✹ (/subscribe/digital/) The Power of the Prosecutor in America: Abuse, Misconduct, Unaccountability, and Miscarriages of Justice

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by Casey J. Bastian

The prosecutor has more control over life, liberty and reputation than any other person in America.

– Robert Jackson, Former U.S. Attorney (1940)

To many people, prosecutors are viewed as the "Champion of the People." Americans rightly expect those given such tremendous responsibility and incredible power will ensure that justice is done. They shall maintain the integrity of the criminal justice system and promote respect for the rule of law. To that end, the American prosecutor ought to be noble and honorable, committed to vindicating the law, and someone to whom the notion of success isn't simply the number of convictions obtained at any cost.

But what happens when we find that the reality is dramatically different? When it's revealed that there is a darker side to the modern American prosecutor? Or worse, that prosecutors have never been the embodiment of the glowing public image, and securing convictions no matter the costs is all that has ever really mattered. Research, empirical

evidence, and judicial findings reveal a seedy underbelly where individuals who wield immense power cause nearly as much damage to individuals and the rule of law as any number of criminal defendants.

For decades, prosecutors have ruled the criminal justice system with near absolute power. Concentrating so much power in the hands of any one human being inevitably leads to its abuse. Power tends to corrupt, and absolute power corrupts absolutely. The consequences of this corrupted power play out every day across the country. Too many Americans are subjected to abusive power at the expense of their life and liberty. Jackson's observation was not only insightful, but it has also become more deserving of heed as time passes.

There is simply no greater concentration of power in the criminal justice system than that wielded by the modern American prosecutor – and we now know it is abused at alarming rates. This has devastating consequences for the individuals involved and the criminal justice system at large. One report found that "the scope and subjects of prosecutorial power have likely increased over the past century." In 2016, one scholar declared that the "system's overriding evil is the concentration of power" in the hands of prosecutors.

Prosecutorial abuses occur at both the state and federal level. The great majority of prosecutions are conducted at the state level. The assumption that electoral oversight serves as a mechanism of restraint, as prosecutors at the state level are elected officials, bears little fruit. At the federal level, top prosecutors and their subordinates are appointed, with little to no electoral accountability.

The range of criticisms is broad and of many persuasions. "No one of good conscience should want the job," said one former prosecutor. A federal appellate judge declared that "there is an epidemic of prosecutors hiding exculpatory evidence." That's alarming if true, and the evidence indicates that it is. The National Registry of Exonerations ("NRE") found that 30% of all exonerations involved misconduct by prosecutors. The University of California at Irvine's School of Social Ecology noted that misconduct by federal prosecutors was two and half times more common than misconduct by police and an astounding "seven times as common" among "white collar crime exonerations."

That this is the reality after numerous Supreme Court decisions have established and reinforced procedural protections for criminal defendants should shock the conscience. It clearly demonstrates a profound willfulness by prosecutors to disregard the rule of law and embrace a disturbing "win-at-any-cost" mindset. Yet, prosecutors seem to bristle at the term "prosecutorial misconduct," preferring, rather self-servingly, "prosecutorial error" because the term does not connote intentional wrongdoing.

The belief that prosecutors in general are a serious problem continues to gain momentum. Social justice activists argue prosecutors are "protecting trigger-happy cops." Other critics argue that unchecked prosecutorial power is reflected in "overcrowded prisons, out of control snitches, and racially lopsided justice." It is not just laypersons who are voicing their concerns; professionals, experts, scholars, and researchers are offering critiques on a national level as well.

Prosecutorial abuse is considered to be "quite possibly the most pressing challenge in American criminal justice." Such a belief stems from the reality that the professional decisions of prosecutors "are relatively unconstrained and subject to weak oversight." Indeed, the existing jurisprudence meant to ensure honest prosecutorial functioning has no teeth, with courts reluctant or unwilling to invoke their supervisory authority in an effort to sanction and prevent abuse. As such, continuing conversations about prosecutorial power must include discussions on non-existent accountability and unrestrained discretion. Professor of law Angela J. Davis, at the American University of Washington College of Law, argues that the "deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application."

Prosecutorial Discretion

A prosecutor's discretionary charging power, the ability to charge someone with a crime – or not – is likely the most consequential of the many important duties and responsibilities of prosecutors. This power is the "essence" of "control over the entire system." The prosecutor can guide the entire outcome of the process as they desire through nothing more than the charges filed against a defendant. There is a notable lack of transparency when it comes to the exercise of this discretionary power.

The decision to charge or plea bargain is entirely discretionary and essentially unreviewable. This power results in prosecutors having a "greater impact" than that of any other official within the criminal justice system. Factors that lead to these decisions are made behind closed doors. There is absolutely no requirement that a prosecutor disclose their reasoning. Most offices do not even have uniform standards guiding these decisions, and charging decisions are often made on an ad hoc (when necessary) basis, e.g., perhaps the prosecutor learns that the defendant has a criminal history or information that can be leveraged.

The significance of this discretionary latitude cannot be overemphasized. Let's imagine a person is arrested for allegedly possessing methamphetamine. The prosecutor has multiple options: no charges or charges designed to increase the prosecutor's leverage for purposes of conviction. A charge of simple possession is likely a misdemeanor, while distribution offenses can carry lengthy mandatory minimum terms of imprisonment. A factually

innocent person faced with the potential to spend years behind bars will frequently plead guilty to simple possession, after being charged with the greater offense, just to minimize sentencing exposure. There are many real world cases in which people have pleaded guilty to possession of a drug that later turned out to be to be a perfectly legal substance such as doughnut icing or stress-ball sand. Such a disturbing outcome is even more likely if the person has a prior record. The NRE found that 20 percent of all exonerations involved wrongful convictions resulting from guilty pleas.

Another aspect of prosecutorial discretion is the "trial penalty." That describes the situation where a prosecutor requests a substantially harsher sentence upon conviction at trial, after the defendant rejected a prior plea offer containing a lighter sentence, for no other reason than the defendant had the audacity to insist on exercising their right to a trial and did not spare the prosecution the "inconvenience and necessity of a trial." According to the National Association of Criminal Defense Lawyers, "This penalty is now so severe and pervasive it has virtually eliminated the constitutional right to a trial."

Pretextual Prosecutions

Another form of exercising prosecutorial power is "pretextual prosecution." There is an enthusiastic trend towards this "ad hoc instrumentalism." It has been described as "the use of criminal prosecutions and other legal proceedings as interchangeable tools" available for opportunistic use "against people or behaviors thought to be dangerous or undesirable."

Traditionally, there was a sense among prosecutors to only prosecute criminal violations and not do so out of a "desire to punish the defendant for other reasons." With pretextual prosecution, instead of first discovering a crime has been committed and identifying the culprit, a prosecutor starts by "picking the man" and then "pin some offense on him." This strategy is becoming known as "intelligence-driven prosecution." The Manhattan District Attorney's Office proudly boasted of discerning who was "driving crime in Manhattan" and then becoming "focused on taking them out." This concept of "intelligence-driven prosecution" mirrors similar policing tactics. Advocates argue there is nothing nefarious about it but simply that prosecutors "employ computerized analytics to target organizational resources where they will have the greatest impact." Often, the poor and other disfavored groups are subject to these so-called intelligence-driven prosecutions. Unfortunately, the opportunities for prosecutorial abuse are virtually limitless.

Increase in Prosecutorial Power

What precisely is driving the increase in prosecutorial power is a subject of debate. It is not solely within individual cases that prosecutors wield power. The full spectrum of prosecutors' duties and powers also involve planning and lobbying for criminal justice

policies and strategies. Typically, the head prosecutors also serve as "de facto leaders of the local criminal justice system." Prosecutors lobby for or against policies while exerting substantial influence over criminal justice legislation. Increased power may be a natural consequence when one considers the "politics of crime," involving "tough on crime" politicians and policies.

There has been an "explosion" in what constitutes a federal crime. In 1980, there were 3,000 federal crimes; in 2008, there were 4,450. In addition, there are federal regulations, which are so numerous that they can't even be accurately counted, but it is believed that they number in the "tens of thousands." According to the U.S. Sentencing Commission, there were almost 84,000 federal prosecutions in 2010; there were only 29,000 in 1990. Misdemeanor prosecutions have doubled at the state level since 1972. So, the question is: could the increase in prosecutors' power be attributed to the "proliferation of criminal statutes"?

Other factors to consider are ballooning caseloads and rapid rise of plea bargaining. Researchers in 2012 found that "as systems of criminal adjudication have become increasingly burdened, they have substituted consensual case dispositions for trials." Similar to how traffic increases when a highway is widened, plea bargaining seems to have "inflated caseloads by expanding the system's capacity." That's quite thought-provoking because it's generally been thought that the rise to dominance of the plea bargain was in response to untenable caseloads.

The natural restraint of a prosecutor to behave ethically and legally has been curtailed by the Supreme Court. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court declared that it is "better to leave unredressed the wrongs done by dishonest officers [of the court] than to subject those who try to do their duty to the constant dread of retaliation." And with that statement, the Court helped create the environment in which many prosecutors brazenly flout the rules governing fair trials and ensuring due process of law because they understand that there are virtually no consequences for bad behavior. Prosecutorial immunity is the likely root of prosecutorial misdeeds and the increase in power.

Another reason advanced as to why prosecutorial power is increasing is that it is more acceptable to people. The prevailing sentiment is that "prosecutors traditionally have exercised authority only within the sphere of criminal proceedings," and this seems to affect only "actual or potential criminal defendants." Since most people can't imagine that they would ever be the target of prosecutorial power, they have limited empathy for those who are.

It is naïve to believe that you would never be the target of a criminal prosecution. Harvey A. Silverglate discussed the overreach of federal law in his book "Three Felonies A Day: How the Feds Target the Innocent." According to the book, federal criminal laws have become dangerously disconnected from the English common law tradition, and prosecutors can pin arguable federal crimes on any one of us, for even the most seemingly innocuous behavior. When everything is a crime, everyone is a criminal. Prosecutors understand that and use it to their advantage.

David A. Sklansky teaches and writes about criminal law, criminal procedure, and evidence at Stanford Law School and has written extensively on issues surrounding the modern prosecutor. In "The Problems with Prosecutors," he identifies "at least seven different problems with American prosecutors." These issues include the level of overall prosecutorial power generally, unmitigated discretionary function, frequent illegal misconduct, a mindset of punitive ideology governing prosecutor conduct, prolific unaccountability, organizational inertia in prosecutors' offices, and the "ambiguity" of the prosecutor's role in the criminal justice process. Many believe that all the problems in the criminal justice system revolve around these seven issues.

Differing Views of the Role of the Prosecutor

There is a school of thought that believes a just use of the prosecutor's power is where we find the solutions – after all, if the prosecutor wields so much power, exercised correctly, it would probably result true justice. This is known as the "progressive prosecutor" movement. The idea took off after Angela Davis published her 2009 book "Arbitrary Justice: The Power of the American Prosecutor." In her book, she argued that "prosecutors should use their discretion to reduce mass incarceration and racial disparities."

That there are racial disparities in arrests and convictions is evidenced by numerous studies. The Bureau of Justice Statistics revealed that a Black man has a one in three chance of being incarcerated; compare that to Hispanics (one in six) and whites (one in 17). Critics claim this demonstrates the "stark racial disparities that characterize the American criminal justice system." Former federal prosecutor, professor, and analyst Paul Butler writes that the "movement is new but promising." Butler argues that because prosecutors are "one of the primary sources" behind excessive punishment and mass incarceration, "they must be part of the solution."

There is also the idea of conviction integrity units ("CIU") within prosecutors' offices that can provide oversight, especially after complaints of misconduct are filed. The State Bar of Michigan reported that "As of June 2022, there are 94 CIUs nationwide," at the local, state, and federal level. CIUs are designed "to promote transparency and conduct collaborative investigations" with defense attorneys.

There is also the idea of "community prosecution" branches, which encourages "prosecutors to focus on pragmatic solutions rather than punishment for its own sake." Some prosecutors are uncomfortable with this role since they are accustomed to the more "combative function" traditionally embraced by the profession. Hadar Aviram published a 2013 article in the St. John's Law Review where he described prosecutors as "hyperadversarial." Aviram added that they "Subscribe to a 'conviction psychology' theory of prosecution, where prosecutors prioritize convictions over justice." So, what should the role of a prosecutor be exactly? For that answer, we look again to the Supreme Court.

Supreme Court's View of Prosecutors

In 1935, the Supreme Court was led by Chief Justice Charles. E. Hughes and is often referred to as the "Hughes Court." The Hughes Court is remembered for both "championing economic conservativism" and "remarkably progressive rulings that dramatically expanded civil rights and personal freedoms." The Court truly seemed to advance constitutional protections for the individual in every arena of society presented. The scope of criminal procedure decisions merits a lengthy analysis, but the Court's opinion in *Berger v. United States*, 295 U.S. 78 (1935), stands as the high-water mark for prosecutorial idealism.

At that time, the public image of the prosecutor was quite favorable. A New York District Attorney named Williams Travers Jerome was publicly called the "Courtroom Warrior" and was highly regarded due to several high-profile prosecutions. Thomas E. Dewey became famous as New York's "rackets-busting" Special Prosecutor for convicting several notorious gangsters and the president of the New York Stock Exchange. Dewey became the inspiration for the character in "Mr. District Attorney," a popular radio show. The show's opening was quite hyperbolic: "Mr. District Attorney! Champion of the People! Guardian of our Fundamental Rights to Life, Liberty, and the Pursuit of Happiness!" The prosecutor enjoyed the public image as the pinnacle of ethics and morality. But even then, the reality was starkly different. Many courtroom observers viewed the typical prosecutor as a "dirty fighter who wins by cheating."

Henry Singer left the military after World War I, became a lawyer, and opened a private practice in the 1920s. Singer would eventually join the U.S. Attorney's Office in Brooklyn. At the time of Harry Berger's prosecution, Singer was the Chief Assistant. Berger was charged and placed on trial for a run-of-the-mill conspiracy to deal in, and possession of, fraudulent bank notes. While Singer was known as an "aggressive trial lawyer," he was never as well-regarded as Dewey or Jerome. The U.S. Court of Appeals for the Second Circuit once rebuked Singer for "improper courtroom conduct." The *Berger* record reveals Singer did not learn his lesson from being chastised by the appellate court.

Berger and several co-defendants were prosecuted by Singer. Each charge was based on the testimony of one co-defendant named Jack Katz. He was Singer's key witness. The Second Circuit would later characterize Katz as a "thoroughly unreliable person." Katz had a lengthy criminal record and was originally facing 122 years in prison and a $50,000 fine. Singer promised him only two years and a $10,000 fine in exchange for his testimony. If that is not enough to give you pause regarding Katz's motivation and reliability, Katz also believed Berger was "romancing his wife."

Seven trial witnesses testified to Berger's "good reputation for honesty." Based on Katz's testimony, Berger would be convicted of only the conspiracy charge and sentenced to a year and a day in prison. Berger appealed, arguing that he was innocent and Katz framed him. Berger also argued that there was a variance between the indictment and the proof at trial.

The Second Circuit, and eventually the Supreme Court, would agree that any variance was "harmless" and not "fatal" to the indictment. However, both courts would note that the evidence of Berger's involvement in the conspiracy was "weak." This observation made Berger's argument that Singer's misconduct was "pronounced and persistent" integral to his appeal. Berger would argue that Singer's misconduct denied him the right to a fair and impartial trial.

Judge Learned Hand of the Second Circuit addressed Berger's entire argument in one dismissive paragraph. Hand found that Singer had "abuse[d] his position," but it would be "fantastic" to believe any misconduct affected the verdict. Speaking of the trial, Hand concluded, "[w]e can find nothing grave enough to compromise its essential fairness." Berger appealed, bringing his arguments before the Hughes Court.

The Hughes Court disagreed concerning Singer's misconduct, rejecting Hand's ruling. It found that Singer's breach of official and professional rules was to be condemned for its "evil influence upon the jury." The Court issued a unanimous opinion declaring Singer's conduct was "extreme" and cited several examples of misconduct. Singer "overstepped" the "bounds of propriety and fairness" because he misstated facts, assumed "prejudicial facts not in evidence," alluded to witness testimony that had never been stated, made "inflammatory remarks to the jury," and seemed to lie about inculpatory statements made to him outside the jury. The Hughes Court would end up issuing an opinion that would be profound in its ideology but disappointing in its enforceability.

Within the opinion, Justice Sutherland wrote that a prosecutor's interest "is not that it shall win a case, but that justice shall be done." The prosecutor is a "servant of the law, the twofold aim" being "that guilt shall not escape or innocence suffer." One shall prosecute "with earnestness and vigor … strike hard blows" but is "not at liberty to strike foul ones."

The opinion concluded on this promising note: “It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”

Singer’s repeated conduct was contrary to such principles. It is interesting to note that while the Hughes Court was analyzing Berger’s claims, Singer returned to private practice. In an ironic twist, Singer was convicted for attempting to bribe a juror during a high-profile murder trial. The conviction rested solely on uncorroborated accomplice testimony, much like the evidence used against Berger. Unlike Berger, the appellate division reversed Singer’s conviction because the accomplice’s testimony was “unbelievable,” finding that Singer’s right to a fair trial was “prejudiced by inflammatory and incompetent evidence.”

An examination of the legal landscape at that time reveals that Singer’s misconduct was not actually unique or unusual. In 1931, a 14-volume report by the National Commission on Law Observance and Enforcement (“Report”), referred to as the “Wickersham Commission,” documented rampant prosecutorial misconduct in the criminal justice system. The Wickersham Commission was initially prompted by a need to examine prohibition-era policies but quickly broadened into a massive critique of the U.S. criminal justice system. One particularly relevant chapter was entitled “Unfairness in Prosecutions.” The Report analyzed 600 cases from 1926 to 1930 in which prosecutorial misconduct was brought to the attention of the courts. The Report noted systemic prosecutorial abuse and its “adverse impact of the misconduct on the administration of criminal justice.”

Of the 600 cases, two-thirds were reversed; the remaining one-third were upheld as the “defendant’s guilt was clear.” The Report found the continuation of such unfair practices would “create resentment against law and government” because the prosecutor is allegedly “responsible for law observance.” The Report noted that prosecutorial misconduct “easily engenders the dangerous feeling that a fair trial has been denied” and justice is not to be expected. A prosecutor behaving “tyrannically and brutally … alienates the defendant” and causes them to leave prison a “bitter enemy of society, more willing than before to continue a criminal career.” Then, as now, the Report observed that the most serious consequence is the “conviction of the innocent.” The Report ought to be required reading for all prosecutors.

These observations have led many scholars to question the specific purpose of the Supreme Court agreeing to hear Berger’s appeal. It was a routine conspiracy case that “raised no constitutional or significant federal question.” Some speculate that it was because pervasive misconduct was getting the attention of lower courts, academics, and the media. The Hughes Court might have believed it was a good time to “clarify the prosecutor’s legal and ethical responsibilities.”

Others suggest that the Court was protecting individual liberty from abusive prosecutors, much like it was protecting economic liberties from abusive governmental regulation, because wrongful convictions were beginning to get the attention of the public. By exposing prosecutorial misconduct in *Berger*, the Court might dissuade other prosecutors and encourage lower courts to impose consequences for flagrant prosecutorial misconduct.

The subsequent course of criminal law and procedure reveals an irony in *Berger* attaining "jurisprudential immortality." *Berger*'s "powerful rhetoric" is cited by courts when reversing convictions due to prosecutorial misconduct; it is used as a "ritualistic incantation" by defense attorneys when discussing fairness in prosecutions; academics use it as a yardstick against which appropriate ethical standards are measured; and it has been cited hundreds of times in law reviews and thousands of times in appellate briefs. It is meant to inspire a prosecutor to adopt a "heroic persona" in an effort to "eschew winning for the nobler goal of serving the cause of justice." The Hughes Court may have made its declaration because it recognized a darker side to the prosecutor's motive: the prosecutor wants to win very badly and not always for noble reasons.

The reality is that the prosecutors are "armed with more and better weaponry" than their opponent, exercise "inordinate influence" over the "referee and scorekeeper," and they can "cheat without getting caught or suffering any penalty." Prosecutors have honed their craft, finding new ways to "strike foul blows." Empirical evidence reveals "serious and pervasive misconduct." Worse, courts, lawmakers, and professional disciplinary bodies have been unable or unwilling to impose meaningful sanctions. *Berger* elucidated idealism, but its use to impose ritualistic "verbal spankings," without identifying a requirement to impose any real penalties, "breeds a deplorably cynical attitude towards the judiciary."

As Justice Brandeis noted in *Olmstead v. United States*, 277 U.S. 438 (1938) (Brandeis, J., dissenting), "Crime is contagious. If the government becomes a law breaker, it breeds contempt for the law … it breeds anarchy."

Berger is not often cited directly nowadays, but its philosophy has clearly influenced subsequent precedent. It has served as the foundation for a wide range of rulings meant to increase the constitutional protections for criminal defendants while ensuring a fair process. Justice Sutherland's oft-cited words essentially remained an abstract concept until *Jencks v. United States*, 353 U.S. 657 (1957), was decided in 1957. The decision in *Jencks* would become the familiar "*Jencks* Rule" in criminal procedure, later codified as the Jencks Act (18 U.S.C. § 3500). *Jencks* was a procedural "tipping-point" that looked to harness a court's supervisory power to ensure prosecutors disclose impeachment evidence found in

written reports of government witness statements. Prosecutors had a bad habit of covering up inconsistent statements made by their witnesses, knowing that defense counsel might use these statements to cast doubt on the veracity of a government witness' testimony.

During the same term as the *Berger* decision, the Hughes Court decided *Mooney v. Holohan*, 294 U.S. 103 (1935). The *Mooney* opinion noted that the "deliberate deception of court and jury by the presentation of testimony known to be perjured" to obtain a conviction at any cost is "inconsistent with the rudimentary demands of justice." *Mooney* would become a foundational case to the landmark opinion in *Brady v. Maryland*, 373 U.S. 83 (1963), which requires prosecutors to disclose to the defense materially exculpatory evidence in the possession of the government. *Brady* did not cite *Berger*, but it seems to be a natural extension of the philosophy concerning prosecutorial conduct expressed in *Berger*. The *Brady* decision established concrete guidance for prosecutors to turn over "all favorable information" in its possession to the defense. *Brady* noted that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

While *Berger*'s idealism has been inspiring to many decisions where the constitutional protections afforded defendants are recognized, it has done little to reign in misconduct. It also seems to have led to the harmless error analysis becoming more detrimental to defendants. This may have been the real motive of the Supreme Court to decide *Berger*. There was a need to examine the "wayward course of harmless error." Not every appellate judge was as dismissive of claims like *Berger*'s, most routinely held that even trivial errors "raised a presumption of prejudice." Such a presumption often called for automatic reversal. Despite the lofty words of Justice Sutherland, *Berger* implied that lower courts should ignore "inconsequential" errors if they cause only a "possible impact on the outcome." The Supreme Court supported those who believed reversals should not be based on "the mere etiquette of trials" or the "minutiae of procedure." *Berger* became the first court to apply the harmless error statute to prosecutorial misconduct.

The then-existing harmless error statute, 28 U.S.C. § 391, which later became Federal Rule of Criminal Procedure 52, stated that "any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." It's troubling that while *Berger* epitomized the ideal for prosecutorial conduct, it "did not establish meaningful standards" by which a reviewing court is to evaluate misconduct. *Berger* implied that if evidence is weak, a prosecutor's misconduct might not be "harmless." Conversely, prosecutors are free to infer that if there is "strong evidence of guilt," there is more latitude to engage in "pronounced and persistent" misconduct. A case is unlikely to be reversed, particularly if

the judge issues ineffectual in-trial admonitions or curative instructions. Appellate courts are left with a subjective analysis of hypothetical outcomes that might have occurred absent the alleged misconduct. Who can truly say what errors are harmless?

Harmless Error

In 2012, Alejandro Garcia-Lagunas was charged with trafficking large amounts of cocaine by federal prosecutors in North Carolina. During his trial, defense counsel argued that Garcia-Lagunas was a minor drug user, not a high-level dealer as evidenced by his renting of a small, $350-per-month trailer. *United States v. Garcia-Lagunas*, 835 F.3d 479 (4th Cir. 2016). The Government recognized that Garcia- Lagunas' "meager lifestyle was a potential weakness in its case" and invoked racial stereotypes. Absent any corroboration, a detective testified that "Hispanic drug traffickers" send "the majority if not all of the proceeds back to their native countries." When defense counsel objected, the judge overruled it and turned to tropes of his own, saying "based on his experience most Latins [sic] send money home whether they are drug dealers or not." The Government repeated this racist rhetoric during closing arguments. Garcia-Lagunas was convicted and sentenced to more than 15 years in prison.

On appeal, Garcia-Lagunas argued that prosecutors violated his constitutional right to a fair trial by its use of racial stereotypes. The Government even agreed. However, the appellate court upheld the conviction because, it claimed, any "constitutional error" was "harmless." The judges found that the prosecution's "heavy reliance" on the racist testimony was "not significant." The court found that evidence of Garcia-Lagunas' guilt to be "strong," so it was "beyond clear" that he would have been convicted regardless of the "improper testimony."

The doctrine of "harmless error" is a relatively obscure aspect of our American criminal justice system but can result in serious consequences. As a matter of routine, appellate judges will affirm convictions tainted by error as long as they are "confident" the person is guilty. Although harmless error is invoked quite often, it receives little scrutiny. It does, however, have a profound effect on the behavior of prosecutors, judges, and the police.

During an appellate argument in the state of Washington, a prosecutor was asked by the court why he would ask one witness if another was lying when there is a rule clearly prohibiting such conduct. The prosecutor answered quite bluntly, "It's always been found to be harmless error." *State v. Neidigh*, 895 P.2d 423 (Wash. App. 1995). Astonishingly, the prosecutor readily admitted to having no qualms about violating governing legal rules as long as there aren't any consequences for doing so, and as the court proved, there often aren't any. In the published opinion, the court rejected the suggestion that courts "wink at intentional and repeated unfair questioning by prosecutors under the rubric of harmless

error." With logic contorted to its breaking point and belying its own protestation, the court concluded that the prosecutor "was correct in relying on the doctrine of harmless error" and affirmed the conviction. You'd have to almost admire the audacity if it weren't so tragic.

The Appeal, a nonprofit news organization that reports on injustices in the criminal justice system, noted a study found that during a 10-year period, over 90 percent of California death penalty appeals were upheld "even though three-quarters were infected by constitutional error." Imagine the sense of helplessness and injustice of being convicted in a capital case even though your trial admittedly contained errors of constitutional dimensions, but the unconstitutionality is deemed "harmless."

In 1967, the Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967), held that constitutional errors do not automatically require the reversal of a conviction if the government can establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict," i.e., the error is thus deemed harmless. These are referred to as "trial errors." An example of a trial error is the admission of illegally seized evidence. In contrast, the *Chapman* Court recognized that there are some types of error that are not considered harmless beyond a reasonable doubt; such errors came to be referred to as "structural errors." These include the rights to counsel, jury trial, and an impartial judge. Structural errors are defects affecting the overall framework within which the trial takes place, as opposed to simply an error in the trial process itself.

Harvard Law School Professor Carol Steiker notes that subsequent courts have "revolutionized the consequences of deeming conduct unconstitutional." Over the last 50 years, the list of trial errors has ballooned, allowing nearly every error related to allegations of unconstitutional conduct to be subjected to harmless error review. Many of these errors were formerly considered structural errors under *Chapman* and could never be ruled harmless.

The Justice Collaborative identified multiple issues with the current harmless error doctrine. Using harmless error analysis to affirm convictions tainted by procedural and constitutional violations allows the public to presume there is real comportment with constitutional requirements. It also encourages important constitutional values like dignity, equality, and privacy – unrelated to truth and accountability, but not to be foregone – to be ignored. Focusing on guilt alone, judges ignore the "broader social harms" that are inflicted by an unjust process. Importantly, the doctrine also encourages official misconduct because it makes the remedy for a violation so hard to obtain. A prime example

of this is the Washington state prosecutor discussed earlier who told the appellate court that "It's always been found to be harmless" in response to the court's inquiry as to why he violated clear rules forbidding the precise behavior in which he had engaged.

Prosecutorial Misconduct

Prosecutorial misconduct is not officially defined but encompasses a variety of bad acts. The two most common forms are improper arguments and failure to disclose exculpatory evidence. In *Brady*, the Supreme Court ruled that "withholding evidence favorable to the defendant" violates the due process clause of the Fourteenth Amendment. *Brady* requires prosecutors to share with defense counsel any evidence that is "potentially exculpatory" and "material" to the guilt or innocence of the defendant. In *United States v. Bagley*, 473 U.S. 667 (1985), the Supreme Court defined material evidence as that for which there is a "reasonable probability that, had the evidence been disclosed," the outcome of the proceedings would have been different. A prosecutor must make this decision pre-trial.

The Supreme Court has acknowledged that this determination is "often tricky and complex." But because a *Brady* violation does not turn on a prosecutor's intent, they are advised to err on the side of caution. In our adversarial system, one can understand the reluctance of a prosecutor to turn over evidence that could destroy their case. *Brady* has been settled law for over 50 years, yet noncompliance violations are persistent and continue to plague the criminal justice system. In an empirical study of 5,760 capital conviction exonerations conducted between 1973 and 1995, 16 percent were reversed due to suppression of evidence. Disclosure errors are "uniformly recognized as a contributing factor to erroneous convictions."

The NRE found that concealment of exculpatory evidence contributed to 44 percent of all identified wrongful convictions, more than any other type of misconduct. Prosecutors committed misconduct in 52 percent of federal wrongful convictions, compared to 29 percent for state prosecutors. Federal prosecutors commit misconduct at a rate (52 percent) more than twice that of police (20 percent); for state prosecutors, it is less (29 percent) than police (36 percent). The rate of concealing evidence varies by crime: murder (61 percent) and child sexual abuse (27 percent) being the two most frequent types; generally, some form of misconduct occurs at a rate of 82 percent in all wrongful convictions.

The rate at which prosecutors engage in misconduct vis-à-vis police will come as a shock to most people. Police misconduct is photogenic and doesn't need any explanation. Video of a group of police officers beating and kneeling on the back of a handcuffed person begging for air is self-explanatory and provokes outrage at a glance. Consequently, the average person is keenly aware of police misconduct. In contrast, prosecutorial misconduct is

basically impossible to capture on video. It's not photogenic, and thus, most people aren't aware of it. And even if prosecutorial misconduct were caught on video, it would require a crash course in constitutional law and criminal procedure to explain what viewers are watching. Furthermore, pop culture and the average person derisively refer to prosecutorial misconduct, without a genuine understanding of the range of behaviors it actually entails, by an entirely different term – "legal technicality." Police misconduct is visceral; whereas, prosecutorial misconduct is esoteric. That's why the general public is rightfully up in arms about the former, while blissfully unaware of the latter.

Innocence scholars have identified "*Brady* violations as a key factor correlated with wrongful convictions." Brandon Garrett, in "Judging Innocence," looked at 200 DNA exonerations that revealed 37 percent of all exonerations involved *Brady* violations. The Preventing Wrongful Convictions Project compared 260 wrongful convictions to 200 "near-misses" – where the defendant was indicted but not convicted – and the primary distinguishing factor in each were *Brady* violations.

According to the Death Penalty Information Center ("DPIC"), prosecutorial misconduct was present in 121 death-row exonerations, with *Brady* violations a type of misconduct in 35 percent of reversed convictions or sentences and improper arguments in 33 percent of reversed sentences. More than one type of misconduct was found in 16 percent of cases. These types of reversals and exonerations were found in 228 counties, 32 states, and within federal capital proceedings. "The data on wrongful convictions has long shown that prosecutorial misconduct is a significant source of injustice in the criminal legal system," said executive director of DPIC Robert Dunham. "But this research documents that what some judges have described as an 'epidemic' of misconduct is even more pervasive than we had imagined."

A collaboration between the Northern California Innocence Project and the Santa Clara University School of Law published a report entitled "Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009" ("PERPMC report") in 2010. The PERPMC report observed that overall, a "prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies."

There were around 4,000 total state and federal cases in California where prosecutorial misconduct was raised. Only 707 were validated, with 782 combined instances of prosecutorial misconduct found. Of these 782 instances, 444 involved improper arguments and *Brady* violations were found in 66 cases. Describing the failure of judges, prosecutors, and the California State Bar to monitor and discipline prosecutorial misconduct, the PERPMC report called these failures a "critical problem" that fosters misconduct,

undercuts public trust, and impugns honest prosecutors. Between 1997-2009, there were 4,741 public disciplinary actions in the California State Bar Journal – only 10 involved prosecutors and only six of those were in criminal cases. Those six occurred only after the 2004 California Commission on the Fair Administration of Justice.

The Quattrone Center at the University of Pennsylvania Carey Law School examined 5,432 allegations of prosecutorial misconduct in Pennsylvania. The state's courts found actual misconduct in only 204 cases alleged, a mere 2.8 percent of the total reported. It was determined that *Brady* violations accounted for 2,114 (39 percent) of the alleged misconduct, while improper arguments were identified in 1,915 (26.6 percent) of them. The "Hidden Hazards" review that examined the cases "found virtually no functional corrective or accountability mechanisms – only four Pennsylvania prosecutors received official public discipline for prosecutorial misconduct during the period studied."

Wrongful Convictions

With wrongful convictions, jurors and witnesses must face the reality that they unwittingly participated in convicting an innocent person. The tragedies are alarmingly plentiful. These are not just statistics that are being discussed but real people who can never have what they lost returned to them.

In 1980, Kevin Green was wrongfully convicted for assaulting his pregnant wife and murdering their unborn fetus. Green was exonerated in 1996 after prosecutors identified the real perpetrator via a newly created offender DNA database. The DNA match was made from spermatozoa found in Dianna Green. While myopically pursuing and prosecuting Green, Gerald Parker, a.k.a. the "Bludgeon Killer," who committed five prior murders, was roaming free. While Green languished in prison for crimes he didn't commit, Parker was free to commit other crimes, including the rape of a 13-year-old girl.

Andre Hatchett was exonerated after spending 25 years in prison for murder. The investigation into his innocence revealed "rampant police and prosecutorial misconduct." The egregious misconduct included a *Brady* violation in the form of a withheld police interview wherein the only eyewitness identified another individual as the perpetrator. The sole witness for the prosecution had at least 20 criminal convictions prior to his involvement with the Hatchett prosecution, and the prosecution dropped charges on his most recent burglary after his cooperation. Neither side presented medical evidence that Hatchett, 24 at that time and with special needs, "was recovering from severe gunshot wounds to his throat and leg. His right leg was in a cast, requiring crutches, on the night of the crime."

Cedric Dent was wrongfully convicted of murder in 1997. Dent was exonerated after 20 years in prison when the Innocence Project of New Orleans discovered that prosecutors withheld a witness statement that provided a description of the suspect that did not match Dent. Also, prosecutors failed to divulge that the key witness had changed his story "multiple times" before trial. CBS News wrote that: "Cedric Dent is a victim of the failures of every system put in place to protect his rights as a person accused of a crime" and a "district attorney's office that concealed evidence." Dent's uncle, Elvis Brooks, was freed in 2019 after serving 42 years for murder. Documents revealed that prosecutors had withheld "crucial evidence" during his trial as well. Nevertheless, prosecutors required Brooks to plead guilty to manslaughter before they would agree to his release.

Another victim of Louisiana "justice" is Juan Smith. He was convicted at a jury trial of five counts of first-degree murder related to a 1995 armed robbery of a New Orleans home. ABC News reported that "a single eyewitness, Larry Boatner, connected Smith to the killings." Boatner testified that he had "no doubt" Smith was the guilty party. What prosecutors failed to disclose was that the same eyewitness had told investigators he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." The Supreme Court held that this *Brady* violation merited a new trial as these contradictory statements were "plainly material."

In 2000, David Ayers was convicted of murdering a 76-year-old woman in the apartment complex where he was a security officer. Prosecutors failed to disclose that multiple witnesses had identified other suspects. One stated that a different man had been "banging on apartment doors" the day of the murder and had broken into apartments the previous summer. A girlfriend of an incarcerated man told police that she wanted to talk to them about the murder, but police never followed up. Another witness stated that the deceased woman's nephew had been stealing from her. Police conducted a polygraph but never followed up with the nephew, either. Ayers served 11 years before being exonerated by DNA evidence. He was awarded $13.2 million due to the detectives' fabrications and the *Brady* violations. The award was overturned by the Ohio Supreme Court. In 2020, Ayers sued the city of Cleveland and received a settlement of $4.85 million.

Former U.S. Senator Theodore "Ted" Stevens (Alaska Republican) was prosecuted for criminal ethics violations in 2008. Federal prosecutors withheld evidence that the star witness made pretrial statements that could have served as strong impeachment evidence at trial. Prosecutors hid the contradictory statements, procured new and inconsistent statements from the same witness, knowingly introduced false business records, and never allowed defense counsel access to the grand jury testimony of a witness who made helpful statements about the Senator, claiming they were not material. Senator Stevens lost his re-election, his reputation, and his legacy. U.S. District Court Judge Emmet G. Sullivan

ordered an investigation and explained, “The government’s ill-gotten verdict not only cost this public official his bid for re-election, [but] the results of the election [also] tipped the balance of power in the United States Senate.” Senator Stevens died in a plane crash before he could clear his name.

Terry Williams spent three decades fighting his death sentence. In 1984, Williams was convicted and sentenced to death in Philadelphia for the murder of a church deacon who had sexually abused teenagers up to and including the rape of Williams. In 2016, it was revealed that prosecutors hid evidence that was material to the jury during the penalty phase. The DPIC reported that “Nearly 30 years after Williams was sentenced to death, and within a week of his scheduled execution, the Philadelphia Court of Common Pleas heard evidence that prosecutors had presented false testimony from a witness and withheld evidence that it had given favorable treatment to that witness; suppressed evidence that the victim had sexually abused Williams and other boys; and misrepresented to the jury that the victim had been simply a ‘kind man’ who had offered Williams a ride home.”

The case made it to the Pennsylvania Supreme Court after prosecutors appealed the overturning of the death penalty in the Court of Common Pleas. Williams’ case was then heard by the U.S. Supreme Court after the Pennsylvania Supreme Court reversed the lower court ruling and reinstated Williams’ death sentence. The DPIC reported that “The U.S. Supreme Court held in “Williams v. Pennsylvania [579 U.S. 1 (2016)] that Terry Williams’ due process rights were violated when Pennsylvania’s Chief Justice refused to recuse himself from the case.” The Chief Justice had been the district attorney whose misconduct in 1984 resulted in the original capital conviction.

In 2000, Stanley Mozee and Dennis Allen were wrongfully convicted of murder in Texas. Both men were sentenced to life in prison. In 2019, attorneys with the Innocence Project uncovered evidence in the case files that prosecutor Rick Jackson had hidden. Mozee and Allen would be cleared by DNA testing after a later investigation revealed the misconduct. If the prosecutor’s office had not adopted an “open-file” discovery process years after these men’s trials, the evidence might never have been discovered. Mozee and Allen were declared “actually innocent” by Judge Raquel Jones. “Due to egregious misconduct by the trial prosecutor, these two innocent men spent 15 years of their lives in prison,” said Nina Morrison, senior attorney at the Innocence Project. The New York Times reported in May 2021 that “the former lead prosecutor in the case, Richard E. Jackson, who the State Bar of Texas said had withheld evidence during the trial, has surrendered his law license and effectively been disbarred – a relatively rare consequence in the realm of wrongful convictions.”

Plea Bargains

Any critique of the modern American prosecutor's power must include discussions of plea bargaining and the "trial penalty." The sanctioning of plea bargaining has facilitated prosecutorial behavior that is not "misconduct" per se but is clearly abusive by any objective measure. This has led to the diminishment of constitutional protections, punishment for exercising those protections, increased convictions that fuel mass incarceration, and convictions of the innocent. It also incentivizes "snitching" by unreliable jailhouse informants and codefendants seeking leniency or profit. Most importantly, it allows the misconduct of prosecutors to remain hidden from scrutiny.

Founding Father and former President John Adams once said, "Representative government and trial by jury are the heart and lungs of liberty." If true, the criminal justice system today is suffocating. According to the National Association of Criminal Defense Lawyers ("NACDL"), the U.S. criminal justice system churns some 11 million people through its courtroom doors every year. Estimates suggest that "every 2 seconds" of each business day a criminal case disposition occurs through plea bargaining.

Justice Kennedy, in *Missouri v. Frye*, 566 U.S. 134 (2012), observed that 97 percent of federal convictions and 94 percent of state convictions are pleas of guilt. Justice Kennedy then opined that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system." And it is a well-oiled and efficient machine. According to The Sentencing Project, the number of people in U.S. prisons and jails has increased 500% over the last 40 years, with approximately two million people in 2023 in lock-up. The Project attributes changes in sentencing law and policy to the massive increase, not changes in crime rates.

The "sub-constitutional procedural law" that is plea bargaining is "driven not by law but by power – the vastly unregulated power of prosecutors," according to Sklansky. There is a reciprocal nature to unmitigated prosecutorial discretion, exhibited through charging decisions and power. "The more discretion that prosecutors have, the greater will be the concern, generally speaking, about the power they exercise, and vice versa," noted Sklansky.

Three main types of such bargaining leverage are frequently used. As in our hypothetical methamphetamines arrest example, charge bargaining allows prosecutors to overcharge, hoping to coerce defendants into pleading guilty. In "Prosecutors' Role in Plea Bargaining," appearing in the *University of Chicago Law Review*, author A.W. Auschuler outlined charging options available to prosecutors: "Although most prosecutors condemn overcharging, they define it differently than defense attorneys. To prosecutors, overcharging is accusing the defendant of a crime of which he is clearly innocent to induce a plea to the 'proper crime.' Defense counsel identify two types of overcharging, horizontal

[and] … vertical. The original charges usually encompass the charge the prosecutor 'wants' as a lesser included offense. Defense counsel agree that the charges may be perfectly legal." Many of the charges would never withstand the scrutiny of the adversarial process. This conduct has been "routinely diagnosed as a major driver of plea bargaining's pathology."

Sentence bargaining allows prosecutors to directly leverage the promise of greater or lesser sentences to the same effect. But this form of leverage does "less harm than charge bargaining decisions because sentencing necessarily involves other actors."

Rights bargaining allows prosecutors to insert one-sided waivers into plea agreements. Defendants have to promise to forego pre-trial motions, *Brady* material, direct appeals, postconviction appeals, habeas corpus petitions, and other constitutional and statutory rights. "The capacity of prosecutors to construct ever more onerous conditions for a guilty plea cannot be overstated," noted a NACDL report."

This power allows prosecutors to control "who goes to prison and for how long." This is not a new observation. In 1967, U.S. President Lyndon Johnson's Commission on Law Enforcement and Administration of Justice published "The Challenge of Crime in a Free Society" ("Commission Report"). The Commission Report focused on "two aspects of prosecutorial discretion: charging and plea bargaining." It found that prosecutorial decisions were often "made hastily and haphazardly, seldom subject to oversight or review," and the Commission Report noted, "it is surely safe to assume that many mistakes are made."

Normalization of assembly-line justice we call the plea process has received tremendous assistance from the Supreme Court. Scholars suggest that had the process not been so procedurally entrenched by the time it was reviewed, there is a good chance the Supreme Court would have scuttled the process entirely as unconstitutional.

The Supreme Court had rejected "every guilty plea induced by threats of punishment or promises of leniency" until *Brady v. United States*, 397 U.S. 742 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970). The *Brady* and *Parker* rulings changed the governing law and declared that inducements were no longer unconstitutional. In *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the Supreme Court found that threats may cause some defendants to forego a trial, but "the imposition of these difficult choices [is] an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas."

In *Corbitt v. New Jersey*, 439 U.S. 212 (1978), the Supreme Court reviewed a state law that imposed a mandatory life sentence for those convicted of first-degree murder after trial. The law prohibited the entry of guilty pleas but did not prohibit pleas of non vult (no contest), and defendants who pleaded non vult could be sentenced to less than life

imprisonment. Corbitt was convicted of first-degree murder by a jury and sentenced to life in prison. He appealed, arguing that the possibility of a sentence of less than life in prison for pleading non vult but no similar sentencing option available for those who went to trial and were convicted placed an unconstitutional burden on defendants' rights under the Fifth, Sixth, and Fourteenth Amendments. The Supreme Court rejected that argument, ruling that the State is permitted to make due allowance for pleas in its sentencing scheme and that the New Jersey sentencing scheme does not violate the Constitution. The Court stated that "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive a right, is invalid."

Charles H. Clarke wrote an *Indiana Law Journal* article in 1979 denouncing the Corbitt decision. "The Court has authorized the use of trial penalties to erode the trial system of criminal justice without any showing of need, without requiring a rational use of trial penalties and without any protection of the interests of the defendant." Since the *Corbitt* decision, the trial rate has dropped from around 20 percent of all criminal cases to today's approximately three percent rate.

The Trial Penalty

Lewis Hayes was charged with forgery in Kentucky for writing a bad check in the amount of $88.30. Prosecutors offered a plea for a five-year sentence on a charge carrying a 2-to-10-year range. Prosecutors asked Hayes to save them from the "inconvenience and necessity of a trial." If Hayes refused, prosecutors said they would charge him under the Kentucky Habitual Crime Act. Having two prior felonies, Hayes would be facing a life sentence. Hayes lost at trial. Prosecutors were good on their "promise" (threat), and he received a life sentence.

Hayes ended up before the Supreme Court in 1978. He argued that prosecutors violated his Fourteenth Amendment due process rights when they re-indicted him for exercising his Sixth Amendment right to a jury trial. In a 5-4 decision, Hayes' argument was rejected. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). The Court noted that punishing a defendant for doing what "the law plainly allows him to do" is a "due process violation of the most basic sort" but then added that plea bargaining is an "important component of this country's criminal justice system" and "knowing and voluntary" pleas are not a violation of the Constitution. The Court concluded that Hayes was not being punished but merely offered "difficult choices," implying that Hayes had chosen incorrectly.

Prosecutors have adopted the position that there is no trial penalty; instead, it's a "plea discount." The NACDL elaborated, "While most prosecutors will not acknowledge that defendants should be punished for going to trial, most adopt the attitude that leniency is

only for those defendants who admit their guilt before trial which, of course, is the same thing."

Shalom Weiss was charged with a non-violent, white-collar crime. He rejected a plea and went to trial. His co-defendants accepted pleas and received sentences ranging between 6 and 25 years. Weiss was convicted and received the "longest sentence ever imposed in U.S. history for a white-collar crime." He was sentenced to 845 years in prison, later reduced to 835 years.

Weiss's sentence was commuted in 2021 by former President Donald J. Trump after 18 years and $125 million in restitution. The Fifth Circuit stated that plea bargaining "often leads to a more lenient sentence for more culpable defendants who choose to cooperate. This is simply the way that cases against multiple co-defendants are often prosecuted." A five-year sentence that becomes 835 post-trial is not "just the way" cases are prosecuted; it's abusive and vindictive.

Andrew C. Kim, professor at Concordia University School of Law, studied data from 207,352 criminal convictions from 2006 to 2008, as compiled by the U.S. Sentencing Commission. Kim found that "defendants who go to trial have only a 12 percent chance at being acquitted, but can expect a 64 percent longer sentence if convicted, a poor gamble by any metric."

When prosecutors utilize the trial penalty to disincentivize the exercise of constitutional rights, it doesn't just place the misconduct out of sight or prevent it from being examined. It motivates criminal informants to provide any information that may be deemed beneficial. These informants are incentivized to frame innocent parties or place greater culpability on co-defendants for financial gain or to receive a lesser sentence. Prosecutors and informants both benefit, so no one is motivated by a concern about the information's veracity. One study found that 45.9 percent of wrongful convictions were based on "perjury by the prosecution witness."

The Korey Wise Innocence Project at the University of Colorado at Boulder puts the number at 60%. The Project points out that "In many wrongful convictions, defendants were not given key information related to the credibility of the incentivized witnesses who testified against them, including the exact benefits received, the witness's history of cooperating in other cases, and the witness's criminal history." Researchers know that when faced with "damning testimony by an informant" many innocent defendants see "no alternative" but to plead guilty in hopes of a lenient sentence themselves. Scholars note that prosecutors have a "tendency" to "exert the most pressure on defendants in weak cases." This has created the "urgent" and "substantial problem" of a plea "ensnaring the innocent defendant."

“The decisions of an innocent defendant to plead guilty in return for a low sentence inflicts costs on society, even if the defendant prefers this result, because it undermines the accuracy of the guilt-determining process and public confidence in the meaning of criminal conviction,” wrote Stephen J. Schulhofer in Plea Bargaining as Disaster, published in *The Yale Law Journal.*

State and federal prosecutors use coercive plea bargaining tactics to scare people into making decisions they otherwise would not have. Prosecutors have also created procedural mechanisms to induce pleas of guilt through the unfulfilled promise of adjudicative deferments or drug and mental health treatment, hoping that their cases go unchallenged. The Maricopa County Attorney’s Office (“MCAO”) in Maricopa County’s Early Disposition Courts (“EDCs”) do exactly that on an everyday basis.

The EDCs were ostensibly created to “divert” defendants into drug or mental health treatment, instead of convictions and lengthy sentences. One deputy attorney with the MCAO wrote that the real “purpose of EDCs is to facilitate speedy resolutions,” otherwise MCAO “must expend significant resources for trial preparation.” Another MCAO attorney said responding to pre-trial defense motions “would bog the entire system down … given the high-volume of cases in EDC.” That is why the MCAO has a policy of including a header on all plea offers that states MCAO “policy dictates that if the defendant rejects this offer, any subsequent offer tendered will be substantially harsher.”

Prosecutors do not just use their power to leverage guilty pleas from individuals. In 2013, federal prosecutors attempted a novel legal theory of liability with respect to two major corporations, UPS and FedEx. Both companies were indicted for conspiring to distribute controlled substances through their delivery of packages from online pharmacies. Neither business had any idea what was in any of the packages. UPS immediately accepted a non-prosecution agreement and agreed to pay a $40 million fine. FedEx demanded a trial. The Government wanted FedEx to pay a $1.6 billion fine after it refused to accept a plea agreement – more than 40 times that of UPS. The judge expressed skepticism over the Government’s theory of the case, and the Government subsequently dismissed the case. Only because FedEx was willing and able to assert its rights and challenge the Government was its overreach stymied and exposed.

The NACDL wrote, “Society pays a price when, inevitably, guilty pleas operate to foreclose litigation that would have exposed government actions or practices,” and this process sidelines judges from their “traditional supervisory role,” reducing them to “rubber-stamping plea bargains.” As trials and hearings vanish, so too does prosecutorial

accountability. The NACDL also noted that “mistakes and misconduct are rarely uncovered” while the plea process “can encourage sloppiness, and a diminution of the government’s obligation to fairness.”

The Vera Institute of Justice argues that “only by recording plea bargaining processes and decisions and by making these records available can U.S. courts and prosecutors begin to be held accountable.”

Prosecutors Misbehaving

In South Carolina, Donnie Myers “achieved capital convictions on a scale almost unparalleled in the modern era.” As prosecutor of Lexington County, South Carolina, Myers secured 39 death sentences against 28 defendants over a 40-year career. His county had a death-sentence rate of 6.8 per 100 murders. The next county over had a rate of .53 per 100. Myers said he was motivated by duty. “I believe in enforcing the law and, based on the crime, that justice be served.” Which seems fair, even noble. When asked if he was a little overzealous or ever had any doubts about what he did for a living, Myers said no. He said, “If South Carolina didn’t have a death penalty law, it wouldn’t affect me. If there was the slightest hesitation I wouldn’t go forward. It has to fit within the law.”

During the trial of Robert Northcutt, who was accused of murdering his 4-month-old daughter, there was no limit to Myers’ theatrics. He brought in the child’s actual crib, draped in a large black shroud, and simulated a funeral procession. He “supercharged his address to the jury” by tucking a sheet from his own recently deceased son into the crib and cried 16 times. The jury was told that not opting for a death sentence would be to “kick the baby some more” and declare “open season on babies in Lexington County.”

Northcutt’s initial death sentence would be overturned by the South Carolina Supreme Court, which understatedly called Myers’ theatrics “overzealous.”

David Bruck was Northcutt’s trial attorney and described Myers as a “very good lawyer” who knew how to appeal to jurors’ biases. “He worked very hard. There was no trick too dirty,” said Bruck. He compared Myers to a big-game hunter, saying that’s “what death penalty cases were for him – hunting really big human game.”

And Myers had plenty of dirty tricks. In the trial of Joseph Ard, Myers placed screened photographs of a baby’s fetus dressed for a funeral in the courtroom. Ard was convicted for killing his unborn child when he shot his pregnant girlfriend. That conviction was overturned, too; the shooting had been accidental. More than 20 of Myer’s convictions have been overturned.

All across America, prosecutors at the local, state, and federal levels routinely fail to conduct themselves in an ethical manner. There are several types of misconduct, and each inflicts its own unique injury to someone's constitutional rights. An especially pernicious result of misconduct is one that leads to an innocent person on death row. And while every miscarriage of justice resulting from abuse of power is egregious, some examples of individual prosecutors are particularly noteworthy.

In the New York City area, *Brady* violations are so commonplace it has almost become a standard operating procedure. For example, the Kings County District Attorney's Office is known as a breeding ground for prosecutorial misconduct. *The New York Times* reported in July 2022 that "a group of law professors published new complaints against 17 New York prosecutors highlighting behavior that in many cases sent innocent people to prison … in a push for accountability."

During the 30-year period that Harry Connick headed the Orleans Parish District Attorney's Office, crucial evidence was regularly suppressed, sending innocent men to prison for decades and costing the taxpayers millions of dollars. Connick contributed to the extensive crime problem in the New Orleans area by allowing criminals to remain free while prosecuting innocent people.

According to the Innocence Project New Orleans, records reveal that "favorable evidence was withheld from 9 of 36 (25%) men sentenced to death in Orleans Parish from 1973-2002." Four were exonerated after serving a collective 43 years on death row. An additional 19 of 25 non-capital cases were determined to involve *Brady* violations that contributed to the wrongful convictions. Four of these men were serving life and released after serving a collective 70 years. Ten more had convictions reversed. The eight innocent men that Connick's office helped wrongfully convict by withholding material and exculpatory evidence served a total of 113 years in prison. This cost the state of Louisiana more than $2.1 million.

Mark Sodersten spent 22 years behind bars for a murder he didn't commit. In 2007, a California Court of Appeal ("CCA") determined that prosecutor Philip Cline had improperly withheld audiotapes of interviews of his key witness from Sodersten's defense attorney. Upon reviewing the tapes, the CCA discovered that the tapes "contained dramatic evidence" of Sodersten's innocence. The CCA vacated his conviction, but it came too late. Sodersten had died in prison six months earlier. A ruling was issued by the CCA anyway because what happened had "such an impact upon the integrity and fairness" of the system that "continued public confidence … requires us to address the validity" of his conviction, even though relief cannot be provided to him.

Sodersten's attorney filed a formal complaint with the California State Bar alleging that Cline "asked a jury to kill a man based on a conviction perverted." Cline was not even reprimanded. The State Bar closed the investigation because "this office has concluded that we could not prove culpability by clear and convincing evidence." This conclusion is highly questionable as Cline is the one who had conducted the interview on the tapes he withheld.

Like most cases of this kind, there were never any consequences for Cline in sending an innocent person to prison for more than two decades based on an ethically-challenged prosecution. He went on to be re-elected and retired in 2012.

Former Williams County, Texas, district attorney Ken Anderson hid exculpatory evidence that proved Michael Morton did not kill his wife. Anderson concealed the evidence in 1987. Morton was not exonerated until 2010. The state passed an "open-file criminal discovery policy" called the Michael Morton Act in response. Anderson pleaded guilty to a single contempt of court charge and was sentenced to 10 days in jail. He would serve only five days in 2013.

If ever there were a case of the punishment not fitting the crime, this is it. Anderson hid evidence that put an innocent man in prison for decades, and the only consequence was for him to sit in jail for a few days. Undoubtedly, the frequency and seriousness of prosecutorial misconduct would immediately plummet if prosecutors were at risk of serving the same amount of time in prison as the person they helped wrongfully convict through intentional or reckless behavior served. As it stands today, there's essentially no consequences for prosecutorial misconduct. Prosecutors don't have to worry about their liberty, career, or financial wellbeing at risk for bad behavior.

More frequently, in a perversion of justice, misconduct by prosecutors can be a career boon for them. Criminal defense attorney and civil libertarian Harvey Silverglate claims it "can often help." Silverglate says, "Publicity and high conviction rates are a stepping stone to higher office." Often, prosecutors who make a name for themselves by winning convictions in high-profile cases or by racking up a long list of convictions, even if those wins are tainted by misconduct, land at large law firms where they are paid million-dollar salaries.

Silverglate says this is a common career track, and such prosecutors are not hired to litigate. "They're being hired to negotiate plea bargains with the friends they still have in the U.S. Attorney's offices. It's a huge racket," observed Silverglate.

Conclusion

This has been a broad discussion concerning the power of the modern American prosecutor – that is, the "imperial prosecutor," as some observers refer to it – and how that power is regularly abused, resulting in miscarriages of justice by the thousands. The integrity of our

criminal justice system rests largely on the shoulders of the most powerful players within the system, viz., state and federal prosecutors. Chillingly, an alarming number of them have seemingly made the conscious decision to cast aside their moral and ethical obligations as members of the criminal justice system who are duty-bound to uphold the law as simply meaningless as they instead embrace a win-at-any-cost ethos.

In his dissenting opinion in Imbler, Justice White explained that the absolute immunity prosecutors enjoy leaves a "genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives them of liberty." And that is exactly where we find ourselves today. We are so very far from realizing Justice Sutherland's laudable words in *Berger* that the prosecutor's two-fold duty is ensuring "that guilt shall not escape or innocence suffer."

Sources: *accountability.org; aclu.org; brennancenter.org; californiainnocenceproject.org; criminallegalnews.org; deathpenaltyinfo.org; doi.org; eji.org; huffpost.com; innocenceproject.org; ipno.org; jstar.org; nacdl.org; law.cornell.edu; nacdl.org; npap.org; nytimes.com; slate.com; theappeal.org; thecrimereport.org; thefederaldocket.com; theguardian.com; themarshallproject.org; umich.edu; vera.org; veritasinitiative.org; washingtonpost.com; wush.edu; Balko, Radley, 2013 The Untouchables: America's Misbehaving Prosecutors, And The System That Protects Them; Croy, Skylar R., 2019 "When Ministers of Justice Violate Rules of Professional Conduct During Plea Bargaining: Contractual Consequences;" Davis, Angela A., 2017 "The Power and Discretion of the American Prosecutor;" Gersham, Bennet L., 2010 "Hard Strikes and Foul Blows: Berger v. United States 75 Years After;" Gershowitz, Adam M., 2021 "The Race to the Top to Reduce Prosecutorial Misconduct;" Gross, Samuel R. et al., 2020 "Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and Other Law Enforcement;" Henning, Peter J., 1999 "Prosecutorial Misconduct and Constitutional Remedies;" Joy, Peter, 2006 "The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System;" Keenan, David, et al., 2011 "The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct;" Mitchells, Rebecca A., 1988 "Supervisory Power Meets The Harmless Error Rule In Federal Grand Jury Proceedings;" Ridolf, Kathleen M., et al., 2010 "Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009;" Sklansky, David A., 2017 "The Problems with Prosecutors"*