

Policing the Prosecutor: Prosecutorial Misconduct in Wrongful Convictions and
Recommendations to Punish and Deter

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Policing the Prosecutor: Prosecutorial Misconduct in Wrongful Convictions and
Recommendations to Punish and Deter

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Abstract

Purpose

The primary purpose of this research is to advocate for changes within the disciplinary actions of prosecutors found to have engaged in misconduct while in their official capacity. This research explores prosecutorial misconduct within wrongful convictions to identify why current forms of punishment do not adequately punish nor deter those who engage in prosecutorial misconduct; it uses three theoretical frameworks that help to explain why prosecutorial misconduct occurs and make recommendations to deter and detect such conduct; and finally, provides recommendations for best practice through policy, programs and punishments for a more effective system of detection and deterrence for prosecutorial misconduct.

Methods of Approach

The primary method of collecting data is through a review of secondary sources, including: data from textbooks, websites, government and agency studies and reports, and articles from accredited journals. Additional information and statistics were gathered from advocacy agencies such as the Center for Prosecutor Integrity, the National Association of Criminal Defense Lawyers, and the National Registry of Exonerations to support the argument and recommendations of the paper. Information specific to prosecutorial misconduct were reviewed, with an emphasis on collecting information pertaining to changes that can be made in the way that such misconduct is detected and punished. Sykes and Matza's Neutralization Theory, Agnew's General Strain Theory and Burgess and Aker's Differential Association Theory are

used to recommend specific programs, policies, and punishments to detect and deter prosecutorial misconduct.

Summary of Findings

The findings show that there is need for policy and program changes in order to adequately and effectively detect and deter prosecutorial misconduct. The current modes of detecting and deterring such misconduct have failed as prosecutorial misconduct continues to occur. Legislatures, courts, and district attorney offices must look to the motivation behind prosecutorial misconduct in order to effectuate necessary changes. As detailed under the neutralization theory, the risk of engaging in such conduct must outweigh any reward, requiring stiffer punishments and a lack of promotion for engaging in such misconduct. Stress, as detailed by the general strain theory, must be reduced on prosecutors through adequate training, less pressure to win every case, and adequate staffing at prosecutor offices. Further, the subcultures created by prosecutors must be met with internal regulations. To reduce prosecutorial misconduct the following is recommended: the enactment of a per se prejudice rule, mandatory investigations of any prosecutor found to have engaged in misconduct, protection for attorneys who alert authorities to misconduct, increased funding for both prosecutor and public defender offices, and the creation of internal review boards.

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Section 1: Introduction

Statement of the Problem

The United States prosecutor is charged with obtaining justice in cases involving criminal conduct. It is said that the prosecutor has more power and control over an individual's life and freedom than any other person in the United States (Center for Prosecutor Integrity [CPI], 2013). Former U.S. Attorney General Robert Jackson explained that "while the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst" (Robert Jackson, The Federal Prosecutor, Address to the Second Annual Conference of United States Attorneys, (1940) as cited in CPI, 2013, pg. 1). Prosecutors are in a unique position during a criminal case. They not only must zealously advocate for the government, but they must ensure that justice is served (National Association of Criminal Defense Attorneys [NACDL], 2008). It is their job to achieve convictions through every legitimate means possible while also ensuring that they do not engage in misconduct calculated to bring about wrongful convictions (Gershman, 1986). It is the duty of the prosecutor to convict the guilty, but to also prevent the innocent from suffering. It is when a prosecutor ignores his/her dual interest and focuses solely on achieving convictions that prosecutorial misconduct occurs. The consequences of such misconduct are severe and far-reaching. The most obvious is that innocent individuals could be convicted and sentenced for crimes they did not commit and possibly exonerated years later all due to misconduct committed by the prosecutor. In addition, with every case of prosecutorial misconduct and exonerated defendants, the public faith in the prosecutor's office can diminish, which then could extend to the government as a whole.

Although the exact number of cases involving prosecutorial misconduct is unknown, there have been studies in the past that do suggest that such misconduct should cause concern (Schoenfeld, 2005). According to The National Registry of Exonerations [NRE] (2013), 43% of wrongful convictions arise from misconduct involving prosecutors and other officials. Given that such high number of wrongful convictions have been caused by prosecutorial misconduct, it is expected that there would be effective policies, programs, and punishments in place to detect and deter such behavior. Historically, such programs and policies have been unsuccessful as prosecutorial misconduct has continued to occur even with such programs and policies in place (Schoenfeld, 2005). Currently, the task of detecting and deterring prosecutorial misconduct has fallen on state bar associations and the court system. Both have failed at curbing and reducing prosecutorial misconduct, generally giving a slap on the wrist or determining the misconduct was harmless to the case (Center for Prosecutor Integrity [CPI], 2013). Furthermore, the current forms of detecting and deterring prosecutorial misconduct fail to address why a prosecutor may engage in such behavior. Therefore, the following research paper explores prosecutorial misconduct within wrongful convictions to identify the limitations of current practices and to suggest new policies and programs to detect and deter such misbehavior.

Purpose of the Study

The primary purpose of this research is to advocate for changes within the disciplinary actions of prosecutors found to have engaged in misconduct while in their official capacity. This research explores prosecutorial misconduct within wrongful convictions to identify why current forms of punishment do not adequately punish nor deter those who engage in prosecutorial misconduct; it uses three theoretical frameworks that help to explain why prosecutorial misconduct occurs and make recommendations to deter and detect such conduct; and finally,

provides recommendations for best practice through policy, programs and punishments for a more effective system of detection and deterrence for prosecutorial misconduct.

Significance of the Problem

Prosecutorial misconduct is an abuse of power that is often left unchecked and unpunished. Such abuse of power has led to a diminished trust in the government to effectively carry out their duty. By studying prosecutorial misconduct in wrongful convictions and the lack of punishments handed down or detection of such egregious behavior, it is hoped that more effective programs, policies, and practices can be created to decrease misconduct by prosecutors, ensure the integrity of the criminal justice system, and restore society's faith in the government and the criminal justice system. With improved practices and programs in place to detect and deter prosecutorial misconduct, such misconduct should decline, less individuals will be wrongfully convicted, and that there will be a direct impact not only in how cases are handled by prosecutors, but also on the number and types of appeals, which may also result in a much more cost-efficient criminal justice system.

Methods of Approach

The primary method of collecting data is through a review of secondary sources, including: data from textbooks, websites, government and agency studies and reports, and articles from accredited journals. Additional information and statistics were gathered from advocacy agencies such as the Center for Prosecutor Integrity, the National Association of Criminal Defense Lawyers, and the National Registry of Exonerations to support the argument and recommendations of the paper. Information specific to prosecutorial misconduct were reviewed, with an emphasis on collecting information pertaining to changes that can be made in the way

that such misconduct is detected and punished. Agnew's General Strain Theory and Burgess and Aker's Differential Association Theory is used to recommend specific programs, policies, and punishments to detect and deter prosecutorial misconduct.

Section 2: Literature Review

The following section will provide an in-depth examination of prosecutorial misconduct in the United States. First, a definition of prosecutorial misconduct and wrongful conviction will be provided, including the most common forms of prosecutorial misconduct. Second, the current statistics on prosecutorial misconduct will be examined to determine the current scope of the problem of such misconduct. Third, the consequences of such misconduct will be provided. Finally, the current modes of detecting and deterring prosecutorial misconduct will be discussed, focusing on the weaknesses of such programs and policies to show that the current modes are not sufficient to deter and detect prosecutorial misconduct.

Definitions

Prosecutorial misconduct occurs when a prosecutor “overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense” *Berger v. United States*, 295 U.S. 78 (1935). In other words, it occurs when a prosecutor violates a law or code of professional ethics during the pendency of a prosecution. Prosecutorial misconduct can occur at any stage of the investigation or criminal case, including presentation to a grand jury, charging decisions, discovery, plea bargaining, trials, and appeals (Schoenfeld, 2005). The most egregious misconduct and that which has been tied to more reversals of convictions is that which occurs during criminal trials, including during pretrial discovery, trial or appeals. Many issues of prosecutorial misconduct are based upon *Brady* violations, or suppression of evidence (NACDL, 2008). In *Brady v. Maryland*, 373 U.S. 83 (1963), the court held that “suppression by the prosecution of evidence favorable to an accused violates due process when the evidence is material to either guilt or punishment,

irrespective of good faith or bad faith of the prosecutor.” The reasoning behind the *Brady* ruling is to guarantee that a defendant receives a fair trial during which all evidence of guilt and innocence is presented to the jury in order to determine a fair and just result (Jones, 2010). The *Brady* rule requires the prosecution to investigate, preserve, and disclose favorable and material information to the defense. Favorable evidence is that which is exculpatory and that can be used for impeachment (Jones, 2010). Material information means that the evidence must have had an impact on the determination of guilt (Jones, 2010).

NACDL (2008) provides an extensive overview of the different types of prosecutorial misconduct that occurs during a trial besides *Brady* violations. This misconduct can range from improperly introducing excluded evidence to assassinating the character of the defendant. Prosecutors are prohibited from telling a jury that the defendant refused to speak to the police or is refusing to testify in his or her own defense; however, prosecutors have engaged in such misconduct during trials. During trial, prosecutors may engage in making inflammatory statements during closing arguments that are based upon the prosecutor’s own belief, which is specifically prohibited by the ethical rules governing prosecutors. Finally, during trial, prosecutors have been accused of introducing misleading or false forensic evidence, including faulty lab work or so-called “scientific evidence” that is found using unreliable and outdated techniques, as well as, suborning perjury of their witnesses. There are ethical rules that have been put in place by both state and federal authorities which expressly prohibit such behavior, but, as will be discussed, such rules have not deterred this misconduct.

Prosecutorial misconduct does not occur only during the trial stage of a criminal case (CPI, 2013). Misconduct can occur from the moment the police begin their investigation into an individual suspected of criminal activity (CPI, 2013). Such misconduct can come in the form of

an abuse of discretion through charging a defendant with more offenses than is warranted for an offense (CPI, 2013). Discretion is the power to act in accordance with one's own personal beliefs (Gershman, 1986). It is the prosecutor that decides who to charge, what to charge, when to charge, and how to charge an individual, giving them immense power (Gershman, 1986). This discretion of the prosecutor can be based upon vindictiveness, bigotry, or due to other unethical reasons (Gershman, 1986).

Once a defendant is charged, a prosecutor may abuse their power during the plea bargaining process, during which the prosecutor has all of the power to grant or withhold a plea offer (Gershman, 1986). During this process, the prosecutor is able to exert a large amount of pressure in order to obtain a plea agreement, including granting leniency (Gershman, 1986). Discretion of the prosecutor at the plea bargaining stage has resulted in harsher penalties for defendants who turn down plea bargains and instead decide to go to trial (Devers, 2011). Research has shown that prosecutors have used threats to ensure that the defendant accepts a plea bargain, even when evidence against the defendant is unsubstantial (Devers, 2011). Prosecutorial misconduct at this stage of the criminal process is concerning as 90-95 percent of all cases resolve through a plea bargain (Devers, 2011).

Current Statistics

The exact number of cases involving prosecutorial misconduct is elusive, because of the secretive nature that surrounds such misconduct as most happens behind closed doors (CPI, 2013). Although the Innocence Project only attributes 14% of cases of wrongful convictions to government misconduct, evidence suggests that nearly all of the convictions would have been prevented by more competent and ethical legal counsel (Collins & Jarvis, 2009). Between 1989 and June of 2016, there have been 1,810 exonerations of innocent individuals wrongfully

convicted of a crime (NRE, 2016). NRE (2016) estimates that 51% of all wrongful convictions are caused by official misconduct, including prosecutorial misconduct. The highest rate of official misconduct during this time was in homicide cases with 68% being attributed to official misconduct. Between 1970 and 2005, appellate courts had reviewed 11,452 cases in which the defendant had made a claim that the prosecutor engaged in misconduct (Schoenfeld, 2005). Of that 11,452 cases, 20% were either dismissed, reversed, or had a sentence reduced due to the misconduct of the prosecutor.

The State of California is one of the few states which has conducted an in-depth study examining state and federal court rulings where prosecutorial misconduct was alleged (Possley & Seargeant, 2011). The study conducted by Possley and Seargeant (2011) found prosecutorial misconduct in more than 800 cases. Of the more than 800 cases, a judge set aside the conviction or sentence, declared a mistrial, or excluded evidence in 202. Prosecutorial misconduct was deemed harmless in 614 cases, thereby upholding the conviction despite the misconduct. The study found that prosecutors that engaged in misconduct on multiple occasions accounted for nearly one third of all cases of misconduct. In the more than 800 cases, 107 prosecutors were found to have engaged in misconduct on more than one occasion, while two prosecutors engaged in misconduct four times, two engaged in misconduct five times, and one prosecutor was found to have engaged in misconduct six different times. As the statistics show, misconduct on the part of the prosecutor in continuing to occur, with many cases being caused by prosecutors who had previously engaged in misconduct. The statistics clearly indicate a need for a change in policy and programs to detect and deter prosecutorial misconduct.

Consequences of Prosecutorial Misconduct

The consequences of prosecutorial misconduct are far-reaching and long lasting (CPI, 2013). The worst consequence of prosecutorial misconduct is a wrongful conviction. A wrongful conviction occurs when a defendant is found guilty of a crime that he or she did not commit (Johnson, 2013). According to Gould and Leo (2010), there are two different types of wrongful convictions, procedural and factual innocence. Procedural innocence focuses on the law and procedure followed in a criminal case, in which the government is penalized for violating a defendant's fundamental rights through overturning a conviction and sometimes ordering a new trial. Often times this type of innocence is referred to as a legal technicality. Factual innocence refers to a situation where the facts do not support finding the defendant guilty because someone else committed the crime. Prosecutorial misconduct can occur in both procedural and actual innocence cases. For the purposes of this paper, all types of wrongful convictions will be considered if they result from prosecutorial misconduct.

In 2013, one in one hundred citizens were serving time in jail or prison (CPI, 2013). Every year, thousands of Americans become victims of prosecutorial misconduct, affecting more individuals than previously thought (CPI, 2013). Based upon the exonerations between 1989 and 2016, over 16,135 years of life have been lost due to wrongful convictions, including those caused by prosecutorial misconduct, which is an average of 8.9 years per case (NRE, 2016). The cost of prosecutorial misconduct is clear and tremendous in that it can result in years lost of an individual's life. Studies have shown that those who have been wrongfully convicted and imprisoned suffer from chronic psychological trauma, including psychiatric and adjustment difficulties (Gould & Leo, 2010). Further, once exonerated, these individuals then face problems securing housing, employment, and financial support, let alone support in reconnecting with family and children that they have been separated from while imprisoned (Gould & Leo, 2010).

These problems only arise if the wrongfully convicted is able to prove his or her innocence and gain his or her freedom. In some cases, the wrongfully convicted may remain behind bars and can only seek release through parole, where it is extremely difficult to maintain innocence while proving rehabilitation (Gould & Leo, 2010).

Not only does the wrongfully convicted defendant face lifelong consequences, but so does their family (CPI, 2013). The families of those wrongfully convicted are often ostracized and threatened for the assumed actions of their convicted family member (Grounds, 2004). Grounds (2004) conducted several interviews with family members to discuss how neighbors and community members threatened their safety based upon what their convicted family member was convicted of doing. The strain on the family financially and emotionally is extraordinary. Oftentimes, the only visits with family are in prison, straining the familial bond. Further, once the wrongfully convicted individual is released, his or her return home is not celebratory, as they are often a stranger to their family. Family members of those wrongfully convicted often times suffer from varying mental disorders, including depression and post-traumatic stress disorder. In addition, when an individual is wrongfully convicted, society at large is threatened as the real offender remains at large (CPI, 2013).

Although wrongful convictions are the most severe consequence of prosecutorial misconduct, there are other consequences as well. Not only is society at risk when the real offender is not caught, but CPI (2013) examined the tax burden placed on society due to wrongful convictions. A Texas examination of wrongful convictions found that taxpayers paid \$8.6 million in taxes to correct 45 wrongful convictions. Further, it was found that in Illinois, 85 exonerations cost the taxpayers \$214 million. With the real offender at large, the tax burden for wrongful convictions, and the knowledge that the prosecutor engaged in misconduct, it isn't

surprising that the public confidence and faith in the criminal justice system decreases, thereby lowering trust in the government.

Current Modes of Detecting and Deterring Prosecutorial Misconduct

Currently there are several modes of detecting and deterring prosecutorial misconduct that include: State Bar Associations and ethical rules, Constitutional requirements, the courts, and the criminal and civil liability. The following section will examine each of the current modes of detecting and deterring prosecutorial misconduct, pointing out how each has fallen short of exposing and punishing such misconduct.

Harmless Error Doctrine

Historically, the courts have been given the power and ability to punish prosecutors who engage in misconduct using supervisory power (Ross, 2001). By using the supervisory power, courts have the authority to dismiss and suppress evidence on their own motion by setting procedures for their courtroom that were not controlled by the constitution or Congress (Ross, 2001). The authority to set such procedural standards in the courtroom was put in place to deter governmental misconduct and preserve judicial honesty and reliability (Mitchells, 1988). The supervisory power of courts appears to be an effective measure to both detect and deter prosecutorial misconduct as such conduct does occur in front of judges; however, the Supreme Court has continuously chiseled away at this power through the use of the harmless error doctrine (Schoenfeld, 2005). Federal Rules of Criminal Procedure 52 states “any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” The harmless error doctrine was put in place to allow appellate courts the authority to affirm a defendant’s conviction when the defendant’s guilt is undeniable, even if they were not afforded a

fair trial (Greabe, 2016). The purpose of the doctrine was and still is to avoid costly retrials based upon trivial errors (Fairfax, 2008). However, the doctrine has now evolved into a mechanism to preserve convictions despite serious constitutional, evidentiary, and procedural violations, all while allowing prosecutors to continue to engage in serious misconduct without being punished (Fairfax, 2008). The doctrine aligns with the courts reluctance to reverse convictions due to a desire for finality in cases (Schoenfeld, 2005).

The United States Supreme Court has limited a court's use of the supervisory power by increasing the power of the Harmless-Error Doctrine, including constitutional errors that do not involve a basic right to a fair trial, through varying standards of review (Greabe, 2016). The first case that set forth a standard of review for errors in trial was *Kotteakos v. United States*, 328 U.S. 750 (1946). The Supreme Court held that when reviewing nonconstitutional errors, a court must determine whether the error had a significant and damaging effect on the jury's verdict. It wouldn't be until nearly forty years later that the court looked at constitutional errors, as for that forty years, every error found to constitutional in nature immediately resulted in a new trial (Greabe, 2016). In *United States v. Hastings*, 461 U.S. 499 (1983), prosecution violated the defendant's Fifth Amendment right against self-incrimination by referring to the defendant's silence during trial and during closing arguments. The court held that the lower court was not authorized to use the supervisory power to punish prosecutorial misconduct unless the defendant was able to show that he was prejudiced by the conduct (*United States v. Hastings*, 461 U.S. 499 (1983)).

In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court set forth the standard to determine if a constitutional error was harmless. In *Chapman*, the court held that before a constitutional error can be determined to be harmless, the court must state that it was harmless

beyond a reasonable doubt. If the defendant would have been found guilty regardless of whether the error occurred, then the constitutional error will be considered harmless. However, the court did hold that there are certain constitutional rights that are so basic to a fair trial that they could never be considered harmless (Greabe, 2016). Although the court did not provide an exhaustive list, they stated that such rights would include the right to counsel, the right to not have a coerced confession used against them, and the right to an impartial judge (Greabe, 2016). Although the court did explain that there are some constitutional rights that are not amenable to the harmless error doctrine, they did not explain to the lower courts how to determine which constitutional errors could be deemed harmless (Greabe, 2016).

It was not until *Fulminante v. Arizona*, 499 U.S. 279 (1991), that a framework for lower courts to use was provided to determine whether a constitutional error should be examined under the *Chapman* test. The court created two categories, trial errors and structural errors. Trial errors occur during the actual trial and presentation to the jury, allowing the court to examine the error in the context of all of the other evidence submitted to the court to determine whether or not the error was harmless. Structural errors are those errors which occur in the composition of the trial instrument. Structural errors were further defined in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) as errors that directly affect the framework of the proceedings, including: the right to a public trial, the right to counsel, the right to represent oneself at trial, and the right to have counsel that the defendant chooses.

As Ferguson-Gilbert (2001) illustrates, the Supreme Court did not stop with *Hastings*, *Chapman*, and *Fulminante* and further expanded the harmless error doctrine by stating that a defendant is only entitled to habeas corpus relief for convictions obtained through prosecutorial misconduct if the defendant is able to establish that actual prejudice resulted from the

misconduct. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the prosecutor made unconstitutional references to the defendant's silence. The Supreme Court in *Brecht* determined that the harmless error standard in *Hastings* and *Chapman* was too strict for federal habeas corpus review and such a review would be reserved for cases where the defendant proved that he had been harmed by the prosecutor's misconduct. Therefore, to ensure that only the worst cases were reviewed under the harmless error doctrine, the court held that a state conviction should not be reversed unless the error "had a substantial and injurious effect or influence in determining the jury's verdict," rather than harmless beyond a reasonable doubt. Ferguson-Gilbert (2001) explains that the effect has been substantial as now instead of having the prosecutor prove that the error was harmless, the defendant must now bear the burden of proving that the error was not harmless by showing actual prejudice. Therefore, the harmless error doctrine has greatly decreased the ability of defendant's to obtain relief from prosecutorial misconduct through the relief of last resort, habeas corpus, by shifting the burden to the defendant.

Nearly three years after the decision was handed down in *Brecht*, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 (Greabe, 2016). This act included a provision, in specific 28 U.S.C § 2254(d)(1), which bans a petition for federal habeas corpus for claims that a state court improperly decided a federal constitutional claim unless the state's decision involved the arbitrary application of federal law. Seven years later in *Mitchell v. Esparza*, 540 U.S. 12 (2003), the Supreme Court held that 28 U.S.C. § 2254(d)(1) applies to state court determination that a constitutional error is harmless under *Chapman* and prohibits federal relief unless the use of the *Chapman* test was unreasonable. Both *Brecht* and 28 U.S.C. § 2254(d)(1) were both affirmed in *Fry v. Pliler*, 551 U.S. 112 (2007). In this case, it was argued that § 2254(d)(1) eliminated the need that a defendant filing for habeas corpus must satisfy the

Brecht test for harmless error. The court in *Fry* held that there must be satisfaction of the *Brecht* test prior to a collateral relief, such as habeas corpus, and that the AEDPA would not replace the more stringent test of *Brecht* with the more liberal test in *Chapman*.

The Harmless-Error Doctrine has evolved in such a manner as to continually erode a court's supervisory power. Currently, as Greabe (2016) explains, there are four different types of errors that the court recognizes under the harmless-error doctrine. First, there are constitutional structural errors, which are not allowed to be examined under the harmless-error doctrine. Second, there are constitutional trial errors challenged on direct review and not habeas corpus, which are reviewed under the *Chapman* test. Third, there are non-constitutional trial errors challenged on direct review that are tested using *Kotteakos* test. Finally, there are constitutional errors that are challenged under collateral review like habeas corpus that must be examined for harmful error using the *Brecht* test. It is clear to see why there is so much confusion to this day about how to examine errors made in trials. The confusion not only puts defendants at risk of an unfair trial, but it takes away a court's power over the courtroom and the conduct of those who are tasked with carrying out justice.

Civil and Criminal Liability

Under section 1983 of the Civil Rights Act, "every person who...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...or other proper proceeding for redress." Congress enacted this amendment in order to protect citizens and challenge the conduct of a state official who is alleged to have deprived the citizen of a federal statutory or constitutional right (Moore, 2006). Unfortunately, the civil liability of prosecutors under §1983 has been diluted by the Supreme Court. (Chemerinsky,

2014). First, in *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court of the United States held that prosecutors are entitled to absolute immunity from civil liability under §1983 if the acts are within the scope of the prosecutor's duties, regardless of whether they "knowingly use false or misleading testimony or suppress evidence" that is favorable to the defendant (Scheck, 2010). The court also decided that prosecutors only have qualified immunity for investigative or administrative acts (Chemerinsky, 2014). The court did acknowledge that their decision left defendants without a civil remedy against prosecutorial misconduct (Scheck, 2010) but believed such misconduct would be redressed by the powers of the trial judge, appeals courts, and state bar associations (*Imbler v. Pachtman*, 424 U.S. 409 at 427).

Imbler was not the last time that the Supreme Court addressed the issue of civil liability for prosecutors (Scheck, 2010). In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Supreme Court held that when a prosecutor holds a press conference, the act is administrative and not a part of their duties and, therefore, is only protected by qualified immunity. However, in *Van De Kamp v. Goldstein*, 129 S. Ct. 855 (2009), the Supreme Court extended the absolute immunity doctrine to include the administrative acts found with supervisory attorneys training and supervision of younger attorneys in regards to *Brady* requirements. As Scheck (2010) illustrates, the Supreme Court has made it clear that a prosecutor is absolutely immune from liability when their actions are found to be within their official duties as a prosecutor. However, if the actions of a prosecutor are investigative or administrative, except for those involved in supervising or training less experienced prosecutors, in nature then prosecutors are still protected through qualified immunity, but not to the full extent of absolute immunity. Therefore, it is extremely difficult to bring a civil suit against a prosecutor for a violation of their constitutional rights.

Civil liability is not a realistic tool to detect and deter prosecutorial misconduct as prosecutors are shielded from such liability.

Under 18 U.S.C. Section 242 provides criminal liability for any person who, under the law, deprives any citizen of their constitutional rights and subjects them to a fine of not more than \$1,000 and/or imprisonment of not more than one year (Federal Bureau of Investigation [FBI], n.d.). This statute allows for the criminal prosecution of prosecutors who have willfully denied a defendant any of his or her constitutional rights (Smith, 2008). However, criminal prosecution of prosecutors for their misconduct is extremely rare (NACDL, 2008). There are several issues with using criminal liability as a remedy for prosecutorial misconduct (Smith, 2008). First, if a prosecutor engages in misconduct, it is their fellow prosecutors who must charge them with a crime, creating a tremendous conflict of interest (Schoenfeld, 2005). They must, in effect, prosecute one of their own and bring scrutiny to their office and policies (Schoenfeld, 2005). Dunahoe (2005) explains the other two reasons for a lack of criminal liability. Second, as hesitant as a prosecutor may be to bring criminal charges against a fellow prosecutor, so too is the judge in imposing criminal sanctions against a prosecutor. Generally, judges will reserve imposing criminal sanctions for prosecutorial misconduct when it involves the most serious of constitutional deprivations. Finally, the criminal statute only bans the willful deprivation of rights that are protected by the Constitution. This means that a defendant not only has to prove that the prosecutor violated his or her constitutional rights, but that the prosecutor knew that his or her actions would deprive the defendant of his or her constitutional rights. Having to prove both the violation and the motivation of the prosecutor is an extremely hard task for defendants to accomplish, leading to an ineffective policy to deter prosecutorial misconduct.

State Bar Associations

Each state in the United States has in place a process to discipline the misconduct committed by attorneys who are licensed to practice in that state (NACDL, 2008). Further, the Department of Justice's Office of Professional Responsibility (OPR) has the responsibility of investigating allegations of misconduct committed by federal prosecutors (NACDL, 2008). The mission of such programs is to detect, investigate, and ultimately punish if the allegation are proven true through sanctions, including fines, publication of the misconduct, and even disbarment (Schoenfeld, 2005). Further, in 1998, Congress passed the Citizens Protection Act, which requires federal prosecutors to follow the ethics rules of the states where they practice (Dunahoe, 2005). Currently every state, except for California, has adopted a version of the American Bar Association's Model Rule of Professional Responsibility (American Bar Association [ABA], 2016). California will likely never adopt the ABA's rules given they have over 280,000 lawyers practicing in the state, as such a rule change would likely disrupt the field of law (State Bar of California, 2016). Many of the rules do not apply to prosecutors, since their role is to represent the people rather than an individual client; however, some of the rules do apply to all attorneys, including prosecutors (Davis, 2007). These rules involve ethical issues like: offering false evidence, making false statements, concealing evidence, or interfering with witnesses (Davis, 2007). The only rule in the ABA's Model Rules is 3.8, which deals with the special responsibilities of a prosecutor (ABA, 2016). A prosecutor in a criminal case must ensure that: all charges that are brought against a defendant are supported by probable cause; a defendant has been advised of his rights; that all exculpatory evidence is revealed to the defense both before and during a trial; and, most recently added, that a prosecutor seeks a remedy to

conviction when they know of clear and convincing evidence establishing that the defendant was convicted of a crime they did not commit (ABA, 2016).

Although such programs and rules are put in place to detect and deter prosecutorial misconduct, it is very rare that prosecutors, both federal and state, are punished through such agencies and programs (Gier, 2006). In most cases, either the State Bar never enforced the ethical rules or the prosecutors who violated the rules were never even reported to the State Bar by judges, victims of their misconduct, or fellow attorneys (Gier, 2006). Although fellow attorneys are required under the ABA model rules to report misconduct committed by other attorneys, defense attorneys may fear retaliation by the prosecutor's office if they report one of their fellow attorneys (Gier, 2006). Defendants may also fear that a prosecutor's office may become vindictive towards them in the future if they report misconduct by a prosecutor (Gier, 2006). Between 1970 and 2007, it was found that there were only 44 instances of disciplinary actions against prosecutors (NACDL, 2008). Of those 44 instances, the most severe punishment involved the disbarring of two prosecutors, while twelve prosecutors had their licenses suspended (NACDL, 2008). The majority of the cases involved assessing the costs of the proceedings to the prosecutor (NACDL, 2008). As stated previously, it is estimated that 43% of wrongful convictions can be attributed to misconduct by prosecutors (CPI, 2013). Therefore, it is clear to see that prosecutors are escaping punishment handled by state bar associations and such programs and agencies are not effective in detecting or deterring prosecutorial misconduct.

Each of the current modes of detecting and deterring prosecutorial misconduct have not been effective in their mission. The harmless-error doctrine repeatedly allows for misconduct by prosecutors to be deemed harmless, allowing convictions to stand even though a prosecutor violated ethical rules and, in some instances, constitutional rights. Logically, the next step in

rectifying a wrong by an attorney would be through civil and criminal liability. However, the Supreme Court of the United States has made it clear that so long as prosecutors are acting within the scope of their professional duties they are absolutely immune to civil liability. Further, although there are criminal statutes in place to punish prosecutors for misconduct, there must be proof that the prosecutor willfully violated the rights of a defendant and there must be a prosecutor and judge willing to convict one of their own. Finally, the last line of defense against prosecutorial misconduct, state bar and lawyer regulation units, have failed to properly investigate and punish such misconduct. It is no surprise that prosecutorial misconduct continues given the lack of consequences a prosecutor faces for engaging in such misconduct.

Section 3: Theoretical Explanation of Prosecutorial Misconduct

There are numerous theories to explain why individuals commit crimes or behave in a delinquent manner. However, there have been few studies or papers written connecting prosecutorial misconduct with the theories of crime. In the following section, this section will explore three theories of crime and apply them to prosecutorial misconduct.

Neutralization

Neutralization theory as described by Skyes and Matza (1957) claims that individuals will use methods or techniques of neutralization to justify their illegal, unethical, or otherwise wrong behavior (Tibbetts & Hemmens, 2010). The use of the methods and techniques of neutralization allows an individual to freely engage in the deviant behavior without any feelings of guilt or remorse. Skyes and Matza identified five techniques or methods of neutralization, including: 1) denial of responsibility, 2) denial of injury, 3) denial of the victim, 4) condemnation of the condemners, and 5) appeal to higher loyalties. In reality, there are numerous excuses that people come up with to rationalize their behavior.

Application of Neutralization Theory to Prosecutorial Misconduct

Neutralization theory has been empirically tested on prosecutorial misconduct (Schoenfeld, 2005). Schoenfeld analyzed the job of a prosecutor in relation to the neutralization theory, creating the hypothesis that neutralizations combined with motivation and opportunity create an environment that is perfect for a prosecutor to engage in misconduct. Motivation to engage in misconduct in a professional setting comes from the competition culture where the value of personal success and winning are measures of an individual's worth. Motivation can come in the form of raises and promotions for a high conviction rate. In addition, an assistant

district attorney may have political ambitions and the idea of being tough on crime may motivate them to commit misconduct. Once an individual has the motivation to engage in misconduct they must develop methods to rationalize their behavior as it is against the norms, which is called neutralization. There are several that prosecutors' use, including denial that the act causes harm to others, arguing that the laws or rules that were violated were unfair or wrong, or arguing that everyone else does it so why shouldn't they. It is the combination of motivation and neutralizations that give rise to misconduct.

According to Ferguson-Gilbert (2001), prosecutors are motivated to engage in misconduct for several reasons. First, many prosecutors value their success by how many cases they win at trial. Prosecutors desire the praise they receive for their high conviction rates, which, to them, signals a successful prosecutor. This drive to win cases in order to be considered successful has caused prosecutors to carry out their job for self-interest rather than for public good. Second, this all or nothing approach to winning cases is rewarded by their peers through career advancement. Prosecutors with high conviction rates, regardless of whether they are obtained through misconduct, show the prosecutor is successful and therefore should be promoted. This idea of gaining promotion through conviction rates and pleasing higher authority's breed's misconduct, as many will do anything to advance in their career. Finally, prosecutors may be motivated engage in misconduct because they have aspirations of higher office. Individuals who are seen as tough on crime because they have a high conviction rate are more likely to be voted into office than those who do not have high conviction rates. These conviction rates can be achieved through misconduct. Although the prosecutors are aware that this behavior is wrong, they are rewarded for gaining convictions and are able to rationalize their behavior. Thus, providing the motivation and neutralization required to engage in misconduct.

General Strain Theory

Building on Robert Merton's strain theory, Robert Agnew's general strain theorizes (1992) that individuals are pressured into committing crimes due to stress, strains, or negative experiences that they experience. Stress and strain bring with it negative emotions and it is those negative emotions that allow an individual to commit crimes to release those feelings. This is especially true if the individual lacks the ability to cope with stress, has low social control, or is predisposed to committing crimes. Strain theories are based upon the stress of failing to meet a goal. With this in mind, Agnew added two new areas of strain/stress: the introduction of noxious stimuli and the removal of positive stimulus. He based his theory on the idea that individuals from all social classes deal with stress and strains and are capable of committing crimes based upon that stress (Tibbetts & Hemmens, 2010). This was different than most strain theories as those theories were centered on the lowest social class of individuals, assuming that those in the middle and upper class had the capabilities to deal with stress and would not engage in crime. He also differentiated between subjective and objective stress. Objective stress relating to those stresses that are generally disliked by the majority of a group and subjective stress relating to those stresses that are disliked by the individual who is experiencing them (Baron, 2008).

Application of the General Strain Theory

The job of a prosecutor is extremely stressful, with pressures coming from various circumstances, individuals, and expectations. In any criminal prosecution, the first pressure a prosecutor faces comes from law enforcement officials (Hon, 2012). The officer involved in the case will likely want the case charged and there is an expectation that it will be charged and a conviction and sentence gained. Even with the pressure of the officers involved in the case, a

prosecutor is tasked with remaining objective and fair and not being overrun by the feelings of the officer. Another source of pressure comes from the victim and their family, who expect the prosecutor to not only gain a conviction after charging a case, but to make them whole again with an often harsh punishment. It is the job of the prosecutor to not allow this strain to dictate what they do in a case, which is often extremely hard to do. Not only are there numerous scenarios that cause stress, the prosecutor job is one where the attorney is not afforded the chance to make a mistake as the consequences of making such a mistake can be lifelong and life altering (Hon, 2012). Finally, another strain or stress may be a prosecutor who is focused upon the number of convictions they achieve or who has hopes of political office. A prosecutor who is afraid of letting down police officers and victims or who is stressed from the extreme strain of achieving the goal of convictions or political office and is unable to cope with such stress may turn to unethical misconduct to achieve these goals and decrease the strain and stress.

Not only are there pressures from police officers, victims, and the prosecutor's own aspirations, but the demands of the job are extremely stressful with overwhelming caseloads and understaffed offices (Beck, 2016). In the State of Wisconsin, two studies have shown that prosecutor offices in the state are understaffed and unable to effectively deal with the increased caseload. The Legislative Audit Bureau study in 2014 showed that in order to adequately and efficiently deal with the number of criminal cases, the state needed to hire 130 more prosecutors. With understaffed offices, the stress and strain on the prosecutorial staff is enormous to handle and clear cases as quickly as possible, leaving a high possibility for error and misconduct. Gershowitz and Killinger (2011) found that prosecutors often have hundreds of open felony cases at any given time, which far exceed the caseloads of public defenders, whose caseloads are often criticized. Such overwhelming caseloads lead to a lack of time and resources for

prosecutors, leaving cases to not be scrutinized and the possibility for individuals to be wrongfully convicted.

Differential Reinforcement Theory

Robert Burgess and Ronald Akers (1966) developed the differential reinforcement theory by expanding Edwin Sutherland's differential association theory (Tibbetts & Hemmens, 2010).

Differential association theory argues that criminal behavior is learned through the formation of definitions that are favorable to violating the law. Burgess and Akers expanded this theory by including Albert Bandura's model of modeling and imitation and B.F. Skinner's operant conditioning. They agreed that individuals learn their criminal behavior, but it is through observing others and mimicking what they have observed. This learned behavior is then rewarded or punished, thus reinforcing the misconduct.

Application of Reinforcement Theory

Although this theory has never been applied to prosecutorial misconduct, it has been applied to police misconduct, which provides a similar structure to prosecutors (Chappell & Piquero, 2004). The researchers theorized that based on Akers' theory, officers create peer groups through which they form opinions on deviant behavior. As new officers enter the department, they are subjected to these existing opinions on deviant behavior and peer pressure. This peer pressure is especially high in police departments due to the large amount of time spent with fellow officers rather than with non-officers. This creates an atmosphere where definitions of deviant behavior are developed and are either reinforced or abandoned.

Just as with police officers, prosecutors also have the potential to create subcultures within the office in which they learn to engage in misconduct. These subcultures may be

accepting of certain misconduct, including witness tampering, withholding evidence, or using improper arguments at trial, especially when it comes to promoting a win at all cost mentality (Ferguson-Gilbert, 2001). New prosecutors often learn what acceptable behavior is by observing and mimicking older more experienced prosecutors. Thereby, causing new prosecutors to be exposed to existing opinions on misconduct. Further, as Ferguson-Gilbert (2001) points out, there is pressure within prosecutor offices by fellow prosecutors to obtain a high conviction rate at any costs. Definitions of misconduct are relaxed in order to produce a higher number of convictions, which is accepted within the subculture. Subcultures within prosecutor offices place value on an individual prosecutor's tally of wins, defining success by conviction rates and rewarding higher producing prosecutors. As with police officers, prosecutors are exposed to an enormous amount of peer pressure as much of their time is spent with fellow prosecutors. This learned behavior brought on by the subculture within the prosecutor's office is often times rewarded through promotions and raises. Those with high conviction rates tend to be promoted more quickly, reinforcing the learned misconduct.

Each theory detailed above provides a possible cause for why prosecutors engage in misconduct and will allow for a better analysis into what can be done to more effectively detect and deter misconduct. Motivation, stress, and subcultures within the prosecutor's office all can cause a prosecutor to find that the risk of misconduct outweighs any possible consequence. Based upon the theories described above, programs and policies can be implemented to directly combat incidents of prosecutorial misconduct and protect against future incidents.

Section 4: Recommendations to Detect and Deter Prosecutorial Misconduct

The current modes of detecting, deterring, and punishing prosecutorial misconduct are not proving successful as the statistics show such misconduct is continuing to occur. Therefore, there must be changes in the form of policy change and implementation of programs in order to ensure misconduct is discovered and punished, as well as, to prevent future acts of misconduct. The following section will describe six separate policy changes and programs that will be necessary in order to hopefully better detect, deter, and punish prosecutorial misconduct.

Enactment of a Per Se Prejudice Rule for Constitutional Errors

The first step in protecting defendants from prosecutorial misconduct begins by making changes to the harmless error doctrine. As stated previously, the harmless error doctrine has eroded the court's supervisory power, allowing both constitutional and non-constitutional errors made by prosecutors to be dismissed (Fairfax, 2008). The most realistic approach to reducing prosecutorial misconduct is by returning the harmless error doctrine to non-constitutional errors and enacting a per se prejudice rule for constitutional errors (Kamin, 2002). Nonconstitutional errors would continue to be subject to the harmless error doctrine regardless of the prosecutor's knowledge of whether their conduct was in error. Constitutional errors would be the basis for an automatic reversal or dismissal of the indictment or charge (Kamin, 2002). This change would guarantee the protection of a defendant's constitutional rights and preserve the integrity of the judicial system by only allowing inconsequential errors to be deemed harmless. Some critics may believe that this system would cause the judicial system to lack efficiency. Although there may be additional costs in having a per se prejudice rule, this rule would be confined to constitutional errors, prohibiting most trivial errors from the calculation. In addition, the cost, both financially

and emotionally, of wrongfully convicting a person is much higher than the cost of ensuring their constitutional rights are protected (Kamin, 2002). Furthermore, this proposal would deter prosecutorial misconduct immediately. There would no longer be motivation to misbehave or commit ethical violations that involve constitutional rights by the prosecutor if the immediate result would be an automatic reversal or dismissal. Such a change would need to occur through a case being brought to the United States Supreme Court in order to undo previous case law.

Although a change in the harmless error doctrine to allow for an immediate reversal or dismissal would eliminate some motivation for prosecutorial misconduct, it does not eliminate all of the opportunities, as some behaviors are not discovered by the court system and would generally only cover those errors that are constitutionally protected and those likely discovered during trial. This leaves many instances of prosecutorial misconduct, including vindictive prosecution, witness tampering, plea bargaining abuse, and abuse of discretion. Therefore, changes to the harmless-error doctrine alone will not be enough and must be implemented in conjunction with other policies and programs.

State Bar Investigations

Working alongside a per se prejudice rule for constitutional errors, state bar associations should enact a policy change within their organizations that requires an immediate investigation into any prosecutor who is named in an opinion where misconduct results in a reversal of the conviction (Gier, 2006). Gier (2006) suggests that such a policy change would allow state bar associations to start investigations without a grievance having been filed, which could hold up the process. It may be argued that such a policy change could be a waste of time and money as a prosecutor may have only engaged in misconduct that one time. However, an investigation and

complaint against a prosecutor may deter that prosecutor and others from engaging in misconduct in the future. Such a deterrence would in effect save the state and taxpayers money from having future mistrials, retrials, and the enormous damaging effects on the defendant, defendant's family, and the victim. The cost of an investigation after a prosecutor is named as committing misconduct, especially misconduct that results in a reversal of a conviction, is worth any additional cost to avoid greater costs in the future. It also helps to remove motivation to commit misconduct as if their misconduct results in a reversal, they will be immediately investigated.

Unfortunately, there has been resistance by state bar associations to implement such immediate investigations into prosecutors named in an opinion as committing misconduct (Carr, 2016). According to Carr (2016), the focus of the majority of the resources provided by state bar associations are on small-firm and solo practitioners whose actions are more likely to be based upon self-serving reasons and motivated by money. The purpose of the bar associations is to protect the public and clients from such attorneys, which prosecutors do not fall under. However, in 2008, the American Bar Association, of which all states except California have adopted, implemented two amendments to Rule 3.8, which specifically governs prosecutors (Green, 2012). These amendments require that prosecutors investigate any material and credible evidence and if such evidence produces a reasonable likelihood that the convicted did not commit the crime, then the prosecutor must remedy the conviction. Although there has been some movement by state bar associations to regulate prosecutors, as Gier (2006) points out, there must be immediate investigations of prosecutors who are named as committing misconduct in court opinions.

Protection for Whistleblower Attorneys

As previously stated, fellow attorneys are required under state bar rules and the ABA Model Rules of Conduct to report abuses and unethical misconduct by other attorneys. ABA Model Rule 8.3 specifically requires an attorney who knows that another attorney has committed a violation of the rules of conduct that calls into question that attorney's honesty or ability to be an attorney *shall* report that attorney to the appropriate authorities. This means that in some states attorneys can be punished if they know of such behavior and do not report it. However, many times attorneys do not report such behavior for fear of retaliation by prosecutors (Gier, 2006). As Gier (2006) states, even though there is such a mandate for attorneys to report on unethical practices of other attorneys, there are no protections in place for anyone who serves as a whistleblower on fellow attorneys. Therefore, if an attorney reports on a prosecutor, they are then at the mercy of the prosecutor. Often times in cases of criminal law, it would involve a defense attorney reporting on the prosecutor for misconduct. If the prosecutor is allowed to remain in their position after the complaint and investigation, they would be in continued contact with the defense attorney who reported their behavior. Unfortunately, the prosecutor would know who reported them, as the complaints are not anonymous. Therefore, the prosecutor could then use their position to retaliate against the defense attorney, through civil suits or through their professional relationship that also puts innocent defendants at risk of a vindictive prosecutor. Given the potential for such retaliation by a prosecutor, it is not surprising that many defense attorneys do not report misconduct, even though they are ethically obligated to do so. To ensure the safety of whistleblower attorneys, there needs to be a policy change with state bar associations. Although the first thought would be to allow for anonymous grievances, unfortunately this would allow for unsubstantiated claims of misconduct and expend unnecessary

amounts of money investigating such claims. Therefore, the reporter should remain anonymous to the prosecutor. The state bar association would have full access and be able to complete a full investigation, including questioning the reporter about the misconduct, all while protecting their identity and ensuring there is no retaliation.

Increased Funding

As detailed by the General Strain Theory, stress on prosecutors is great due to overwhelming caseloads brought on by understaffed offices. One way to combat this form of stress and decrease possible errors and misconduct would be through increased funding of prosecutor offices (Gershowitz & Killinger, 2011). As Gershowitz and Killinger (2011) point out, there must be an increased in funding for prosecutor's offices; however, to ensure that indigent defendants are not disadvantaged due to underfunded public defenders, there must also be increased funding for public defender offices as well. This is an unpopular approach to most legislatures, as public defenders offices are usually the first place budget cuts occur, rather than increased funding. However, it is vital that there is no advantage given to prosecutor offices with increased staff. Therefore, Gershowitz and Killinger (2011) recommend that any increase in funding to prosecutor's offices be tied to increase in funding to public defenders. With an adequately staffed prosecutor office, the caseload would no longer be as overwhelming. The stress of dealing with hundreds of cases at one time would be decreased, leading to less errors and less misconduct.

Internal Regulation

The above changes to policy involve entities that are outside of the prosecutor's office. The following section will describe two programs that can be implemented to provide internal

regulation of prosecutors. The first section will examine conviction integrity units, which focus on reviewing wrongful convictions. The second section will examine professional integrity units, which is a program that provides quality assurance and compliance with office, court, and ethical rules.

Conviction Integrity Units

Conviction Integrity Units (CIU's) are a subsection of a prosecutor's office that is designed and created to prevent, detect, and resolve wrongful convictions (NRE, 2016). Their specific goal is to investigate claims of wrongful convictions and put in place procedures and policies to prevent future wrongful convictions (CPI, 2014). In the last two years, CIU's have been involved in the exoneration of 152 wrongfully convicted individuals, with 58 such exonerations occurring in 2015 (NRE, 2016). Although there have been great strides made by CIU's in the past two years, according to the NRE (2016), it is too soon to tell what kind of lasting impact such programs will have into the future. However, thus far, their initial impact has been great. According to the NRE (2016), the creation of CIU's is completely in the hands of the prosecuting office and the District Attorney and requires no legislative body to be created. It is the decision of the District Attorney as to whether they will create special units within their office dedicated to serve specific cases, including such cases like sexual assault and domestic violence. As such, the CIU's are also special units that are created at the sole discretion of the District Attorney.

The first CIU was created in 2006 in Dallas, Texas (Dallas County, 2016). Since 2006, 23 more CIU's have been created across the country to investigate, deter, and rectify wrongful convictions (CPI, 2014). Although this number may seem great, there are over 2,300 district attorney offices across the country. As the NRE (2016) accurately states, the CIU having been

created by the prosecutor's office is at the mercy of what the District Attorney wants the unit to be. Most CIUs do not have a working relationship with the defense attorneys in their community. In addition, there is no external review of the units to ensure they are run fairly and efficiently. Fortunately, of the current 24 CIU's, two of the largest have taken a different approach in how they are run. In Dallas and Brooklyn, the CIU's were created to have a close relationship with the local defense attorneys, public defenders, and all innocence projects. In order for a CIU to be successful, they must involve local and state-wide criminal defense attorneys and innocence project members to participate.

In order to ensure efficiency, fairness, and accuracy, a model to follow is provided by the Dallas CIU (CPI, 2014). In Dallas, the district attorney specifically hires prosecutors who have a record of ethical practice. This particular CIU not only examines possible wrongful convictions, but also helps advise on current criminal prosecutions (Dallas County, 2016). According to the Dallas County (2016) website, the CIU also provides training to attorneys and law enforcement. Finally, if an individual is found to be innocent, the CIU aids in prosecuting the actual criminal. The Dallas CIU is made up of two Assistant District Attorneys, an assistant, and one investigator who examine cases of possible wrongful conviction. As stated previously, this unit does corroborate and work closely with local defense attorneys and innocence project members. Access to CIU's is extremely important; individuals who believe they have been wrongly convicted or their family members must be able to alert such units of their beliefs. The Dallas CIU offers a website online with instructions on how to submit their claim to the CIU, including an address and phone number. Further, the website clearly explains why the CIU may not investigate certain cases.

There has been one District Attorney's Office who has gone above and beyond the conventional CIU. In 2006 the North Carolina General Assembly created the North Carolina Innocence Inquiry Commission (North Carolina Administrative Office of Courts [NCAOC], 2016). According to their website, the Commission began operating in 2007 and since then has reviewed hundreds of innocence claims. The Commission is tasked with providing an independent entity that looks into credible claims of wrongful convictions. This group is made up of eight members that are picked by the Chief Justice of the North Carolina Supreme Court and the Chief Judge of the North Carolina Court of Appeals, thus eliminating any oversight by the prosecutor's office. The eight members of the Commission are extremely diverse and include: a superior court judge, a prosecuting attorney, a criminal defense attorney, a victim advocate, one member of the public, a police officer, and two discretionary members. The Commission only examines cases of claimed wrongful convictions for felony offenses and there must be credible and verifiable evidence of innocence. The Commission only investigates claims involving new evidence that exonerates an individual and does not examine cases involving technical or procedural trial errors. As of 2016, 1944 cases have been examined by the Commission, with 1862 having been closed. Of the 1944 cases, the Commission has held nine hearings. Once the Commission holds the hearing, they take a majority vote as to whether there is enough evidence to merit judicial review. If there is enough evidence, they refer the case to a three-judge panel. Since the creation of the Commission, ten individuals have been exonerated. This type of conviction integrity unit is free from conflicts of interest as the unit is composed of individuals from varying backgrounds to ensure a balance in finding justice.

Prosecutorial Integrity Units

Scheck (2010) laid the foundation for how a prosecutor's office should develop and institute a prosecutorial integrity unit (PIU) or professional integrity unit as he calls it. The idea behind PIUs is based upon the units used in the medical, business, and industrial fields. Such units have been successful in other fields at combating misconduct, addressing professional errors, and providing adequate information and training to employees. A prosecutorial integrity unit would provide five key processes that would help a prosecutor's office detect and deter misconduct. If misconduct is discovered, then the offending prosecutor would then be punished and their cases investigated for further instances of misconduct. The PIUs would serve as a way of disbanding the prosecutorial subculture that is accepting of misconduct in order to raise one's tally of wins in order to receive praise and promotion. Clear guidelines would be set to ensure that ethical rules were followed and instances of misconduct would be tracked. Such a tracking program would be similar to police department use of Early Warning Systems, to warn of individual prosecutors who engage in misconduct.

According to Scheck (2010), the first process that a PIU would provide is checklists. Checklists have been proven to be a highly successful tool in the medical community and lowered preventable deaths. Just at Johns Hopkins Hospital alone, a checklist to prevent intravenous line infections prevented 43 infections and eight deaths. For prosecutors, the checklists would provide the basic steps to ensure misconduct does not occur. Scheck (2010) recommends any prosecutorial checklist to provide real time help completing their task and that can be used to audit the prosecutor's job. As stated previously, *Brady* violations are one of the worst types of prosecutorial misconduct that occur. There are two types of checklists that can be implemented to help combat *Brady* violations. First, there should be a post-arraignment checklist to ensure that all evidence and documents relating to the case are turned over to the defense. This

checklist would be after the defendant has entered their plea and when most evidence must be turned over. The checklist would provide a complete list of police reports, statements, digital evidence, physical evidence, and any other type of evidence relating to the case to ensure that the defense is given everything and there are no *Brady* violations. Second, there would be a pre-trial checklist that again include all of the evidence in the case to ensure that nothing was missed prior to beginning trial. The prosecutor can use both checklists during the pendency of the case to ensure that all evidence has been turned over to opposing counsel.

Second, there must be a process put in place to gather and track misconduct and errors, much like police departments do with Early Warning Systems. Using the checklists that were discussed previously, prosecutor offices can track instances of misconduct, including late evidence disclosures. Such a tracking system would allow for a determination of whether certain types of cases promote violations or if certain individuals are continually engaging in misconduct. Such a system would be kept confidential in the prosecutor's office to ensure accurate reporting. However, repeated misconduct could result in disciplinary actions, including termination of their position.

Third, there must be clear office guidelines as to the conduct, procedure, definitions, and expectations when prosecuting a case, including ethical considerations. Scheck (2010) explains that in certain circumstances there can be ambiguous ideas as to what exactly is considered exculpatory evidence. The office should provide clear written rules and standards as to what it constitutes as discoverable evidence, as well as, procedures as to charging decisions, plea bargaining, ethical rules concerning conduct and rules of evidence, as well as, conduct in investigating and sentencing hearings. Such guidelines will ensure that each prosecutor is acting

in accordance with office policy and if a prosecutor is found to be violating the office policy they can be appropriately disciplined.

As important as clear office guidelines and policy are, it is even more important that prosecutors are properly trained, and PIUs provide such training programs (Scheck, 2010). Continuing education and training programs are crucial to ensure that the previous three procedures work correctly. PIUs are not effective unless every prosecutor in an office understands how they work, how to implement the programs, the law and ethical rules surrounding the guidelines, and the dangers posed if the rules and procedures are not followed. Training should include an array of topics, including what to do with inconsistent witnesses, what evidence is discoverable, procedures in the courtroom, what to do if misconduct is observed from fellow attorneys, among many other topics. Such training would help increase the success of PIUs and ensure there are no questions as what the expectations of the prosecutor are from the office.

Through the development of clear checklists and guidelines, a tracking system similar to the police department's early warning system, and continuing education and training programs, the PIUs can provide prosecutor offices with the tools to detect, deter, prevent, and punish prosecutorial misconduct within their own offices. Such a program will help address current issues of misconduct and help ensure that individuals are not wrongfully convicted.

It is quite clear through the recommended changes in policy and programs that there is no one single answer to detecting and deterring prosecutorial misconduct. In order to adequately address the problem of such misconduct, there must be changes made legislatively and judicially through the harmless error doctrine, state bar and lawyer regulation units must investigate all claims of misconduct, whistleblowers must be protected, and programs implemented within

prosecutor offices that correct previous errors, as well as, train, guide, and detect continuing prosecutorial misconduct. With such changes to policy and implementation of such programs, it is hoped that misconduct on the part of prosecutors will decrease, as the risk to engage in such behavior would far outweigh any benefit.

Conclusion

In conclusion, based upon the current statistics showing that prosecutorial misconduct is still occurring, there is need for policy and program changes in order to adequately and effectively detect and deter prosecutorial misconduct. The current modes of detecting and deterring such misconduct have failed as prosecutorial misconduct continues to occur. Legislatures, courts, and district attorney offices must look to the motivation behind prosecutorial misconduct in order to effectuate necessary changes. As detailed under the neutralization theory, the risk of engaging in such conduct must outweigh any reward, there must be reduced motivation to engage in misconduct through stiffer punishments and a lack of promotion for engaging in such misconduct. Stress, as detailed by the general strain theory, must be reduced on prosecutors through adequate training, less pressure to win every case, and adequate staffing at prosecutor offices. Further, the subcultures, under the differential association theory, created by prosecutors must be met with internal regulations. To address the causes of prosecutorial misconduct the following is recommended: the enactment of a per se prejudice rule, mandatory investigations of any prosecutor found to have engaged in misconduct, protection for attorneys who alert authorities to misconduct, increased funding for both prosecutor and public defender offices, and the creation of internal review boards. Although there will likely always be prosecutorial misconduct, it is hoped that with the recommended changes to policy and programs, the incidents of such conduct will be greatly reduced.

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