stevens, No. 08-cr-231(EGS), 2009 WL 6525926, at \*1 (D.D.C. Apr. 7, 2009).

<sup>29</sup> *Id.*

However, the cases that are reported prove that prosecutorial misconduct is one of the leading causes of wrongful convictions.<sup>30</sup> As previously stated, a prosecutor commits misconduct by violating “well-established” trial rules, typically rules set forth in case law, statutes, ethical codes and court orders.<sup>31</sup> The Supreme Court of the United States defined prosecutorial misconduct in *Berger v. United States*, when a prosecutor oversteps “the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.”<sup>32</sup> Popular types of prosecutorial misconduct include overcharging defendants,<sup>33</sup> witness tampering,<sup>34</sup> suborning perjury,<sup>35</sup> improper jury selection,<sup>36</sup> and pressuring defendants into a guilty plea.<sup>37</sup> Furthermore, a common violation committed by prosecutors is failure to turn over all exculpatory evidence.<sup>38</sup> In the past, the media and the public focused primarily on intentional violations or purposefully conduct

---

<sup>30</sup> *News Report: Prosecutorial Misconduct and Wrongful Convictions*, INNOCENCE PROJECT (Aug. 25, 2010), <https://www.innocenceproject.org/new-report-prosecutorial-misconduct-and-wrongful-convictions/>.

<sup>31</sup> See Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 885 (2015).

<sup>32</sup> *Berger v. United States*, 295 U.S. 78, 83 (1935).

<sup>33</sup> Lori Quick, *Prosecutorial Misconduct Before and After Trial*, SIXTH DIST. APP. PROGRAM 1, <http://www.sdap.org/downloads/research/criminal/laq15.pdf> (last visited Dec. 20, 2019).

<sup>34</sup> *Id.* at 17. Prosecutors typically overcharge a defendant to gain competitive advantage in the give-and-take negotiations of the plea-bargaining process. *Id.*

<sup>35</sup> *Id.*; Witness tampering occurs when a prosecutor improperly examines a witness, misrepresents information such as the witness’s testimony, intimidates a witness or interferes with the defense counsel’s access to the witness.

<sup>36</sup> *Id.*; Improper jury selection occurs when a prosecutor excludes a juror for illegitimate reasons such as race, religion, ethnicity or sexual orientation. Further, a prosecutor cannot use peremptory challenges to strike prospective jurors for illegitimate reasons when they are fully capable of serving on the jury.; See also *Batson v. Kentucky*, 476 U.S. 79 (1986), wherein the Supreme Court found that the use of preemptory challenges to discriminate against a juror based on race alone is a violation of the defendant’s equal protection rights and therefore, is unconstitutional. *Id.*

<sup>37</sup> Quick, *supra* note 33, at 16 (noting that recently, plea-bargaining in the American criminal justice system has come under scrutiny because some prosecutors pressure defendants to plead guilty to avoid order being subjected to harsher punishment or sentences if the matter proceeds to trial, sometimes resulting in innocent people pleading guilty to avoid harsher punishments and significant jail time); See also Walter Paylo, *Are Innocent People Pleading Guilty? A New Report Says Yes*, FORBES (July 31, 2018: 8:06 PM), <https://www.forbes.com/sites/walterpavlo/2018/07/31/are-innocent-people-pleading-guilty-a-new-report-says-yes/#62f829175193>.

<sup>38</sup> *Id.* at 1 (explaining that when a prosecutor does not turn over all exculpatory evidence, it is considered to be a Brady Violation, and also discussing purposeful delay of trial by not handing over the evidence on time and only giving the defense counsel a few days to prepare for trial); See also *Brady v. Maryland*, 373 U.S. 83 (1963). Here, the Supreme Court found that the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request, a general request, or no request at all. The duty is borne by the prosecution, because a prosecutor may hide the evidence from the defendant. This is to ensure defendants due process.

perpetrated by prosecutors.<sup>39</sup> However, this idea has expanded and evolved; now, the public and media focus more on abuses of discretion or negligence, even if it is not done purposefully.<sup>40</sup>

In a study linking prosecutorial misconduct to wrongful convictions, the Innocence Project review found that “64 of the first 255 DNA exonerees raised allegations of prosecutorial misconduct in their appeals in civil suits filed after exoneration.”<sup>41</sup> The multiple courts surveyed found that half of the cases involved some type of prosecutorial misconduct.<sup>42</sup> But, the courts also found that the prosecutor’s conduct resulted in “harmful error” in only twelve cases.<sup>43</sup> As a result of recent studies like these, there has been more public pressure and emphasis to hold prosecutors accountable for harmful mistakes performed by prosecutors.<sup>44</sup> Wrongful convictions undermine the American criminal justice system because they allow an innocent person to be punished for an offense they did not commit while the actual perpetrator of the crime walks free.<sup>45</sup> Further, wrongful convictions shake the public’s confidence in the system once the wrongful convictions are identified.<sup>46</sup> Despite the efforts of prosecutors to ensure that justice is served, recent and past evidence demonstrates that prosecutors are fallible by highlighting misconduct, exercise of bad judgment, or even simple carelessness as responsible for causing convictions of thousands of innocent people in America.<sup>47</sup>

Four decades ago, the U.S. Supreme Court implemented a nationwide policy that granted prosecutors absolute immunity for acts committed while on the job or in a prosecutorial role, thereby

---

<sup>39</sup> Green & Yaroshefsky, *supra* note 5, at 52.

<sup>40</sup> *Id.*

<sup>41</sup> DR. EMILY M. WEST, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 1 (Innocence Project, 2010); *See also* PROSECUTORIAL MISCONDUCT AND WRONGFUL CONVICTIONS (Innocence Project, 2010).

<sup>42</sup> WEST, *supra* note 41, at 3.

<sup>43</sup> *Id.*

<sup>44</sup> Green & Yaroshefsky, *supra* note 5, at 52.

<sup>45</sup> PHILIP ROSEN, WRONGFUL CONVICTIONS IN THE CRIMINAL JUSTICE SYSTEM (Library of Parliament, Research Branch 1992).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

essentially granting them unconditional protection.<sup>48</sup> This means that prosecutors, while acting within the scope of their employment, are not held civilly liable for actions “taken in their role as prosecutors, that may have violated the rights of a criminal defendant.”<sup>49</sup> This absolute immunity protects prosecutors from civil lawsuits even when they intentionally violated the laws or engaged in misconduct.<sup>50</sup> As a result, prosecutors are able to escape punishment for misconduct, even if the conduct is purposeful.<sup>51</sup> The Center for Public Integrity examined over 11,000 cases involving claims of prosecutorial misconduct over a three-year period that were under review of the appellate court.<sup>52</sup> The courts found misconduct in thousands of cases but affirmed the convictions because the prosecutorial misconduct was considered to be “harmless error.”<sup>53</sup> Still, the court did overturn convictions in 2,000 cases because of the prosecutorial misconduct committed in those cases.<sup>54</sup>

As discussed briefly, prosecutors are subject to reprimand by each state they work in.<sup>55</sup> However, the states typically do not take action against the prosecutors and the mechanisms in place to deter prosecutors from performing any misconduct are simply weak and ineffective.<sup>56</sup> Further, many courts and defense counsels are reluctant to report serious cases of prosecutorial misconduct because the allegations take too long to resolve.<sup>57</sup> Therefore, there is a lack of confidence that these complaints will be fully and fairly investigated.<sup>58</sup> This often allows prosecutors to get away with

---

<sup>48</sup> Bidish Sarma, *After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, AMERICAN CONSTITUTION SOCIETY (July 19, 2016), [https://www.acslaw.org/?post\\_type=acsblog&p=11579](https://www.acslaw.org/?post_type=acsblog&p=11579); *See also* Imbler v. Pachtman, 424 U.S. 409 (Mar. 02, 1976), wherein the Supreme Court held that prosecutors are generally entitled to absolute immunity from civil liability under the federal civil rights statute, 42 U.S.C. § 1983.

<sup>49</sup> Bidish Sarma, *After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, AMERICAN CONSTITUTION SOCIETY (July 19, 2016), [https://www.acslaw.org/?post\\_type=acsblog&p=11579](https://www.acslaw.org/?post_type=acsblog&p=11579).

<sup>50</sup> *Id.*

<sup>51</sup> Angela Davis, *Prosecutors Who Intentionally Break the Law*, 1 AM. U. CRIM. L BRIEF 16 (2006).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Alan Feuer, *Holding Prosecutors Accountable Is Hard. It Could Get Harder*, NY TIMES, Oct. 8, 2017.

<https://www.nytimes.com/2017/10/08/nyregion/holding-prosecutors-accountable-is-hard-it-could-get-harder.html>.

<sup>56</sup> Philip Rosen, *Wrongful Convictions in the Criminal Justice System*, Canada Library of Parliament Research Branch, (Jan. 1992) <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp285-e.htm>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

misconduct and also permits them to repeat their misconduct.<sup>59</sup> Ultimately, the states generally defer to their respective bar association to conduct an investigation and to take action against the prosecutor for misconduct.

The ABA is an organization that “provides law school accreditation, continuing legal education, information about the law, programs to assist lawyers and judges in their work, and initiatives to improve the legal system for the public.”<sup>60</sup> Therefore, the ABA is the organization that typically will release model ethical rules and procedures and recommend that states adopt them.<sup>61</sup> If an attorney is to violate any of the ethical regulations, the state bar where the violation occurred must investigate the allegation and reprimand the attorney.<sup>62</sup> However, each state has its own standards on ethical standards for prosecutors to follow.<sup>63</sup> The type of sanctions that the ABA recommends that each state implement is disbarment by the court, suspension by the court for an appropriate fixed period of time not in excess of three years, probation imposed by the court not in excess of two years or imposed by the board or counsel with the consent of respondent not in excess of two years.<sup>64</sup>

This article will now take a closer look at Texas’ and New Jersey’s ethical rules and procedures in place to minimize prosecutorial misconduct. Such analysis will prove that the current system in place is not effective nor efficient. Specifically, the efforts of Texas and New Jersey to pass various types of legislation to stop prosecutorial misconduct and to assess if it is truly working.

## **II. Prosecutorial Misconduct in Texas.**

---

<sup>59</sup> *Id.*

<sup>60</sup> *About the ABA Journal*, ABA, <http://www.abajournal.com/about> (last visited Dec. 22, 2019).

<sup>61</sup> *See generally* Leslie C. Levin & Lynn Mather, *Beyond the Guild: Lawyer Organizations and Law Making*, 18 WASH. U. GLOBAL STUDIES L. REV. 589 (2019).

<sup>62</sup> *See generally id.*

<sup>63</sup> *Standards on Prosecutorial Investigations (Table of Contents)*, ABA (Dec. 5, 2018), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pinvestigate/](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate/).

<sup>64</sup> *Model Rules for Lawyer Disciplinary Enforcement, Rule 10*, ABA (June 28, 2017), [https://www.americanbar.org/groups/professional\\_responsibility/resources/lawyer\\_ethics\\_regulation/model\\_rules\\_for\\_lawyer\\_disciplinary\\_enforcement/rule\\_10/](https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_10/).



Texas is consistently being criticized in the media for wrongful convictions and the prosecutorial misconduct that has particularly contributed to it. Specifically, the media reports focus on exonerations of innocent people that have been behind bars for a number of years.<sup>65</sup> For example, Ernest R. Willis was convicted of setting a house on fire and killing two women.<sup>66</sup> During the trial, the Pecos County referred to Willis as a “rat”, “an animal”, a “satanic demon”, and a “mean vicious dog.”<sup>67</sup> The prosecutor further told the jury that “our sociologists will tell you, our psychiatrists will tell you, when they snap, they snap, and they are not human beings anymore. They have no utility to us. None.” As a result, the jury found Willis to be guilty of the crime and sentenced him to death.<sup>68</sup>

After trial, the defense attorneys found that the psychologist had given Willis an exam before trial that stated he would not present much danger to society.<sup>69</sup> The information would have been helpful to Willis in avoiding the death penalty, because the prosecution had used the suggestion of future violence against Willis.<sup>70</sup> Additionally, the post-conviction investigation revealed that the prosecutor had suppressed the psychological report and prejudicial comments contributed to his conviction.<sup>71</sup> Willis spent 17 years on death row for a crime that he did not commit.<sup>72</sup> The prosecutor was not reprimanded for his actions, but rather, the prosecutor maintains that Willis is guilty and should be put to death.<sup>73</sup>

---

<sup>65</sup> See generally Juan A. Lozano, Report Finds Exonerations in the US Rose Again in 2016, U.S. News (March 7, 2017), <https://www.usnews.com/news/best-states/texas/articles/2017-03-07/report-finds-exonerations-in-the-us-rose-again-in-2016>.

<sup>66</sup> See generally Ernest Ray Willis, NATIONAL REGISTRY OF EXONERATIONS (June 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3755>.

<sup>67</sup> Kelly Gier, Note, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191, 192 (2006).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 193.

Michael Morton's arrest and conviction in 1986 serves as another example of prosecutorial misconduct. Morton was arrested and convicted for the murder of his wife.<sup>74</sup> Despite all of the evidence pointing to his innocence, including testimony from various witnesses, the prosecution chose to proceed to trial. Even the defense attorneys raised a concern that the prosecution withheld exculpatory evidence from the trial judge.<sup>75</sup> The main piece of evidence used in Morton's trial was the report of the chief investigator because it contained eyewitness's accounts and relevant facts pertaining to Morton's whereabouts that night.<sup>76</sup> Also, the prosecution failed to present witnesses or physical evidence linking Morton to this horrific crime.<sup>77</sup> However, they were able to hypothesize a reasonable scenario that the jury ultimately believed.<sup>78</sup>

Moreover, Anthony Graves was convicted in assisting in multiple murders.<sup>79</sup> There was no physical evidence linking him to the crime, but instead, Grave's conviction rested primarily on the co-defendant's testimony.<sup>80</sup> Graves was sentenced to the death penalty as a result of his conviction.<sup>81</sup> Just two weeks before his execution, the co-defendant retracted his testimony.<sup>82</sup> The U.S. Court of Appeals for the Fifth Circuit found that the prosecutors elicited false statements and withheld testimony that could have influenced the jurors.<sup>83</sup> Thus, the court overturned Graves conviction, but he spent eighteen and half years in prison and sixteen of those years where in solitary confinement.<sup>84</sup> Again, the

---

<sup>74</sup> *Michael Morton*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/michael-morton/> (last visited Dec. 16, 2019).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Anthony Graves Becomes 12<sup>th</sup> Death Row Inmate Exonerated In Texas*, DEATH PENALTY INFO. CTR. (Oct. 28, 2010), <https://deathpenaltyinfo.org/anthony-graves-becomes-12th-death-row-inmate-exonerated-texas>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Anthony Graves*, ACLU, <https://www.aclu.org/bio/anthony-graves> (last visited Dec. 16, 2019).

prosecution did not face any repercussions for intentionally eliciting false statements and withhold crucial testimony.<sup>85</sup>

Eventually, the Innocence Project launched an investigation into this case requesting that DNA testing be done on some of the items that were found at the crime scene.<sup>86</sup> Five years later, the DNA request was granted and all of the evidence was tested for DNA.<sup>87</sup> Ultimately, the DNA results proved that Morton did not kill his wife.<sup>88</sup> Morton spent twenty-five years in prison because of the prosecutors on his case withheld evidence and failed to properly test the evidence.<sup>89</sup> The prosecutors and investigators did not face any consequences for their misconduct and negligence.<sup>90</sup>

These cases may seem rare, but they represent three scenarios in which misconduct performed by a prosecutor affected the outcomes of the cases and convicted innocent people of terrible crimes.<sup>91</sup> Although these people were eventually found innocent, they will not be able to get the time back that they spent in prison and many will have difficulty re-adjusting to life in society. The Center for Public Integrity cited nearly 600 cases in Texas alone, from 1970 until 2003, where allegations of prosecutorial misconduct were raised as an issue on appeal.<sup>92</sup> The cases that were in the appeals process ranged from crimes of sexual assault to murder.<sup>93</sup> The Texas Court of Appeals ended up reversing or remanding the conviction, sentence, or indictment in 152 cases.<sup>94</sup> The most common misconduct committed by the prosecutors were improper trial tactics such as inappropriate cross-examination and statements during arguments, jury selection discrimination, withholding evidence from defense by the

---

<sup>85</sup> DEATH PENALTY INFO. CTR., *supra* note 79.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See Gier, supra* note 67.

<sup>92</sup> *Id.* at 193.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

prosecution, failure to correct false testimony by the prosecution, and other pre-trial indictment issues.

95

Despite the numerous wrongful convictions in Texas and prosecutorial wrongdoings that have contributed to it, exonerations in Texas have significantly increased as “wrongful convictions are being overturned at an unprecedented rate”.<sup>96</sup> According to the National Registry of Exonerations, in 2013 “there were 13 exonerations in Texas, compared with 39 in 2014 and 54 in 2015.”<sup>97</sup> This has been possible due to the combined efforts of innocence advocacy groups and certain “prosecutors’ offices taking the initiative to ensure the validity of their convictions through the work of conviction integrity units.”<sup>98</sup> Further, because of all the exonerations in the state of Texas, the state legislation is trying to come up with a more efficient system by passing various legislative laws and acts.<sup>99</sup>

For example, in 2013 the Texas legislator passed the Michael Morton Act to specify that prosecutors contemplating evidence must disclose it to the defense attorneys.<sup>100</sup> Under the Michael Morton Act, upon request of the defense, the prosecution must turn over all “evidence that is in their possession, custody, or control and that is not work product or otherwise privileged.”<sup>101</sup> Although the United States Supreme Court decision in *Brady v. Maryland* already mandates that prosecutors must

---

<sup>95</sup> *Id.* at 193-94

<sup>96</sup> Laura Bayouth Popp, *Prosecutorial Misconduct and the Role of Discipline: Examining the Intersection Between Error and Ethics*, TEXAS BAR, <https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=37301> (last visited Dec. 23, 2019); *see also* The Editorial Board, *Texas Cracks Down on the Market for Jailhouse Snitches*, THE NEW YORK TIMES, <https://www.nytimes.com/2017/07/15/opinion/sunday/texas-cracks-down-on-the-market-for-jailhouse-snitches.html> (July 15, 2017) (Explainint that, within the last thirty years, Texas has more than three-hundred confirmed cases of wrongful conviction); *see also* *The National Registry of Exonerations*, U. MICH. LAW, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View=%7Bfaf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7%7D&FilterField1=ST&FilterValue1=TX&SortField=Exonerated&SortDir=Asc> (last visited Dec. 23, 2019).

<sup>97</sup> POPPS, *supra* note 96; *see also* *The National Registry of Exonerations*, *supra* note 97.

<sup>98</sup> POPPS, *supra* note 96.

<sup>99</sup> *Id.*

<sup>100</sup> Michael Morton Act, S.B. 1611, 83d Leg., 2013 Tex. Gen. Laws 49 (codified at Tex. Code Crim. Proc. Ann. Art. 39.14). As mentioned previously, Michael Morton was convicted of killing his wife. Mr. Morton spent 25 years of his life in prison before evidence that was withheld by the prosecution exonerated him. *See Michael Morton*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/michael-morton/> (last visited Dec. 16, 2019).

<sup>101</sup> POPPS, *supra* note 96.

provide the defense with all evidence that is “material either to guilt or to punishment”, the Michael Morton Act broadened this doctrine.<sup>102</sup> The Michael Morton Act now requires that prosecutors hand over all evidence to the defense, including “police reports and witness statements, regardless of whether the evidence is material to guilt or punishment”.<sup>103</sup>

Further, Texas has adopted a special rule within its Disciplinary Rules of Professional Conduct which apply specifically to prosecutors, Rule 3.09.<sup>104</sup> The rule states that a criminal prosecutor is to “refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause”.<sup>105</sup> Additionally, the rule states that a prosecutor should refrain from assisting in an interrogation unless the prosecutor is assured that the accused has been advised of his or her right and has been given a reasonable opportunity to obtain counsel.<sup>106</sup> The rule moreover mandates that a prosecutor make a timely disclosure to the “defense of all evidence or information known to the prosecutor”.<sup>107</sup> However, the rule does not go into further detail, nor does it seem to directly address the pervasive issue of prosecutorial misconduct. Instead, the rule and comments simply address that a prosecutor has the responsibility “to see that justice is done, and not simply to be an advocate”.<sup>108</sup> Also, the comment briefly mentions that the accused should receive “procedural justice,” including right to counsel, pretrial, trial, and post-trial rights.<sup>109</sup> However, the Texas Disciplinary Rules of Professional Conduct do not require a posting of the rules in prosecutors’ offices, or distribution to prosecutors during orientation. Additionally, the Texas Rules of Professional

---

<sup>102</sup> *Id.*

<sup>103</sup> *Texas Enacts “Michael Morton Act” Intended to Reduce Wrongful Convictions*, DEATH PENALTY INFORMATION CENTER (May 20, 2013), <https://deathpenaltyinfo.org/news/texas-enacts-michael-morton-act-intended-to-reduce-wrongful-convictions>. The Michael Morton Act further extended the Brady v. Maryland decision. The Act requires all evidence be turned over, including all police reports and witness statements. *Id.*

<sup>104</sup> TEXAS DISCIPLINARY RULES OF PROF’L CONDUCT r. 3.10.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> TEXAS DISCIPLINARY RULES OF PROF’L CONDUCT r. 3.10 cmt.

Conduct do not mention nor require that the prosecutors in Texas receive any type of mandatory training to prevent or correct prosecutorial errors.<sup>110</sup>

In addition to the Michael Morton Act and Texas Disciplinary Rules of Professional Conduct, in 2017 Texas Legislature passed House Bill 34.<sup>111</sup> This bill regulates “the use of jailhouse informants, requires police to record interrogations, and toughens the rules for police lineups in securing eyewitness identifications.”<sup>112</sup> The bill also calls for new studies to be conducted on drug field test kits and crime scene investigations.<sup>113</sup> Specifically, the bill is aimed on making sure prosecutors are following procedures and not abusing their power.<sup>114</sup> These procedures include influencing an eyewitness identification, and pressuring or offering jailhouse informants something in return for their cooperation, such as money or dropped/lessened charges.<sup>115</sup>

For example, Randy Arledge spent 14 years in prison for a murder after investigators pressured Arledge’s accomplice in an unrelated armed robbery to lie.<sup>116</sup> Arledge’s accomplice testified that Arledge confessed to the murder, after the accomplice had also received special privileges.<sup>117</sup> Due to scenarios like this, the bill aims to make sure prosecutors “keep track of all informants and provide the defense the informant’s entire criminal history, as well as any benefits he or she received for testifying in any case”.<sup>118</sup> Specifically, the bill requires that:

an attorney representing the state shall track: 1) the use of testimony of a person to whom a defendant made a statement against the defendant’s interest while the person was imprisoned or confined in the same correctional facility as the defendant, if known by the attorney representing that state, regardless of whether the testimony is

---

<sup>110</sup> *See generally id.*

<sup>111</sup> Jolie McCullough & Justin Dehn, *How some see Texas as the “gold standard” against wrongful convictions*, THE TEXAS TRIBUNE (Sep. 20, 2017, 12:00 AM), <https://www.texastribune.org/2017/09/20/texas-lawmakers-hope-prevent-wrongful-convictions/>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See generally id.*

<sup>115</sup> *Id.* According to Michelle Feldman, a legislative strategist at the Innocence Project, prosecutors may pressure jailhouse informants during negotiations, thereby creating a strong incentive for the informant to lie.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Later, Arledge was exonerated after DNA evidence pointed to a different man.

<sup>118</sup> *Id.*

presented at trial; and 2) any benefits offered or provided to a person in exchange for testimony.”<sup>119</sup>

Furthermore, all conversations between the jailhouse inmate and the prosecutor must be recorded.<sup>120</sup> Additionally, Texas also passed the Tim Cole Act in 2009. The Act was enacted to render compensation and services to the wrongfully convicted and imprisoned.<sup>121</sup> A person may not collect later than “the third anniversary of the date the person on whose imprisonment the claim is based received the pardon or was granted relief”, in essence found innocent of the crime alleged.<sup>122</sup> Also, the Tim Cole Act even applies if a deceased person would be entitled to compensation.<sup>123</sup> Therefore, in a case where there is a posthumous pardon, the person’s heirs, family, legal representatives, or estate are entitled to compensation.<sup>124</sup> The person must go through an application process in order to receive any compensation or services.<sup>125</sup>

Further, the Tim Cole Act provides \$80,000 per year of the wrongful incarceration, adds free college tuition, health benefits, and financial and personal counseling.<sup>126</sup> The compensation will be paid out in monthly payments, after a lump-sum is received up front. The act further offers an annuity that allows the compensation to be passed on through a person’s estate.<sup>127</sup> Lastly, the Act sets up the Tim Cole Advisory Panel on Wrongful Convictions. It operates as an investigation panel looking into what occurred specifically in the person’s case.<sup>128</sup>

---

<sup>119</sup> H.B. 34, 2018 Leg. 85 (Tex. 2018).

<sup>120</sup> *Id.*

<sup>121</sup> Johnathan Silver & Lindsay Carbonell, *Wrongful Convictions Have Cost Texans More Than \$93 Million*, THE TEXAS TRIBUNE (June 24, 2016), <https://www.texastribune.org/2016/06/24/wrongful-convictions-cost-texans-over-93-million/>. The Act is named after Timothy Brian Cole, who died in a Texas prison serving a 25-year sentence for a rape he did not commit. *Id.* The judge did not allow exculpatory evidence into Mr. Cole’s trial. *Id.*

<sup>122</sup> H.B. 1736, 2019 Leg. (Tex. 2019).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Hilary Hlyton, *Texas: The Kinder, Gentler Hang ‘Em High State*, TIME (Sept. 19, 2009), <http://content.time.com/time/nation/article/0,8599,1924278,00.html>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

As well as the above legislation mentioned, Dallas County formed Texas's first Conviction Integrity Unit ("CIU") in 2007.<sup>129</sup> The unit is an independent division of the District Attorney's office that "investigates claims of wrongful convictions".<sup>130</sup> The CIU cannot on its own overturn a sentence, but it can make a recommendation to the Texas Court of Criminal Appeals.<sup>131</sup> Many counties in Texas have followed Dallas' footsteps and created their own CIU in order to exonerate innocent people whom have been wrongfully convicted.<sup>132</sup> However, many do speculate about the effectiveness of a CIU because they are often controlled by an elected District Attorney.<sup>133</sup> Thus, depending on the District Attorney, the CIU can actively investigate claims of innocence or draw out their investigations.<sup>134</sup>

Last, the Texas Bar Association is also stepping in by attempting to bring sanctions against prosecutors for misconduct. In 2017, John Jackson, a Texas prosecutor, was tried in a civil court for convicting Todd Willingham of murdering his family and convincing the jury to sentence Willingham to death.<sup>135</sup> Jackson convinced the jury to sentence Willingham to death.<sup>136</sup> Willingham was executed in 2004, most likely for a crime he did not commit.<sup>137</sup> It is alleged that during trial Jackson knowingly used forensic evidence referred to as junk science and a false jailhouse mate's testimony to get the conviction.<sup>138</sup> Allegedly, Jackson made a deal with a jailhouse inmate who agreed to testify against

---

<sup>129</sup> *Id.*

<sup>130</sup> Jessica Pishko, *No County For Innocent Men*, D MAGAZINE (May 15, 2018, 11:30 AM), <https://www.dmagazine.com/frontburner/2018/05/dallas-county-exonerations-innocent-conviction-integrity-unit/>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* Today, 33 counties across the state of Texas have adopted a CIU within their localities.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Radley Balko, *A Texas Prosecutor Is On Trial For Alleged Misconduct*, THE WASH. POST (May 3, 2017, 10:04 AM), [https://www.washingtonpost.com/news/the-watch/wp/2017/05/03/a-texas-prosecutor-is-on-trial-for-alleged-misconduct/?noredirect=on&utm\\_term=.088c54c63a0a](https://www.washingtonpost.com/news/the-watch/wp/2017/05/03/a-texas-prosecutor-is-on-trial-for-alleged-misconduct/?noredirect=on&utm_term=.088c54c63a0a).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* During Tod Willingham's trial, the prosecution's case was two pronged; 1) testimony by fire investigators that the fire debris show that the fire was deliberately set and 2) false testimony by a jailhouse mate. John Jackson used junk science which is referring to arson science that has been debunked after decades of misuse.



Willingham.<sup>139</sup> Additionally, Jackson concealed this information from Willingham’s defense attorneys, which is a clear violation of the law.<sup>140</sup> The Texas state bar accused Jackson of violating several sections of the Texas Disciplinary Rules of Professional Conduct, such as making false statements, concealing evidence favorable to the defense and obstruction of justice.<sup>141</sup>

It is highly unusual for a state bar to actually take action or bring sanctions against prosecutors.<sup>142</sup> It is even more rare for the state bar to take action in a public setting, such as making an attorney stand trial.<sup>143</sup> For example, since 2011, out of the 2,000 or so attorneys whom the Texas Bar has acted or sought sanctions, just ten of the investigations have resulted in any type of disciplinary action against a prosecutor.<sup>144</sup> Although Jackson was ultimately cleared by the jury in this matter, it was one of the first extreme steps a state bar has taken to condemning prosecutors for their misconduct.<sup>145</sup>

As discussed, although Texas previously had the highest wrongful conviction rate in the nation, the lone state is now making great strides in corrective and preemptive legislation.<sup>146</sup> Specifically, Texas’s legislation allows it to provide larger compensation packages to the wrongfully convicted which exceed other states.<sup>147</sup> The legislation passed also has more of a focus on preventing wrongful convictions in the future by implementing stricter procedures for police and prosecutors to follow. Lastly, the legislation is putting more of an emphasize on exonerating the wrongfully convicted.

---

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Maurice Possley, *Former Prosecutor Cleared of Misconduct in Texas Death Penalty Case*, THE WASHINGTON POST (May 11, 2017), [https://www.washingtonpost.com/national/former-prosecutor-cleared-of-misconduct-in-texas-death-penalty-case/2017/05/11/f5c3d24c-3662-11e7-b373-418f6849a004\\_story.html?utm\\_term=.b68bd174205d](https://www.washingtonpost.com/national/former-prosecutor-cleared-of-misconduct-in-texas-death-penalty-case/2017/05/11/f5c3d24c-3662-11e7-b373-418f6849a004_story.html?utm_term=.b68bd174205d).

<sup>142</sup> See Balko, *supra* note 135.

<sup>143</sup> See generally *Misconduct and Punishment: State disciplinary authorities investigate prosecutors accused of misconduct*, CENTER FOR PUBLIC INTEGRITY (June 26, 2003), <https://publicintegrity.org/politics/state-politics/harmful-error/misconduct-and-punishment/>.

<sup>144</sup> See Balko, *supra* note 135.

<sup>145</sup> *Id.*

<sup>146</sup> See H.B. 34, 2018 Leg. 85 (Tex. 2018); H.B. 1736, 2019 Leg. (Tex. 2019); S.B. 1611, 2013 Leg. 83 (Tex. 2013).

<sup>147</sup> Jill Ament, *Texas Pays Wrongfully Convicted Inmates More Than Any Other State. But Can It Keep That Up?*, TEXAS STANDARD (Oct. 23, 2017), <https://www.texasstandard.org/stories/texas-pays-wrongfully-convicted-inmates-more-than-any-other-state-but-can-it-keep-that-up/>.

Today, Texas is leading the nation in exonerations with a total of 359 exonerations from 1989-2019, which leads to the inference that the efforts of the legislators are paying off.<sup>148</sup>

However, even if the numbers currently are in Texas's favor, there has been a decline in the number of exonerations in the past few years. In 2016, there was a record high of fifty-eight exonerations in the year, but in 2017 there were only twenty-three exonerations.<sup>149</sup> Many speculate that the effort to identify exonerees is due in part to the increase in compensation for the wrongfully convicted. Further, with the recent exonerations, there has been little to no effort in holding prosecutors or District Attorneys accountable for their role in these wrongful convictions. Thus, it is important to question whether the wrongful conviction reform attempts by Texas are actually effective and whether the rest of the nation should replicate the same approach.

### **III. Prosecutorial Misconduct in New Jersey.**

The State of New Jersey is not typically known for prosecutorial misconduct or wrongful convictions. Unlike Texas, New Jersey does not have high wrongful conviction rates and in fact, has one of the lowest wrongful conviction rates in the country.<sup>150</sup> Therefore, New Jersey rarely attracts media attention for wrongful conviction errors. Although it is relatively infrequent, prosecutorial misconduct has occurred in New Jersey. For example, Bryon Halsey spent twenty-two years behind bars for the crime of rape and murder of two children.<sup>151</sup> Halsey confessed to the rape and murder after the investigators spent over thirty hours interrogating him without any breaks.<sup>152</sup> The prosecution knowingly used this coerced confession and the false testimony of a witness to convince the jury to

---

<sup>148</sup> Dustin Cabral, *Exonerations by State*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Oct. 2, 2019).

<sup>149</sup> See also *Texas Still Leads the Nation for Exonerations*, BRODENMICKELSEN.COM (Nov. 12, 2018), <https://www.brodenmickelsen.com/blog/texas-still-leads-nation-exonerations/>.

<sup>150</sup> See generally Cabral, *supra* note 148.

<sup>151</sup> Tom Haydon, *Innocent man awarded \$12.5M, still haunted by the 22 years he spent in prison*, NJ.COM (July 30, 2015), [https://www.nj.com/union/2015/07/falsely\\_convicted\\_man\\_received\\_125\\_mill\\_settlement.html](https://www.nj.com/union/2015/07/falsely_convicted_man_received_125_mill_settlement.html).

<sup>152</sup> *Id.*

find Halsey guilty of the crime.<sup>153</sup> The lead prosecutor of Halsey's case did not get reprimanded nor received any sanctions from the New Jersey Bar Association.<sup>154</sup>

Jacob Gentry is another shocking wrongful conviction story in which prosecutorial misconduct played a role. Gentry was convicted of aggravated manslaughter, although he repeatedly and consistently claimed that the action was committed in self-defense.<sup>155</sup> However, throughout the trial, the prosecutor consistently made improper comments, including in her opening and closing statements.<sup>156</sup> The prosecutor also asked improper questions during the cross-examination of Gentry.<sup>157</sup> For instance, the Judge ruled a statement made by Gentry's girlfriend to investigators on the night of the incident to be inadmissible, but the prosecutor asked Gentry a prohibited question about the statement during cross-examination despite the judge's order.<sup>158</sup> Additionally, the prosecutor again went against the Judge's ruling by further questioning Gentry on whether his statement was consistent with his co-defendant, who was being tried separately.<sup>159</sup> This line of questioning ostensibly allowed the jury to be aware about a co-defendant in the case who pleaded guilty to the crime at hand.<sup>160</sup>

Eventually, through the appeals process, the Appellate Division of the New Jersey Superior Court set aside Gentry's convictions and ordered a new trial.<sup>161</sup> One of the reasons that the Appellate

---

<sup>153</sup> *Id.* During Byron Halsey's trial, the man that was later found to be guilty of the crime Halsey was accused of testified against Halsey. After he was exonerated, Halsey later sued the Union County Prosecutor's Office and the investigators that were involved in his case for misconduct. He ultimately settled the lawsuit for \$12.5 million dollars, but the settlement specifically stated that this is not an admission of guilt. *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Maurice Possley, *Jacob Gentry*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5017> (last updated April 24, 2019).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

Division ordered a new trial was due to the prosecutorial misconduct that occurred at trial.<sup>162</sup> Again, there is public information about the prosecutor in the case receiving sanctions or being reprimanded for his actions, leading to the inference that the prosecutor was not penalized.

To date, the State of New Jersey has exonerated thirty-eight individuals since 1989.<sup>163</sup> As demonstrated in cases discussed above, it is uncommon for prosecutors themselves to face consequences for their actions, even if the action is taken knowingly and deliberately to hurt the defense or defendant. For example, an assistant prosecutor in Bergen County, New Jersey committed harmful error at three separate trials, which resulted only in one reversal.<sup>164</sup> Another assistant prosecutor in Warren County, New Jersey committed six errors within a five-year period, resulting in two reversals.<sup>165</sup> Further, in 2012 the American Civil Liberties Union of New Jersey (ACLU of NJ) and Rutgers School of Law released a report, “Trial and Error: A Comprehensive Study of Prosecutorial Conduct in New Jersey”.<sup>166</sup> This is the first report in New Jersey that specifically studied and researched the criminal trials that raised on prosecutorial misconduct on appeal between 2005 and 2011.<sup>167</sup>

Additionally, the report also tracked the number of case decisions that ultimately were reversed due to prosecutorial error and if prosecutor faced any type of discipline for committing the error.<sup>168</sup> The report found that a total of 343 prosecutors committed some type of error, such as

---

<sup>162</sup> *Id.* The Appellate Division of the New Jersey Superior Court also noted that the Judge did not properly instruct the jury on self-defense. Specifically, the jury did not understand that self-defense can be used as a defense for aggravated manslaughter, not only for murder.

<sup>163</sup> *The National Registry of Exonerations*, U. MICH. LAW, <https://www.law.umich.edu/special/exoneration/Pages/detail.aspx?View=%7BF9AF6EDDB-5A68-4F8F-8A522C61F5BF9EA7%7D&FilterField1=ST&FilterValue1=NJ> (last visited Dec. 20, 2019).

<sup>164</sup> Alexi Freidman & James Queally, *ACLU report: N.J. prosecutors with multiple misconduct violations faced no discipline*, NJ.COM (Sept. 19, 2012), [https://www.nj.com/news/2012/09/aclu\\_report\\_nj\\_prosecutors\\_wit.html](https://www.nj.com/news/2012/09/aclu_report_nj_prosecutors_wit.html).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *ACLU-NJ Report Finds Gaps In Prosecutorial Accountability*, ACLU OF NEW JERSEY, <https://www.aclu-nj.org/theissues/criminaljustice/proscondreport> (last visited Oct. 10, 2019).

<sup>168</sup> *See generally* ACLU OF NEW JERSEY, TRIAL AND ERROR: A COMPREHENSIVE STUDY OF PROSECUTORIAL CONDUCT IN NEW JERSEY (2012).

making improper remarks to the jury, appealing to emotion rather than facts, or withholding exculpatory evidence.<sup>169</sup> However, not one of those prosecutors, including the ones who even committed multiple errors, received any type of discipline for their misconduct.<sup>170</sup> Furthermore, within the 570 cases studied, there were 229 instances of prosecutorial error.<sup>171</sup>

Although the report did not specifically indicate the impact the error had on each specific case, the Appellate Division of the New Jersey Superior Court did overturn fifty-three guilty verdicts within this sample of cases.<sup>172</sup> When a court overturns a conviction based on a prosecutor's misconduct, the court tacitly acknowledges that there is a serious risk that the misconduct led to a wrongful conviction.<sup>173</sup> The New Jersey Supreme Court has stated, "reversals are necessary whenever a 'prosecutor's misconduct had the clear capacity to have led to an unjust verdict.'"<sup>174</sup>

While the number of cases in which prosecutorial misconduct impacted the outcome of a trial is low in proportion to all of the criminal cases tried in New Jersey, prosecutorial misconduct is still a problem often overlooked. Such misconduct can cause substantial damage to someone's life, especially if it results in a wrongful conviction. Thus, it is worthwhile to consider the procedures New Jersey has in place to hold prosecutors accountable for their actions.

In 2000, the New Jersey Legislature introduced the County Prosecutors' Code of Ethics (the "bill").<sup>175</sup> The primary goal of the bill was to establish "a code of ethics for county prosecutors and their employees".<sup>176</sup> Throughout the entirety of the proposed bill, the bill discusses various conduct that a county prosecutor should engage in and refrain from, stating that a prosecutor should "not solicit, receive or accept any gratuity, gift or other thing of value...offered or given for the purpose of

---

<sup>169</sup> *Id.*

<sup>170</sup> *See* Freidman & Queally, *supra* note 164.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> ACLU OF NEW JERSEY, *supra* note 169, at 25.

<sup>174</sup> *Id.* (quoting *State v. Frost*, 158 N.J. 76, 88-89 (1999)).

<sup>175</sup> County Prosecutor's Code of Ethics Act, S.B. A338, 2000 Leg. 209 (N.J. 2000).

<sup>176</sup> *Id.* at 2.

influencing him (or her)".<sup>177</sup> Additionally, the bill discusses enforcement mechanisms to be put in place to ensure the act is being adhered to. Specifically, the act states that the New Jersey Attorney General should have the right to "enforce the provisions of the ethics code" and to penalize prosecutors for a violation., including a fine and "removal, suspension, demotion, or other disciplinary action" that he or she deems appropriate.<sup>178</sup> Although this bill was a step the right direction towards positive reform, unfortunately, it ultimately was not passed.<sup>179</sup>

Although these ethical rules were not enacted, in 2011, the Office of the Attorney General wrote an immense memorandum that was distributed amongst all prosecutors' offices.<sup>180</sup> The memorandum, "Prosecutor Conduct: How to Avoid Reversible Error" thoroughly addresses prohibited prosecutorial conduct in summation, opening statements, examination/cross examination, and grand jury trials.<sup>181</sup> The memorandum also urges prosecutors to avoid risking the integrity of the trial or conviction.<sup>182</sup>

Further, although there is no specific policy that requires mandatory training, supervision or discipline, prosecutors' offices in New Jersey take it upon themselves to minimize and prevent misconduct. For example, the prosecutors' offices in New Jersey are spending extra time to train prosecutors to avoid the common errors, making sure another attorney is sitting "second chair" at every trial, or creating their own way of disciplining or rewarding the behavior of prosecutors.<sup>183</sup> But unlike Texas, guidelines promoted by New Jersey's Attorney General already seem to be more progressive in addressing prohibited prosecutorial conduct, particularly because prosecutors' offices in New Jersey seem to be more involved and proactive in taking action to reduce prosecutorial errors.

---

<sup>177</sup> *Id.* at 3.

<sup>178</sup> *Id.* at 7.

<sup>179</sup> *See Bills 2000-2001*, NEW JERSEY STATE LEGISLATURE, <https://www.njleg.state.nj.us/bills/BillView.asp> (last visited Dec. 18, 2019).

<sup>180</sup> *See* ACLU OF NEW JERSEY, *supra* note 169, at 29.

<sup>181</sup> *Id.* at 10-11.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 29.

The State of New Jersey has taken further proactive steps to prevent wrongful convictions within its criminal justice system. In April 2019, Attorney General Gurbir Grewal announced the creation of the Conviction Review Unit (“CRU”) within the Attorney General’s Office of Public Accountability and Integrity (“OPIA”).<sup>184</sup> The CRU invites currently or formerly incarcerated individuals to submit applications outlining their claim of innocence to the unit. Upon receipt of the application or letters of inquiry, CRU staff examine the case for newly discovered evidence or factual inconsistencies. In some cases, the CRU staff undertake a complete re-investigation of the individual’s case. Whereas most conviction integrity units across the nation are run at the county level, the CRU of the New Jersey Attorney General is the first statewide conviction integrity unit in the country.

Arguably, it is likely that the procedures and ethical rules in place are what causes New Jersey’s wrongful conviction rate to be lower than Texas. Of course, the size of the two states are drastically different and that must be a consideration when looking at the number of prosecutorial errors and wrongful convictions, specifically because the criminal justice system is bigger and may be harder to monitor mechanisms in place to prevent prosecutorial misconduct. When considering that the New Jersey Attorney General has addressed prosecutorial misconduct with New Jersey prosecutor’s offices directly with specific guidelines on how to approach misconduct issues, the New Jersey Attorney General acknowledges that a problem exists and that the state will take actions to prevent the problem from persisting.

Just viewing at the type of legislation and actions taken by the state to ensure that prosecutors are trained and knowledgeable about the misconduct, New Jersey appears to be stricter on a prosecutor’s actions. Conversely, Texas does not have any legislation, other than the vague Texas Disciplinary Rules of Professional Conduct, that informs a prosecutor on expected conduct specific

---

<sup>184</sup> Press Release, Office of the Attorney General, AG Grewal Announces Creation of Statewide Conviction Review Unit and Statewide Cold Case Network (April 11, 2019) (on file with author).

conduct that constitutes a violation ethical rules and consequences for violations of ethical conduct. Further, the mere existence of legislation does not always mean that the state is successful in implementation of the legislation, since the state also needs to effectively enforce the legislation however, progressive legislation in both states are steps in the right direction to minimize the effect of prosecutorial misconduct.

#### **IV. How Can Prosecutors Stop Convicting the Innocent?**

In addition to legislation, there is much more that needs to be done to address this problem. Particularly, that the Supreme Court of the United States (“SCOTUS”) decision in *Imbler v. Pachtman* gives prosecutors absolute immunity.<sup>185</sup> Absolute immunity allows prosecutors to be exempt from criminal and civil liability for any actions taken within the scope of their employment as a prosecutor.<sup>186</sup> Also, absolute immunity still applies even if the prosecutor knowingly and purposefully committed misconduct that could have led to a wrongful conviction.<sup>187</sup> This ruling allows prosecutors that intentionally withheld exculpatory evidence from the defense, in sheer violation of the law, to escape civil and criminal liability.<sup>188</sup> Therefore, instead of absolute immunity, prosecutors should have qualified immunity, like the majority of government officials. Qualified immunity protects government officials from liability only if “their conduct does not violate clearly established statutory or constitutional rights”.<sup>189</sup> Thus, it protects government officials who are appropriately acting within the scope of their employment.

---

<sup>185</sup> *Imbler v. Pachtman*, 424 U.S. 409 (1976).

<sup>186</sup> *Id.*; See also Bidish Sarma, *After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, AM. CONST. SOC’Y BLOG (July 19, 2016), [https://www.acslaw.org/?post\\_type=acsblog&p=11579](https://www.acslaw.org/?post_type=acsblog&p=11579).

<sup>187</sup> *Imbler*, 424 U.S. at 431.

<sup>188</sup> *Id.* at 443.

<sup>189</sup> AM. CONST. SOC’Y BLOG, *supra* note 186.



In *Imbler*, SCOTUS held that prosecutors are entitled to absolute immunity due to several factors, including; 1) the fear that “a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions” to the prosecutor by bringing meritless suits, 2) because other avenues for prosecutorial accountability exist, 3) because courts may be “blurred by even the subconscious knowledge that a post-trial decision” might result in a prosecutor being liable to pay damages for their error and judgment, and 4) because by allowing civil suits to be brought against a prosecutor it “would cause a deflection of the prosecutor’s energies from his public duties and the possibility that he would shade his decisions”.<sup>190</sup> However, none of the Supreme Court’s justifications apply today. With qualified immunity, as long as they are acting within the scope of their employment and the conduct did not violate a “clearly established right”, prosecutors would still be protected from a defendant unreasonably using their anger to sue the prosecution.<sup>191</sup> Further, after the *Imbler* decision, SCOTUS held in *Heck v. Humphrey* that in order to bring a civil suit for a wrongful conviction, the plaintiff has the burden of proving that the conviction was wrongful in criminal court before filing a civil suit.<sup>192</sup> Therefore, *Heck* limited the number of credible lawsuits against prosecutors.<sup>193</sup>

Additionally, another alternative available for holding prosecutors accountable for misconduct is disciplinary sanctions, typically issued by the governing state and criminal prosecutions.<sup>194</sup> As previously discussed, however, this alternative is rarely used. Particularly, a Fordham Law Review article found that “*Brady* and related due process violations committed by public prosecutors are

---

<sup>190</sup> *Imbler*, 424 U.S. at 423-30.

<sup>191</sup> Bidish Sarma, *After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, AM. CONST. SOC’Y BLOG (July 19, 2016), [https://www.acslaw.org/?post\\_type=acsblog&p=11579](https://www.acslaw.org/?post_type=acsblog&p=11579).

<sup>192</sup> *Id.*; *See also* *Heck v. Humphrey*, 512 U.S. 477 (1994).

<sup>193</sup> *See also* *Heck v. Humphrey*, 512 U.S. 477 (1994).

<sup>194</sup> Sarma, *supra* note 191.

tolerated by their respective offices, which almost never discipline or sanction offenders.”<sup>195</sup> Moreover, the Supreme Court worried that a court may subconsciously be afraid of the prosecutor being personally liable for wrongdoing, thus influencing the court’s ruling.<sup>196</sup> This manner of thinking defies ideals of the American justice system. Specifically, a court should consider whether the prosecutor may be personally liable by the ruling. Also, the main justification for the Supreme Court’s ruling on absolute immunity is to protect the prosecutor’s judgment calls or harmless errors.<sup>197</sup> As previously stated, qualified immunity will shield prosecutors from being sued for any harmless errors or misconduct as long as it does not violate a “clearly established” right.<sup>198</sup> Qualified immunity will allow prosecutors to be held accountable for intentional misconduct in bringing charges, plea bargaining, and conduct during trial. Therefore, absolute immunity for prosecutors should be eliminated and instead qualified immunity should be implemented.

Also, the culture surrounding prosecutor’s offices can be a factor that plays into prosecutorial misconduct and it undermines SCOTUS’s ruling in *Imbler*.<sup>199</sup> The type of culture is often determined by the chief prosecutor for the local government.<sup>200</sup> The United States of America is the only country in the world that allows its citizens to elect chief prosecutors, such as Attorney Generals, County Attorneys, State Attorneys or more commonly known, as District Attorneys.<sup>201</sup> Although it depends on the size of the office, chief prosecutors primarily have the job of prosecuting felony criminals,

---

<sup>195</sup> *Id.*; See also Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined By Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, (2011); See generally *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>196</sup> Sarma, *supra* note 191.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Jay Michaelson, *It’s Not Just Bad Cops: Prosecutors Run Wild*, DAILY BEAST (August 8, 2015), <https://www.thedailybeast.com/its-not-just-bad-cops-prosecutors-run-wild?ref=scroll>; See also Sarma, *supra* note 191. The SCOTUS’s *Imbler* ruling was dependent on a prosecutor being an independent government official who made decisions without taking public opinion into account. See generally *Imbler v. Pachtman*, 424 U.S. 409 (1976).

<sup>200</sup> Michaelson, *supra* note 199.

<sup>201</sup> *Id.*

handling state level civil suits, misdemeanor offenses.<sup>202</sup> Also, the chief prosecutor is an advisor to the country as well as the state officials.<sup>203</sup> Further, each state has the power to implement its own procedures for enlisting chief prosecutors.<sup>204</sup> The most common procedures for a state to implement is to either elect or have the governor of the state appoint a chief prosecutor.<sup>205</sup> Therefore, each state can decide on the number of chief prosecutors to appoint, their titles, and the area of jurisdiction that each chief prosecutor will be appointed to.<sup>206</sup>

In Texas, each prosecutor office is run by a “locally elected county attorney, district attorney or criminal district attorney who has the authority to prosecute criminal” and minor civil cases.<sup>207</sup> New Jersey, in contrast, is one of only three states to have the sitting governor appoint a chief prosecutor. Recently, the procedure of electing a prosecutor has come under scrutiny across various states. Specifically, many believe that prosecutors should not be elected because it tends to mix politics with the justice system.<sup>208</sup> Further, it also makes prosecutors run on a certain platform such as “tough on crime” which in turn allows an enormous amount of room for grandstanding.<sup>209</sup> Holding elections for prosecutors also has been shown to prove that it influences the culture of a chief prosecutor’s office, at times leading to a “win at all cost” culture. Typically, while a prosecutor is running for election or reelection, they tend to sacrifice fairness to increase the number of convictions of their office.<sup>210</sup>

---

<sup>202</sup> Dee Dee Smith, *The Role of a Deputy Prosecuting Attorney*, CHRON, <https://work.chron.com/role-deputy-prosecuting-attorney-11187.html> (last visited Dec. 19, 2019).

<sup>203</sup> *Id.*

<sup>204</sup> Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 *Yale L.J.* 1528, 1530-31 (2012) From 1820 to 1860, each state across the country adopted new constitutions to expand voting for government offices, such as governors, judges, and prosecutors. Between 1832 and 1860, one third of the states decided to give voters the right to elect prosecutors. *Id.*

<sup>205</sup> *Id.* at 1535. Electing district attorneys was a means of gaining partisan advantage. Many believe it was a way to assure control of government for one political party, whichever party dominated at the time. However, instead, many states began electing district attorneys to be more responsive to the criminal justice priorities of the community rather than the governor or state legislature. The whole election process for chief prosecutors has come under scrutiny the last few years because it allows biased politics to become mixed up with the justice system that is supposed to be objective. *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Andrew Novak, *It's Too Dangerous to Elect Prosecutors*, THE DAILY BEAST (Aug. 24, 2015, 1:12 PM), <https://www.thedailybeast.com/its-too-dangerous-to-elect-prosecutors>.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

One study determined that the “electoral “tough on crime” mantra emphasizes “wins”, even if the “wins” lead to over-punishment or injustice”.<sup>211</sup> This mantra heavily influences prosecutors to commit misconduct in order to increase their conviction rates.<sup>212</sup> Therefore, if the chief prosecutor is pushing this mentality, it follows that the rest of the prosecutors working in that county will follow that mantra.<sup>213</sup>

There are alternatives to electing prosecutors that may be more efficient, such as having the sitting governor appoint the district attorney. However, some might speculate that the governor will also have the opportunity to push his or her own agenda, and therefore the prosecutor would still need to be reviewed and vetted for the position.<sup>214</sup> Moreover, district attorneys could be given a promotion that is based on merit and time spent on the job, just like any other career. This would allow prosecutors to be qualified for the position and would not allow politics to get brought into the mix. Thus, the whole election procedure to elect a chief prosecutor should be eliminated, as it seems to have more negative effects than good.

In addition to the above changes mentioned for the criminal justice system, a report released by the ACLU recommended that each state should make it mandatory for all prosecutors’ offices to have written policies.<sup>215</sup> The written policy should make prosecutorial error training mandatory.<sup>216</sup> Further, the written policies should require each attorney to have a “second chair” prosecutor to help supervise them in court to avoid making an error.<sup>217</sup> For example, for open arguments and summations, a prosecutor should ask their co-prosecutors and supervisors for their opinion to make

---

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> ACLU OF NEW JERSEY, TRIAL AND ERROR: A COMPREHENSIVE STUDY OF PROSECUTORIAL CONDUCT IN NEW JERSEY 37-38 (2012).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

sure unconstitutional violations are not committed.<sup>218</sup> Additionally, the written policy must state what the consequences will be if the prosecutors do commit misconduct, especially if a prosecutor has knowingly and purposefully committed multiple errors.<sup>219</sup>

Furthermore, the report released by the ACLU also stated that there should be mandatory reporting of all situations where prosecutorial error and misconduct had played a role.<sup>220</sup> Particularly, the courts should be required to report to the Office of the Attorney General when they have encountered prosecutorial misconduct in a case.<sup>221</sup> In turn, once the Attorney General receives that information, it should automatically be required to report to the state bar ethic's board, particularly in cases in which the court decided that the prosecutorial error substantially prejudiced the defendant, caused a mistrial, or caused a decision to be reversed.<sup>222</sup>

Last, in each report the name of the prosecutor should be released to the public in the opinion.<sup>223</sup> This will help put the defense on notice that the prosecutor has previously committed misconduct or errors, thus giving the defense an opportunity to better prepare. Also, the state bar ethic's board with this information needs to be able to conduct a thorough investigation into the prosecutor that committed the error, specifically the prosecutors who are continuing to commit multiple violations, especially when they lead to wrongful convictions. Moreover, the state bar must punish the prosecutors appropriately.<sup>224</sup> For example, if a prosecutor has committed multiple violations on purpose and with knowledge, the state bar should seriously consider disbarment.

## **V. Conclusion**

---

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

Today, prosecutors hold too much power in the American criminal justice system, as they are able to decide whether to bring charges, plea bargain, and are privileged to evidence before the defense or the court. They should not be protected by absolute immunity, because it allows them to escape misconduct unscathed, specifically in cases where the prosecutor is knowingly and purposefully committing misconduct that has contributed to a wrongful conviction. If America is serious about stopping wrongful convictions and not allowing prosecutors to abuse the system, there needs to be a way to hold prosecutors accountable. By looking at Texas and New Jersey, it was evident that both states are trying to pass legislation to stop this from happening, but even the numbers are minimal, prosecutorial error still plays a role in wrongfully convicting the innocent. However, more reform from both states and nationwide is required to ensure that wrongful convictions become a thing of the past.