Prosecutorial Misconduct:

Assessment of Perspectives from the Bench

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In 1970, a 13 year-old boy disappeared in Harrisburg, Pennsylvania. Three years later, the victim's friend, Steven Crawford, was arrested and tried for murder based largely on a bloody palm print found on a car at the crime scene. At trial, Janice Roadcap, a state forensic chemist, testified for the state that Crawford had left a bloody palm print on a car at the crime site because *there was blood on his hand* before he touched the car. Years later, a copy of Roadcap's original report to the prosecutor was discovered in which she had indicated instead that the blood was already on the car when Crawford got to it. She then altered that detail while testifying at trial. Crawford was exonerated in 2002.

In 1989, 16-year-old Huwe Burton, of Bronx New York, returned home and found his mother facedown on her bed, stabbed to death. Two days later, after hours of interrogation—in which he was alone despite making numerous requests to see his father, and during which time detectives deployed a playbook of promises and threats—Burton appeared on camera, at 3:10 a.m., to confess to an assistant district attorney. Two years later, based solely on that videotaped confession, Burton was convicted. At trial, the prosecutor cross-examined him about missing the first period of school at the time the murder was likely committed even though his teacher had said he was there. The ADA also made arguments about his absence from school in closing. In 2019, Burton was exonerated.

In 2001 in West Virginia, 19-year-old Joseph Buffey was arrested for a burglary and sexual assault of an elderly woman. During a late-night interrogation, he confessed to the crimes but recanted just moments later. Although he maintained his innocence, Buffey's attorney persuaded him to accept a time-limited guilty-plea offer. Fourteen years later, it was discovered that the prosecutor's office was in possession at that time of DNA results from a rape kit that had conclusively excluded Buffey. In 2015, the West Virginia Supreme Court allowed Buffey to withdraw his guilty plea, and he was released. Vowing to retry Buffey after this ordeal, the prosecutor offered him an *Alford* plea in exchange for time served. Fearing re-incarceration, Buffey accepted the plea.

In 2003, Joey Fulgham of Longview, Mississippi, was shot to death in his sleep. Kristi Fulgham, his ex-wife, was a strong suspect. But she told police that her 13-year-old half-brother, Tyler Edmonds, killed her ex by shooting him with a rifle. After hours of interrogation and denials, police brought Kristi into the room to convince the boy to confess. At that point, Edmonds said that he and Kristi squeezed the trigger together. Edmonds recanted but was tried for capital murder. At trial, forensic pathologist Steven Hayne, not state-certified, testified that the path and projectile of the fatal wound corroborated the two-shooter theory "to a reasonable degree of scientific certainty." Implicated in several wrongful convictions, Hayne was a controversial figure. Until the state terminated him five years later, and barred him from further practice, he had testified to performing over 1,500 autopsies per year, substantially exceeding the maximum of 250 recommended by the National Association of Medical Examiners. But the prosecutor called him anyway. The state Supreme Court ultimately overturned Edmonds's conviction, ruling that Haynes's testimony was unhinged from science. Edmonds was retried and acquitted in 2008.

According to *Webster's New World Law Dictionary,* prosecutorial misconduct is "an illegal act or failing to act, on the part of a prosecutor, especially an attempt to sway the jury to wrongly convict a defendant or to impose a harsher than appropriate punishment." In 1935, the U.S. Supreme Court said of federal prosecutors that their interest is "not that it shall win a case, but that justice shall be done…while he may strike hard blows, he is not at liberty to strike foul ones. 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."[1]

Inspired by Peter Neufeld and Barry Scheck's 1992 founding of the Innocence Project,[2] and in light of over three thousand wrongful convictions archived by the National Registry of Exonerations (NRE), founded in 2012 by Samuel Gross and Rob Warden,[3] numerous reports have exposed the role that prosecutors have played in these miscarriages of justice. In one pointed critique, for example, Thomas Sullivan and Maurice Possley challenged those who have enabled abuses via "decades-long absence of discipline imposed on prosecutors whose knowing misconduct has resulted in terrible injustices being visited upon defendants throughout the country. Many honorable lawyers have failed to speak out about errant prosecutors, thus enabling their ethical breaches. The silent accessories include practicing lawyers and judges of trial and reviewing courts."[4]

In a 2020 report published by the NRE, Gross and his colleagues noted that "official misconduct" by government officials contributed to 54% of wrongful convictions—and that the rate was even higher in more severe crimes, up to 72% in

Footnotes

1. Berger v. United States, 295 U.S. 78, 88 (1935).
2. *See* Barry Scheck, Peter Neufeld & Jim Dwyer, Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted (2000); *see also* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2011).
3. *See* The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Nov. 7, 2022).
4. Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. Crim. L. & Criminology 881 (2015); *see also* Heather Schoenfield, *Violated Trust: Conceptualizing Prosecutorial Misconduct*, J. Contemp. Crim. Just. 250 (2005).

homicides. More specifically, they found significant evidence of prosecutorial misconduct in 30% of cases (e.g., withholding exculpatory evidence, making false claims or improper arguments in court, tampering with witnesses, knowingly taking perjured testimony). In these latter instances, only 4% of prosecutors were sanctioned, and the sanctions were typically mild.[5]

Why is it that prosecutors are seldom disciplined, often in the face of ample evidence? One reason may be that judges and others within the system do not agree on what acts of prosecutorial discretion constitute willful or intentional forms of misconduct—as opposed, say, to situations involving a mere reckless disregard of the rules, poor judgment, or a simple mistake.[6] In one report, the Innocence Project thus used the term "prosecutorial error and misconduct" to include any type of prosecutorial action that falls outside of legal and ethical guidelines, regardless of intent or knowledge.[7]

To our knowledge no empirical research has sought to answer this basic question: Is there a consensus within the judiciary as to what acts of prosecutorial discretion raise ethical questions worthy of investigation? Do judges generally agree on what constitutes prosecutorial misconduct, or do these determinations reside in the eye of the individual beholder? We report on an exploratory new line of research aimed at assessing the level of consensus within the judiciary on this consequential and highly charged question.

METHOD

PARTICIPANTS

We emailed 5,210 U.S. state, federal, and local court judges a survey link using a listserv obtained from *The American Bench,* a directory containing more than 20,000 judges. In this email, we indicated that we were interested in how various acts of prosecutorial discretion were perceived by judges and others, that participating would involve reading brief descriptions and then answering some questions, and that all responses would be anonymous.

In total, 409 judges clicked the link; 355 provided one or more responses; 284 judges completed the survey entirely. Overall, 73% of respondents were male, 25% were female (others did not report); they averaged 61 years-old, with ages ranging from 35 to 87. Seventy-two percent were state judges from 38 states (the most highly represented, in order, were Michigan, Florida, Georgia, Oregon, and Wisconsin); 5% were federal judges; others did not report. Overall, the sample averaged 15.55 years of experience on the bench and estimated having presided over a median of 2,000 cases (we did not ask respondents to indicate whether they had prior experience as prosecutors or defenders).

THE SURVEY INSTRUMENT

We modeled this survey after prior "*Frye* test" studies of eyewitness and confession experts that aimed to assess the extent to which various relevant psychological principles elicited general agreement within the scientific community.[8] Prospective respondents were told that the purpose of this survey is to get their perspectives on various acts of prosecutorial discretion, after which we will ask a handful of background questions. For this purpose, we created 27 single-sentence descriptions of behavior, most based on acts committed by prosecutors in actual cases involving proven wrongful convictions. These single-sentence descriptions were decontextualized from the facts of any specific location or case. To control for the possible effects of presentation order, the order of the items was randomized across judges. On average, it took respondents approximately 13 minutes to complete the questionnaire. The acts we surveyed ranged from egregious forms of misconduct on the high end (e.g., manipulating exculpatory evidence) to ambiguous acts of discretion on the low end (e.g., opposing a defense expert on *Frye* grounds). All items appear verbatim in Table 1 (pg. 114).

For each item, we asked two questions: (1) On a seven-point scale, "To what extent does this behavior comport with the ethical conduct you would expect of prosecutors in your courtroom?" (very unethical= -3 to very ethical= +3) and (2) "In your view, should this behavior be investigated as a possible act of prosecutorial misconduct?" (Yes vs. No). Our objective in asking these questions was to gauge levels of agreement as to what constitutes prosecutorial misconduct and to calculate the tipping point on perceptions of ethicality, i.e., how unethical on a 7-point scale must an act of discretion be before it becomes worthy of investigation? After the last item, we invited respondents to offer any comments, suggestions, or insights they had on the topic and to note ethically questionable acts of prosecutorial discretion not listed in this survey.

RESULTS

Based on 8,383 responses from 355 respondents, results showed that the judges in our sample were highly discriminating. The variability of their responses across items on the question of whether an act of prosecutorial discretion was worthy of investigation can be seen in Figure 1 (pg. 115).

We also note that across judges and items, responses to the two questions were significantly and highly correlated (the mean ethicality rating was -2.74 for items they deemed worthy of investigation compared to -0.31 for acts not deemed worthy). Regardless of their age, gender, years on the bench, number of cases adjudicated, or whether they served in a federal or state

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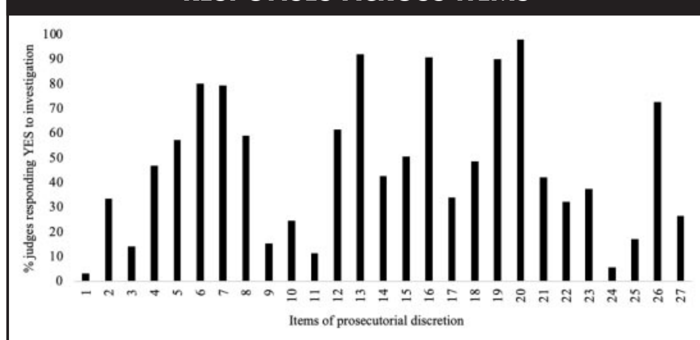
5. Samuel R. Gross et al., Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement 125 (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.
6. *See* Shawn E. Minihan, *Measuring Prosecutorial Actions: An Analysis of Misconduct versus Error*, Prosecutor, Oct.–Dec. 2014 at 22 (provides a delineation of these alternatives, cited by the Department of Justice's Office of Professional Responsibility).
7. The Innocence Project, Prosecutorial Oversight: A National Dialogue in the Wake of *Connick v. Thompson* (2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.
8. *See* Saul M. Kassin et al, *On the "General Acceptance" of Eyewitness Testimony Research: A Survey of Experts*, 56 Am. Psych. 405 (2001); *see also* Saul M. Kassin et al, *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 Am. Psych. 63 (2018).

TABLE 1. ITEMS DESCRIBING ACTS OF PRESECUTORIAL DISCRETION			
Act	**Statement**	**Ethicality (-3 to +3)***	**Investigate? (% yes)**
1. Expert witness	Denying defense counsel an expert witness on the grounds that his or her proffered testimony is not generally accepted in the scientific community.	0.85	3.13
2. Defendant's alibis	Failing to investigate or disclose a defendant's alibis.	-1.20	33.44
3. Jailhouse snitch	Offering informant testimony from a jailhouse snitch with a history of credibility problems.	-0.41	14.00
4. Detective's history	Knowing but not disclosing that the detective who took the defendant's confession had previously taken one or more proven false confessions.	-1.55	46.77
5. Comment on Defendant's silence	Commenting in closing argument on how the jury did not get to hear the defendant's side of the story, thus hinting at an adverse inference, even while noting that the defendant has a right not to testify.	-2.32	57.14
6. Eyewitnesses who failed to identify Defendant	Knowing but not disclosing the presence of one or more eyewitnesses who had failed to identify the defendant in a lineup.	-2.49	79.94
7. Eyewitness who retracted identification of Defendant	Knowing but not disclosing that an eyewitness who identified the defendant in a lineup had earlier failed to do so or identified someone else.	-2.52	79.17
8. Alternative suspects	Failing to investigate or disclose the presence of strong alternative suspects noted in police files.	-1.98	58.94
9. Time-limited plea offer (pre-DNA)	Offering the defendant a time-limited guilty plea before DNA evidence has returned from the lab.	-0.17	15.41
10. Jury selection – *Batson*	Citing race-neutral reasons to use peremptory challenges that remove all prospective jurors from the defendant's racial or ethnic group.	-0.45	24.58
11. Biased forensic examiner	Offering testimony from a forensic examiner who has a known reputation for bias.	-0.42	11.22
12. Incentivized informant	Incentivizing testimony from an informant without disclosing the terms or incentives offered.	-1.97	61.41
13. Perjured testimony	Failing to correct trial testimony known to be perjured by a government witness.	-2.73	91.83
14. Failing to charge a law enforcement official	Declining to charge a law enforcement official despite evidence amounting to probable cause that would support a charge of criminal wrongdoing.	-1.46	42.48
15. Inadmissible evidence	Attempting to introduce inadmissible and prejudicial evidence known to be inadmissible.	-2.08	50.49
16. Failing to disclose exculpatory evidence	Failing to disclose medical or forensic evidence likely to prove exculpatory.	-2.78	90.61
17. Prejudicial summation	Arguing in summation that the State "knows" that the defendant is guilty.	-1.63	33.87
18. Mischaracterizing inconclusive evidence	Mischaracterizing inconclusive forensic evidence as a match to the defendant during closing argument.	-2.10	48.55
19. Time-limited plea offer (post-DNA)	Offering the defendant in a rape case a time-limited guilty plea without disclosing that he was excluded by DNA evidence.	-2.70	90.01
20. Manipulating exculpatory evidence	Hiding, destroying, or tampering with exculpatory evidence and case files.	-2.89	97.76
21. *Alford* plea offer in lieu of exoneration	Vowing to retry a defendant whose conviction was overturned by DNA in order to elicit an Alford plea.	-1.49	42.07
22. Overcharging to elicit a guilty plea	Vowing to add charges or seek excessive sentencing (i.e., disproportionate to the alleged crime) in order to elicit a guilty plea.	-1.15	32.13
23. Police and forensic reports	Failing to seek out all relevant police and forensic reports.	-1.41	37.38
24. Offering leniency for a witness's testimony	Eliciting testimony from a witness in exchange for leniency in the prosecution of another case.	0.98	5.61
25. Threatening defense witness with perjury	Advising a witness who comes forward with testimony favorable to the defense that he or she could be prosecuted for perjury if the statement turns out to be false.	-0.05	17.11
26. Media statement that conveys inadmissible facts	Making public statements to the media that can taint a jury by referencing information known to be inadmissible at trial.	-2.39	72.44
27. Requiring plea waivers	Requiring that defendants who plead guilty waive all rights to discovery, appeal, and other procedural safeguards.	-0.39	26.33

* (very unethical = -3, somewhat unethical = -2, slightly unethical = -1; neutral = 0; slightly ethical = +1; somewhat ethical = +2; very ethical= +3)

FIGURE 1. SHOULD THIS BEHAVIOR BE INVESTIGATED? DISTRIBUTION OF "YES" RESPONSES ACROSS ITEMS



court, the more unethical the judges perceived an act to be, the more likely they were to believe it should be investigated.[9]

Overall, our respondents believed that 47% of acts described in the survey items should be investigated as possible misconduct; 53% should not. Table 1 shows that they exhibited varying levels of agreement across the different items on both questions. On the unethical side of the -3 to +3 continuum, the most egregious behaviors, in order, were hiding, destroying, or tampering with exculpatory evidence (-2.89), failing to disclose medical or forensic evidence likely to prove exculpatory (-2.78), failing to correct trial testimony known to be perjured (-2.73), offering the defendant a time-limited guilty plea without disclosing exculpatory DNA evidence (-2.70), failing to disclose that an eyewitness who identified the defendant in a lineup had previously failed to do so (-2.52) or that other eyewitnesses had failed to do so (-2.49), and making public statements to the media that can taint a jury (-2.39). For these same items, the percentage of judges who believed that these acts should be investigated for prosecutorial misconduct were 98%, 91%, 92%, 90%, 79%, 80%, and 72%, respectively.

On the more ambiguous side of the -3 to +3 ethicality continuum, respondents were the least critical in order, from the bottom up, of the following items: eliciting testimony from a witness in exchange for leniency in another case (+0.98), denying defense counsel an expert witness on *Frye* grounds (+0.85), advising a defense witness that perjury would be prosecuted (-0.05), offering a defendant a time-limited plea *before* DNA tests have returned from the lab (-0.17), requiring defendants who plead guilty to waive all rights to discovery, appeal, and other safeguards (-0.39), offering informant testimony from a jailhouse snitch with a history of credibility problems (-0.41), offering testimony from a forensic examiner who has a known reputation for bias (-0.42), and citing race-neutral "*Batson*" reasons for peremptory challenges that remove all prospective jurors from the defendant's racial or ethnic group (-0.45). For these latter items, the percentage of judges who believed that these acts should be investigated for prosecutorial misconduct were only 6%, 3%, 17%, 15%, 26%, 14%, 11%, and 25%, respectively.

Although the above items yielded relatively high levels of agreement on both questions, a surprising number of behaviors elicited a great deal of variability, or inter-judge disagreement—again, on both questions. As indicated by an approximately 60%-40% (and more even) split on the judgment that a behavior should be investigated for possible misconduct, inter-judge agreement rates were surprisingly low when it came to a prosecutor incentivizing an informant's testimony without disclosing the terms or incentives (61%-39%), failing to investigate or disclose a strong alternative suspect in police files (59%-41%), commenting in closing argument on how the jury did not get to hear from the defendant, thus hinting at an adverse inference (57%-43%), attempting to introduce prejudicial evidence known to be inadmissible (50%-50%), mischaracterizing inconclusive forensic evidence in court as a match to the defendant (49%-51%), knowing but not disclosing that the detective(s) who took the defendant's confession had previously taken other false confessions (47%-53%), declining to charge a law enforcement official of criminal wrongdoing despite evidence amounting to probable cause (42%-58%), and vowing to retry a defendant whose conviction was overturned by DNA to gain an *Alford* plea (42%-58%).

After all items were completed, we invited respondents to comment further: "In light of your background, knowledge, experience, and perspective, we would be interested in any comments or suggestions that you may have regarding ethically questionable acts of prosecutorial discretion not listed in this survey." In addition to the quantitative results, we thus obtained a wealth of qualitative data from 136 judges who offered additional comments.

On the question of what other questionable acts of discretion we might have included, several respondents pointed to misconduct related to plea bargaining: "Particularly, using high mandatory minimums to 'encourage' pleas is abusive," said one respondent. "Intentionally withholding any plea deal or a promise of leniency for a charge partner or snitch who testifies for the prosecution until the trial has concluded to avoid the appearance that the witness's testimony has been bought" said another. A third respondent noted, "I have seen prosecutors charge someone with questionable basis or failing to review all of the evidence when received and amend or modify the charges to the more appropriate level of an offense." Still others pointed to aggressive forms of courtroom conduct that we had not sampled, namely: "Excessive badgering a defendant who is pro se," "Offering testimony from a police officer known to lie," "Neutralizing a judge who is not pro-prosecution by filing a blanket affidavit of prejudice against the judge," and "threatening attorney with repercussions in other cases for vigorously defending another."[10]

A few respondents also commented more broadly on the subject of prosecutorial misconduct and what to do about it. Some judges were emphatic about the need to uphold high standards of conduct (e.g., "Prosecutors' responsibility is to see

9. Here and elsewhere, underlying statistical analyses are available upon request.
10. One judge suggested seven additional items, including "Prosecutor argued that defense counsel attempted to induce a witness to fabricate testimony without any basis in evidence," "Prosecutor made himself a witness by asking witness what witness had previously said to prosecutor," and "Prosecutor urged the jury to ignore jury instructions and follow common sense."

that justice is accomplished—not to garner convictions"; "The State must always keep in mind that its role is not to convict at any cost, but to take all steps necessary to ensure that its agents behave ethically with due respect for the rights of the accused, no matter how heinous the crime"; "When handling criminal cases, prosecutors should be held to the highest standards from the beginning to the conclusion of all cases. Prosecutors who cannot uphold these high standards should not be involved in any way in cases involving life and liberty"; "Criminal defendants have many obstacles, especially those who are indigent. For that reason, in my opinion, ethical rules governing prosecutors should be strengthened to deter actions that unfairly disadvantage defendants"; "Since a search for the truth is the overarching goal of the criminal justice system, I believe any effort to intentionally thwart that goal should be dealt with through discipline").

In contrast, several judges were less emphatic on this point. Within this latter category, we identified two bases of resistance. Some respondents argued that the question of whether disciplinary action is taken should depend on the intentional nature of the behavior (e.g., "It would help to know whether a prosecutor knowingly, recklessly, negligently, or unintentionally engaged in the behaviors described"; "I answered 'no' to many of these questions…because the decision would hinge in my opinion on whether the prosecutor's actions were clearly deliberate or intentional vs. inadvertent or made in the haste of a hearing or trial"; "Both prosecutors and defense lawyers make mistakes. Separating intentional misconduct from negligence is often difficult in the face of the workload these lawyers face").

Others who expressed resistance argued for a more laissez-faire approach to the problem, suggesting that the adversarial system—which brings together prosecutors, defense counsel, a presiding judge, and a jury—is ultimately self-correcting (e.g., "Many patterns presented would be cured or considered acceptable, ethical conduct by prosecutors because the competent defense counsel would check, call or challenge the conduct and protect the defendant from any adverse consequences"; "The prosecutor's mandate to seek justice does not include investigating a case for the defense or pointing out possible arguments"; "Many situations are improper but you rely on defense counsel or the judge to rectify"; "Much of the ethically questionable conduct mentioned should and could be addressed by cross examination"; "In my opinion, often the response to bad prosecutors needs to come from voters, the defense team, and the bench").

DISCUSSION AND IMPLICATIONS

Our survey of 355 judges yielded four "headline" results worth noting. First, responses to the 27 behaviors were eminently rational in two ways. Judges exhibited a great deal of variability in their responses across items, with results distributed from a low of only 3% who saw as worthy of investigation the challenge of an opposing expert on *Frye* grounds up to a high of 98% for hiding, destroying, or tampering with exculpatory evidence. Judges were also internally consistent on both measures: The more unethical they saw the behavior, the more likely they were to believe it to be worthy of investigation.

The second result is that judges exhibited a high level of consensus in their assessment that seven of the behaviors on the list constituted acts worthy of investigation. (Similarly, most agreed in their assessment of eight behaviors that were ambiguous and not worthy of investigation.) On this point, however, we are struck by a fact noted in the NRE report cited earlier—that when these apparently obvious and egregious instances of misconduct have been exposed in actual case (even in cases that yielded wrongful convictions)—disciplinary actions were not taken.[11] For example, 91% of judges agreed that "failing to disclose medical or forensic evidence likely to prove exculpatory" is worthy of investigation. Yet that is exactly what happened in Harrisburg, Pennsylvania, in the 1974 wrongful conviction of Steven Crawford cited earlier. In that case, the forensic state chemist informed the prosecutor about the exculpatory results in an initial report. She then altered her conclusions in testimony at trial—which, according to 92% of our respondents, constitutes the second leading basis for a charge of prosecutorial misconduct.

Unfolding twenty-seven years later, the case of Joseph Buffey of Clarksburg, West Virginia, also illustrates this point. In our survey, 90% of judges saw as unethical and as worthy of investigation "Offering the defendant in a rape case a time-limited guilty plea without disclosing that he was excluded by DNA evidence." Yet that is exactly what happened to Buffey, who had to accept a guilty plea offer to rape after DNA tests the prosecutor did not disclose had already excluded him. In 2015, after he had spent 13 years in prison, the state Supreme Court allowed Buffey to withdraw his guilty plea. To our knowledge, however, the prosecutor, who accepted that plea offer without disclosing the DNA results, was not sanctioned. In fact, while the state Supreme Court made numerous named references to Buffey's defense attorney, the prosecutor was not named even once in the Court's reversal of Buffey's conviction.[12]

We can cite one instance after another to illustrate what seems like a marked discrepancy between theory and practice, between the results of our survey and the lack of disciplinary action taken against those who have committed some of the most egregious of ethical breaches. Perhaps this disparity can be traced to attributions of intentionality. A number of judges in our survey commented afterward that they would have liked more information about context in the items we sampled—such as the prosecutor's intent. This desire for contextual information is understandable (and an objective of ours in future research). Over the years, the Supreme Court has defined prosecutorial misconduct as "any conduct by a prosecutor that violates a defendant's rights, regardless of whether that conduct was known or should have been known to be improper by the prosecutor or whether the prosecutor intended to violate legal requirements."[13] While intent should have no bearing on whether an act constitutes misconduct, perhaps it is relevant for determining what training, supervision, or sanctions are warranted.

11. Gross et al., *supra* note 5, at 186-187.
12. *See* Buffey v. Ballard, 782 S.E.2d 204 (W.Va. 2015).
13. The Innocence Project, *supra* note 7, at 9; *see also* Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972).

Alternatively, perhaps the divide between theory and practice is rooted in the perspective cited earlier, articulated by some judges, that disciplinary actions need not be taken because the adversarial system is ultimately self-correcting (e.g., by relying on competent defense counsel or the judge to rectify matters, the process of cross-examination, appeals courts, state bar disciplinary committees, and voters). We find this argument puzzling. Kicking the can down the road in this way promotes what social psychologists call a "diffusion of responsibility" by which the real or imagined presence of responsible others inhibits bystanders from intervening on behalf of victims who need help in emergency situations.[14] For a criminal justice system built on the principle that punishment is necessary to deter wrongdoing, how can "self-correction" provide a satisfactory response to consequential offenses committed by prosecutors, which often result in wrongful convictions that leave perpetrators on the streets to reoffend?

We believe that it does not. Summarizing the results of multiple investigations, conducted in geographically diverse parts of the country, and using different methodologies, the Innocence Project concluded that "every study arrived at the same conclusion: though allegations of prosecutorial error or misconduct are widespread, few prosecutors are formally disciplined for their actions, even in cases of egregious intentional misconduct"[15] In a 2018 article titled "What Happens When Prosecutors Break the Law?" Nina Morrison wrote an exposé about a Suffolk County, New York prosecutor who was caught altering hundreds of pages of police records to remove exculpatory information about a defendant in a murder case. He was promptly fired, and the murder charges were dismissed. Subsequent to what the judge called an outright "travesty," the district attorney's office reviewed this prosecutor's case files only to find that he had suppressed evidence in four other murder cases as well. Yet at the time of Morrison's article one year later, that prosecutor still had not been sanctioned, charged, or disbarred.[16] (In 2021, he was suspended from practicing law for two years.)

The self-correction perspective, which seems to imply "no harm, no foul," is wrong for yet another reason. The notion that incentivizing an informant's testimony without disclosing the terms (an act that elicited a great deal of variability of response) is correctable via cross-examination presumes that incentivized informants will give truthful testimony in court. Similarly, the notion that failing to disclose a strong alternative suspect in police files is self-correcting presumes that defense counsel would have open access to those files. Yet on both counts, the wrongful convictions databases suggest otherwise. As for ethical breaches in court (like commenting on the defendant's failure to testify, introducing prejudicial but inadmissible evidence, and mischaracterizing inconclusive forensic evidence), research has shown that jurors are often tainted by baseless conjectural questions or the leakage of inadmissible testimony—even when counsel lodges a timely objection and the judge admonishes the jury to disregard.[17]

A third key result concerns the fact that judges disagreed markedly (as measured by a near-even 60-40 split) as to the ethicality and misconduct status of several items. Let's take as an example the situation in which a prosecutor attempts to introduce in court prejudicial evidence *known to be inadmissible*. Fifty percent of respondents in our survey saw this as unethical and worthy of investigation as an act of misconduct; 50% disagreed. Also, with regard to behavior in the courtroom—namely, mischaracterizing inconclusive forensic evidence as a match to the defendant—49% of respondents deemed this unethical enough for investigation; 51% did not. This lack of consensus from the bench should be concerning. If definitions of what constitutes an ethical breach worthy of investigation are so malleable as to elicit judicial disparity of this magnitude, then at least with regard to some behaviors the line between conduct and misconduct resides in the eye of the beholder. One can only imagine what disparities would also be found in additional comparisons. Hence, future work should present contextualized vignettes not only to judges but to prosecutors, defense counsel, and lay citizens with the goal of measuring within- and between-group agreement rates in their assessments.

The fourth result concerns the ethic of tolerance that respondents reasonably exhibited for common adversarial tactics that we had included to provide ambiguous, non-egregious anchor points. To our surprise, judges exhibited little concern about the ethics of offering testimony "from a jailhouse snitch with a history of credibility problems" and "a forensic examiner who has a known reputation for bias." Yet jailhouse and other incentivized informants are a major contributing factor in wrongful convictions.[18] As seen in the Steven Crawford and Tyler Edmonds cases described earlier, and consistent with the scathing critique about forensic sciences published in 2009 by National Academy of Sciences, error and bias in the forensic sciences constitute an even greater contributing factor.[19] These are common and serious sources of error, all preventable if prosecutors would exclude rather than present witnesses who have known credibility problems.

To sum up: Too many innocent people have been wrongfully

14. *See* Bibb Latané & John M. Darley, The Unresponsive Bystander: Why Doesn't He Help? (1970).
15. The Innocence Project, *supra* note 7, at 11.
16. Nina Morrison, Opinion, *What Happens When Prosecutors Break the Law?*, N.Y. Times (June 18, 2018), https://www.nytimes.com/2018/06/18/opinion/kurtzrock-suffolk-county-prosecutor.html.
17. *See* Saul M. Kassin et al., *Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury*, 14 L. & Hum. Behav. 373 (1990) (provides an overview of studies); *see also* Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 L. & Hum. Behav. 469 (2006).
18. *See* Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice (2009) (provides an overview of the problem).
19. *See* National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009). *See also* Saul M. Kassin et al., *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. Applied Res. Memory & Cognition 42 (2013); Glinda S. Cooper & Vanessa Meterko, *Cognitive Bias Research in Forensic Science: A Systematic Review*, 297 Forensic Sci. Int'l 35 (2019).

convicted, leaving the person who actually committed the crime free to reoffend, not only because of faulty evidence, but also because of official forms of misconduct. The incidents are well documented; so are the lack of sanctions that would be imposed to deter future wrongdoing elsewhere in the criminal justice system. By asking judges for their perspectives on discrete acts of prosecutorial discretion, this study sheds new light on part of the problem. The results showed that there is no dispute among judges as to what constitutes the most egregious acts of misconduct—including those that seldom draw disciplinary action. This result begs the question, why the chasm between theory and practice?

We also observed several actions about which judges were evenly split. The notion that the treatment of comparable acts of prosecutorial discretion might depend on the identity of the presiding judge runs afoul of the principle of "equal justice under the law." Troubled by highly variable sentencing practices in the U.S. courts—indeed, what Judge Marvin Frankel had referred to as "law without order"[20]—Federal Judicial Center researchers in the 1970s had judges in an experiment render hypothetical sentences based on a common set of presentence reports and found substantial interjudge differences based on the same information.[21] At the time, this work prompted discussion of sentencing guidelines aimed at reducing these disparities. While the results of our survey are preliminary, they suggest the need for additional research on prosecutorial misconduct modeled after these early sentencing disparity experiments. Short of mandating guidelines, it seems clear for now that continuing education is needed to lend clarity as to what behaviors constitute misconduct and how courts should respond. As well, perhaps legislators should create commissions to regulate these problems with greater transparency—starting with the types of misconduct about which judges are in agreement. Whatever the ultimate solutions, it is our hope that the present survey helps to advance the conversation.

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20. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).
21. *See* ANTHONY PARTRIDGE & WILLIAM BUTLER ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES (1974); *see also* Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109 (1975).